Pro Se

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STATE AND NEW YORK CITY AGREE TO SETTLE CLASS ACTION LITIGATION CHALLENGING UNDER-REPORTING OF JAIL TIME

In a landmark settlement, New York City and State agencies have agreed to more accurately credit prisoners for time spent in custody prior to going to trial. Just over a year ago, two attorneys from the Legal Aid Society's Special Litigation Unit (SLU), William Gibney and Michele Maxian, filed the class action case of Billips v. Horn, 04-CV-1086, in an effort to address problems faced by mentally ill defendants and those who are hospitalized during and after arrest due to health problems. The case was part of an effort to force New York City and the State to more accurately record and certify jail time. It highlighted the gross under-reporting of jail time in cases of mentally ill prisoners who spent time in the custody of the State Office of Mental Health (OMH), and those prisoners who were injured during the course of an arrest and spent time in the custody of the New York Police Department (NYPD). "The biggest problem is that mentally ill defendants were being held for examination and the time they were in custody was being missed because there really wasn't a system for the state to talk to the city," said Michele Maxian of the Legal Aid Society's SLU. "This is a particularly vulnerable population because they are either unable to complain about it or might not realize that they should be credited for that time," she added.

Defendants in the case include state defendants: OMH and the Office of Mental

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Retardation and Developmental Disabilities (OMRDD), and city defendants: New York City Department of Correction (DOC), and the NYPD. Judge Baer, the Southern District Judge assigned to the Billips litigation, has approved the settlement, which requires all of the defendants to make concerted efforts to calculate and certify applicable jail time.

THE DEFENDANTS

State Defendants

For criminal defendants who have been found incompetent under CPL Article 730 and who enter state custody, both OMH and OMRDD have agreed to:

- provide to any correction staff removing a defendant from their custody a document which certifies the number of days that the defendant has spent in their custody;
- cooperate with any request for further information about custody;
- explain any gaps in the state custody period, e.g., escape, etc.; and
- review files for any person formerly in their custody who may have lost jail time under past practices.

NYPD

For criminal defendants held in NYPD custody either at a precinct or in a hospital under police custody during pre arraignment, the NYPD agrees to:

- accurately record jail time;
- certify data daily to DOC regarding custody;
- on short sentences, provide DOC immediately information about the arrest date; and
- cooperate with requests for an investigation about missing time credit.

New York City DOC

For all individuals in their custody, DOC agrees to:

- provide adequate staffing, equipment, and training;
- promptly enter OMH/OMRDD custody information;
- investigate any gaps in OMH/OMRDD certification;
- make NYPD jail time data available for access to clerks at Rikers within one day;
- expand its jail time database to include other jurisdictions by September 30, 2005;
- investigate all proper periods of jail time;
- have case processors certify they have followed all recommended procedures;
- a courthouse review for possible release for all definite sentences;
- compute state sentences within 2 days of imposition;

- establish a centralized jail time complaint person for those no longer in its custody; and

- identify everyone who went to OMH/OMRDD in the past 12 years and deliver this information to the Legal Aid Society for an investigation of jail time.

THE MONITORING PERIOD

The settlement also includes a monitoring period of between one and two years, which will be conducted by Legal Aid against the City, beginning on September 30, 2005, the same date the City must establish a computer link between DOC and the NYPD. The defendants have agreed to provide relevant documents to the plaintiffs to assist them with this monitoring. The length of the monitoring period depends on the degree to which the defendants comply with the settlement agreement. **Therefore, Legal Aid is interested in receiving notice of any case where a defendant/inmate is being denied jail time to which he/she is entitled.**

As part of the settlement, Legal Aid will receive some funds to help defray the costs of monitoring. Legal Aid is obligated to submit quarterly reports to the court, which will assess the accuracy of the City system based on cases reviewed during the monitoring period.

HOW DOES THIS AFFECT YOU?

This agreement, however, is not retroactive, in that it does not force the City to search for jail time that was spent in NYPD custody. Thus, if you believe that you are entitled to jail time because of time you spent in NYPD custody, you should initially send your inquiry to:

Jail Time Coordinator
New York City Department of Correction
Custody Management & Special Operations Bureau
17-17 Hazen Street
East Elmhurst, NY 11370

If you do not receive a response after three weeks, then you should write to:

William Gibney, Esq.
Legal Aid Society
Special Litigation Unit
199 Water Street
New York, NY 10038

UPDATE

Pro Se appreciates comments from our readers and encourages readers to contact us with corrections or updated information on cases. To that end, we have received letters concerning the Persistent Felony Offender Law article published in our last issue, Volume 15 No. 1. One reader, Mr. Oliver West, noted that he is the defendant in the case featured in that article, People v. West, 783 N.Y.S.2d 473 (1st Dep't 2004), and advised us that on December 27, 2004, the Court of Appeals granted his leave application. In addition, another reader contacted us concerning the Brown and Rosen cases which were also discussed in the article, and advised us that those cases were consolidated and argued before the Second Circuit in September 2004, but to date, a decision has not been issued.

A Message from Tom Terrizzi, Former Executive Director of PLS

In this issue of *Pro Se*, there are an impressive number of successful cases litigated *pro se* in state courts challenging disciplinary hearings. The plaintiffs in those cases, either representing themselves or getting help from jailhouse lawyers, have often expanded the law of Tier III hearings, making it possible for others to bring successful challenges to improper hearings or unconscionably long box sentences. Learning when and how to raise an objection in a time of constantly changing legal requirements requires very practical CLE [Continuing Legal Education] efforts.

To its credit, DOCS has continued to fund law libraries in its institutions, allowing those it holds to take a more active part in the appeals of their criminal convictions. DOCS also permits those with problem sentence calculations, those facing long solitary sentences, and those challenging abuse by staff to be heard in a meaningful way. When PLS started *Pro Se* in 1984, we hoped our efforts would supplement the regular law libraries in a way which would bring some sense to the rapidly changing face of prison law. Over the past 20 years, I have heard from many of you expressing gratitude for our attempt to help educate. I, in turn, applaud you for your efforts.

I am leaving PLS after 29 years, but don't expect to wander far from the ongoing effort to minimize the use of incarceration and to make prison conditions more humane. Of the many things I have been involved with at PLS, starting and working on *Pro Se* will always be for me one of our best efforts to advance the cause of justice.

PLS Welcomes New Executive Director

PLS would like to welcome our New Executive Director, Jerry Wein. Jerry comes to us with extensive management and legal experience and a strong dedication to legal services. He began his career as a VISTA attorney for Bronx Legal Services. He then developed expertise in administrative and poverty law and became a law professor at Antioch School of Law. Jerry returned to New York to work with the Greater Upstate Law Project as director of training and later as associate director. More recently Jerry has been involved in significant training and development programs for legal services organizations providing consultation and technical assistance as well as teaching seminars on advocacy, supervision and communication skills. We are very excited about the skills that Jerry brings to this program and we look forward to working with him while we continue to build a stronger and more effective PLS.

News and Briefs

Jury Verdict of $1.25 Million For Food Withheld From Prisoner at Supermax Facility

On December 1, 2004, a federal jury issued a $1.25 million verdict against defendants at the Wisconsin Supermax prison, Boscobel, for withholding food from an inmate. The defendants had denied food to the inmate,

Berrell Freeman, for up to nine days for refusing to comply with prison regulations, including wearing trousers in his cell, keeping a cell light on, and standing in sight of the cell door window.

Boscobel prison was opened in 1999, and was designed to house what government officials referred to as the "worst of the worst," inmates who had conduct problems at other institutions. Mr. Freeman was among the first inmates assigned to the Supermax. At trial, guards testified that when bringing Mr. Freeman his meals, they would frequently find him wearing shorts or a stocking tied around his head as a sweatband, in violation of regulations. In response, Mr. Freeman was denied his food. He lost about 40 of his 180 pounds between April 23 and Oct. 12, 2003. During one month, he was served only breakfast.

At the two-day trial, a physician expert, Linda Farley, testified that the practice of withholding food from inmates is inhumane. The jury found that withholding food as punishment subjected Mr. Freeman to a serious disruption of a basic human need and demonstrated deliberate indifference to an inhumane condition of confinement. Jurors awarded $50,000 in compensatory damages and $1.2 million in punitive damages. In light of the jury verdict, Mr. Freeman's attorney requested an injunction to prohibit the state prison system from withholding food to punish prisoners. The court granted the request, enjoining the defendants "from withholding meals from plaintiff Berrell Freeman as a response to any rule violation that does not constitute an imminent security risk." Freeman v. Berge, 2004 WL 3006937 (December 21, 2004).

7th Circuit Upholds $56 Million Dollar Damage Award for Death of Inmate

Estate of Moreland v. Dieter, 395 F.3d 747 (7th Cir. 2005)

In a §1983 action alleging depravation of civil rights arising from the death of an inmate in an Indiana jail, a jury recently awarded the estate of Christopher Moreland a total of $56 million. The jury found that the defendants, Erich Dieter and Michael Sawdon, sheriff deputies at the time, caused the death of Christopher Moreland by using unnecessary and excessive force. The award consisted of $29 million in compensatory damages and $27.5 million in punitive damages. The defendants appealed, asserting evidentiary and instructional errors and challenged the punitive damage award as unconstitutionally excessive. The plaintiffs cross-appealed the district court's summary judgment ruling which dismissed a cause of action against the sheriff, alleging official policy or custom in the jail. The 7th Circuit upheld both the damage award and the district court's decision granting summary judgment to the sheriff.

The facts of the case are disturbing: Mr. Moreland was arrested for driving under the influence and eventually brought to St. Joseph County Jail. He was placed in the drunk tank and soon provoked a confrontation. A Sergeant responded and sprayed Mr. Moreland with pepper spray. The other inmates in the drunk tank took cover to avoid the spray but stated that they heard what they would describe as "the sound of a basket-ball bouncing off concrete," and that it sounded like "a melon popping, like dropping a watermelon." Although they didn't see what happened, they guessed that it was the

sound of Mr. Moreland's head hitting the concrete floor. Mr. Moreland was then removed from the cell and taken to a shower. Defendants Dieter and Sawdon assisted in getting Mr. Moreland in the shower. Witnesses said that "Dieter pushed Moreland into the shower with such force that [he] hit his head against the far wall. Mr. Moreland was then sprayed with hot water, "which exacerbates the pain of pepper spray." Defendant Sawdon then said to other officers, "'Hey guys, do you want to see something funny?' and then he threw a five-gallon bucket of cold water over Moreland." Mr. Moreland was then handcuffed and shackled in a restraint chair. He was cursing and yelling at the defendants "asking them why they were doing this to him." He was told to shut up by the defendants, and then, while Mr. Moreland was still strapped in the chair, defendant Sawdon sprayed him with pepper spray again.

The defendants forcibly put Mr. Moreland into the shower again and then back into the restraint chair. Some time after, the defendants moved him to an "attorney's room," where a medication aide arrived to examine him. "[S]he described [him] as slouched back in the restraint chair, moaning, and unresponsive. She saw that [he] had a cut above his left eyebrow that had bled profusely." The defendants apparently told her that Mr. Moreland had slipped and fallen. The aide indicated that she wanted to transfer Mr. Moreland to the hospital but the defendants did not want to because that "would require them to remain at work." Mr. Moreland was left in the restraint chair until two day shift officers, who were passing by the room shortly after 7:00 a.m., found him unconscious in the attorney's room. One of the officers took Mr. Moreland, while he was still unconscious, changed his clothes, and put him back in the drunk tank. The aide saw Moreland at 9:40 a.m. "coughing and unresponsive." "At 11:00 a.m., *when she* checked on him again, [he] had not moved. The next time she checked, Mr. Moreland was blue, clod and lifeless." He was pronounced dead at 1:23 p.m., the cause of death being noted as an "acute subdural hematoma that could only have occurred during the period of time Mr. Moreland was confined in the St. Joseph County Jail."

The defendants challenged the jury verdict alleging, among other things, that videotapes of interviews by the Special Crimes Unit with the defendants done after Mr. Moreland's death should have been excluded under Federal Civil Procedure Rule 403 because they were unduly prejudicial. Although the 7th Circuit determined that there was no question that the videotaped interviews of the defendants were prejudicial, it declined to find that the district court erred in its decision to allow the tapes into evidence. "The damage of unfair prejudice was not so extreme here that the district court's decision to admit the videotaped interviews is called into question. As a record of the defendants' respective versions of the events leading up to Mr. Moreland's death, the tapes are highly probative of their actions, state of mind, and credibility."

With respect to the defendants' challenge that the punitive damage award was unconstitutionally excessive, the court noted that, in reviewing punitive damage awards, three factors must be considered:

1. the degree of reprehensibility of the defendants' misconduct;

2. the disparity between the actual or potential harm suffered by the plaintiff and the punitive damage award; and

3. the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

The court noted that the first factor is the most significant. The court found that the "defendants' conduct in this case qualifies as truly reprehensible...To throw a man's head against concrete when he is handcuffed and presents no threat is clearly excessive and malicious. To discharge a canister of pepper spray into the face of a fully restrained, incapacitated individual is vicious and unconscionable." The court went on to note that the "defendants' assault on Mr. Moreland was sustained rather than momentary, and involved a series of wrongful acts, not just a single blow;...all this exacerbates the reprehensibility of their behavior." The court also found that the ratio between the compensatory and punitive damage award was within the range of what is deemed acceptable and that, in light of the injuries suffered by Mr. Moreland, the punitive damage award was constitutional.

Disenfranchisement Laws Criticized by American Correctional Association

As the debate over whether convicted felons should be allowed to vote continues, the American Correctional Association (ACA) has issued a welcome statement inviting all states to end the practice of withholding voting rights from parolees and people who have completed their prison terms. The ACA, which represents correctional officials, encouraged states to revamp their confusing disenfranchisement laws and clearly explain to inmates what to do to regain their voting rights after completing their sentences, noting that people are expected to become responsible members of society once they are released from prison.

There are more than 4.7 million Americans who are denied the right to vote because of their criminal records. There is no evidence that these laws serve any correctional purpose. To the contrary, they may actually contribute to recidivism by keeping ex-offenders disinterested and disengaged from societal concerns. Indeed, there are studies which have shown that former offenders who vote are less likely to return to jail. There are democracies abroad that realize the importance of insuring that all citizens have a vested interest in their communities and in their county, so much so that they take ballot boxes right to the prisons.

Several states are now reconsidering laws barring convicted felons from voting. In Maryland, for instance, the legislature is considering a bill that would eliminate the lifetime ban that remains in place for some offenders. The Maryland bill should pass, and other states may very well follow suit.

Federal Cases

U.S. Supreme Court Continues To Narrow The Class of People Eligible for Capital Punishment

Roper v. Simmons, 125 S.Ct. 1183 (2005)

In a 5-4 decision, the United States Supreme Court has once again narrowed the class of people eligible for execution by abolishing capital punishment for juvenile offenders for crimes committed when they are younger than 18. In deciding Roper, the Supreme Court did something it rarely does: It reversed a decision it made only 16 years earlier. In 1989, in

Stanford v. Kentucky, 492 U.S. 361, a divided Court rejected the proposition that the Constitution bars capital punishment for juvenile offenders in this age group. However, the Court appeared to be swayed by society's reconsideration of capital punishment, noting that 30 states, including the 12 states that have no capital punishment, forbid the death penalty for offenders younger than 18. The Court concluded that the death penalty for minors is cruel and unusual punishment, finding that there is a "national consensus" against such a practice. Significantly, strong international opposition to the practice of putting juvenile offenders to death also influenced the Court's decision. "It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime," wrote Justice Kennedy. As to how the Court decided on what should be the cut off age, the Court held: "The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest," wrote Kennedy.

Although the Court reinstated the death penalty in 1976 (see: Gregg v. Georgia, 428 U.S. 153), it began limiting its application twelve years later when, in 1988, the Court outlawed executions for those 15 and younger (see: Thompson v. Oklahoma, 487 U.S. 815), and then, more recently, in Atkins v. Virginia, 536 U.S. 304 (2002), it banned the execution of those deemed to be moderately mentally retarded. The Roper decision will overturn the present death sentences of about 70 juveniles and will bar all states from seeking to execute minors for future crimes. The largest impact of the ruling will most probably be felt by Texas, where there are 29 juvenile offenders awaiting execution, and Alabama, where there are 14. There have been 22 executions of juveniles since 1975, 13 of them in Texas.

U.S. Supreme Court Allows §1983 Challenge to Parole Board Decision

Wilkinson v. Dotson, et al., —U.S.— ,2005 WL 516415 (Sup. Ct.) (March 7, 2005)

The U.S. Supreme Court recently held in an 8-1 decision that state prisoners are not limited to using the federal habeas corpus statute to seek relief regarding parole issues, but may bring §1983 actions for declaratory and injunctive relief to challenge the constitutionality of state parole procedures. The Court rejected the arguments by the state of Ohio, which asserted that the inmates, Dotson and Johnson, were trying to challenge the duration of their confinement, a challenge that the Court has held cannot be brought by way of a §1983 action.

The history of this confusing area of law began with the case of Preiser v. Rodriguez, 411 U.S. 475 (1973), where state prisoners filed §1983 civil rights actions challenging the constitutionality of the prison's disciplinary proceedings that, in turn, led to their loss of good-time credits. The Court addressed the issue of whether a §1983 action was the proper vehicle to use to bring such a challenge. Although the Court admitted that the claims of the inmate's fell within the parameters of the §1983 statute, the Court noted that: the claims also fell within the parameters of the habeas corpus statute; the habeas corpus language was more specific; the habeas corpus statute "has been accepted as the specific instrument to obtain release from [unlawful] confinement;" and habeas corpus actions require exhaustion of state remedies while §1983 actions do not. "These considerations of linguistic specificity,

history and comity led the Court to find an implicit exception from §1983's otherwise broad scope for actions that lie 'within the core of habeas corpus.'" Wilkinson, citing Preiser, 411 U.S. at 487.

One year later, in Wolff v. McDonnell, 418 U.S. 539 (1974), the Supreme Court expanded on the definition of the "core" of habeas corpus actions. In Wolff, state inmates filed a §1983 action alleging that the prison disciplinary process, which resulted in revocation of good-time credits, was unconstitutional. The Court, in Wolff, held that an inmate could use a §1983 action to obtain a declaratory judgment that the prison disciplinary process was unconstitutional and an injunction on the "prospective enforcement of invalid prison regulations" (418 U.S. at 555) but could not use a §1983 action to request restoration of good time. The Court reasoned that since the declaratory and injunctive relief regarding the regulations would not effect the inmate's term of incarceration, such relief did not lie at the core of habeas corpus actions.

In 1994 Heck v. Humphrey, 512 U.S. 477 was decided. In Heck, the inmate sued for damages, claiming that the state had improperly investigated his crime and destroyed evidence and thus, unconstitutionally, caused his conviction. The Court held that "unless...the conviction or sentence has already been invalidated," 512 at 487, a §1983 action does not lie because "establishing the basis for the damages claim necessarily demonstrates the invalidity of the conviction." 512 U.S. at 481-482. After Heck, lower federal courts debated what it meant to "invalidate" a prior conviction or sentence, and in what context and to what extent this decision should bar an inmate's §1983 claim. Then, in Edwards v. Balisock, 520 U.S. 641, (1997), an inmate sued for damages and declaratory relief, claiming that the procedures used by the state to deprive him of good-time credits violated due process. The inmate also sued for injunctive relief barring the state from engaging in future unconstitutional procedures. The Court found that in that case, if the prisoner prevailed on his claim for money damages and request for declaratory relief, it would "necessarily imply the invalidity of the punishment imposed," and thus could only be challenged through a habeas corpus action. However, with respect to his claim for injunctive relief, the Court found that it did not fall within the exclusive domain of a habeas corpus action because "[o]rdinarily, a prayer for such prospective relief will not 'necessarily imply' the invalidity of a previous loss of good-time credits." 520 U.S. at 646.

This year in Wilkinson, the Court was asked to address the issue of whether that habeas corpus bar applies to prisoners' claims challenging state parole board procedures. Wilkinson involved two inmates alleging that the state procedures used to deny parole eligibility (Dotson) and parole suitability (Johnson) were unconstitutional because they violated the *ex post facto* and due process clauses of the Constitution. The Court rejected the state's argument that because a state prisoner cannot use a §1983 action to challenge "the fact or duration of his confinement," the inmates' claims could only be brought via a federal habeas corpus action or a similar state proceeding. Justice Breyer wrote: "The problem with Ohio's argument lies in its jump from a true premise...to a faulty conclusion." In holding that the inmates' claims are allowed under §1983, the Court noted, that "[b]ecause neither prisoner's claim would necessarily spell speedier release, neither lies at 'the core of habeas corpus.'"

U.S. Supreme Court Grants Certiorari in Case Challenging Arbitrary Placement in Ohio Supermax

Wilkinson v. Austin, 372 F.R.3d 346 (2003) cert. granted 125 S.Ct. 686 (2004)

On December 10, 2004, the United States Supreme Court granted certiorari in the case of Wilkinson v. Austin. In October 2003, the 6th Circuit Court of Appeals in Cincinnati ruled that prisoners cannot be placed or indefinitely detained in solitary confinement at an Ohio Supermax prison (OSP) without due process. The question presented by the Ohio Attorney General office's petition is: When state prison officials decide to place a prisoner in a "super-maximum security" facility based on a predictive assessment of the security risk the prisoner presents, but prison regulations create a liberty interest for the prisoner in avoiding such placement, do procedures meeting the requirements specified in Hewitt v. Helms, 459 U.S. 460 (1983), satisfy the prisoner's due process rights?

The Sixth Circuit held that they do not, and that the balancing test of Matthews v. Eldridge, 424 U.S. 319 (1976), applies instead. The ruling of the Sixth Circuit, if left standing, will effect more than 400 prisoners in Ohio and potentially tens of thousands of inmates across the country by allowing prisoners to contest their detention at a Supermax prison with a hearing. The Center for Constitutional Rights and the Ohio ACLU originally filed the class-action lawsuit in January of 2001 against officials of the Ohio Department of Rehabilitations and Corrections, charging that the treatment of the inmates at OSP constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution. Inmates in Supermax prisons are confined to their cells for 23 hours a day and subject to harsher conditions than inmates at other prisons.

In Wilkinson v. Austin, a complex piece of litigation, the lack of clear policies governing placement in the OSP became the major issue at trial and the only issue on appeal, but placement was one of only three issues central to the case. Major concerns also included the conditions of confinement at the prison, the lack of adequate medical care, and the serious lack of appropriate psychological resources. The complaint alleged that over the years, the State of Ohio indiscriminately assigned inmates to the OSP. Although the OSP was built to house the "worst" criminals in the state, when that population dwindled, the State apparently began to arbitrarily assign inmates to the Penitentiary. The lawsuit alleged that the State did so using extremely limited guidelines for determining whether an inmate should be sent to the OSP. The Supreme Court of the United States has agreed to hear *Wilkinson v. Austin* on the question of whether this sort of lack of procedure is a gross violation of prisoners' right to due process. The case is scheduled to be argued on March 30, 2005. *Pro Se* will report on the decision from the Supreme Court when it is issued.

Second Circuit

Seizure of New Afrikan Political Literature May Violate Inmate's First Amendment Rights

Shakur v. Selsky, 391 F.3d 106 (2d Cir. 2004)

The Second Circuit issued another favorable decision for inmates at the end of last year when, in December 2004, it decided the case of Shakur v. Selsky, and held that the seizure of plaintiff

Shabaka Shakur's writings about an African liberation group could be challenged as a violation of his First Amendment rights. Reversing the district court's decision, the Second Circuit held that the confiscation of Mr. Shakur's New Afrikan political literature could be challenged, since such confiscation may not be related to the "legitimate penological interests" of DOCS.

The Facts

The facts of the case are as follows: Between 1999 and 2002, DOCS' officials confiscated New Afrikan political literature from Mr. Shakur's cell on at least three occasions, and each time he was charged with violating Rule 105.2, possessing unauthorized "organizational insignia or materials." DOCS has a regulation which states that an unauthorized group is "any gang or any organization which has not been approved by the deputy commissioner for program services."

At his first hearing, Mr. Shakur initially requested that the material simply be given to the Facility Media Review Committee (FMRC) for review. DOCS' regulation 7 NYCRR §712.2-712.3 establishes the FMRC and states that "[i]t is departmental policy to encourage inmates to read publications from varied sources," but that "[w]hen there is a good faith belief that a publication...in [the] possession of an inmate violates one or more of the media review guidelines, said publication shall be confiscated and referred to the FMRC for review and decision." Mr. Shakur's request was denied. He then defended his possession of the material, arguing that it was political in nature and not related to gangs. The Hearing Officer disagreed and sentenced Mr. Shakur to 18 months in SHU.

At his second hearing, Mr. Shadur again requested that the material that was confiscated be given to the FMRC. His request was again denied, and he was found guilty and given a penalty of thirty days in keeplock. He appealed the decision all the way through to filing an Article 78, challenging that DOCS had erred in failing to send the materials to the FMRC, that Rule 105.12 was inapplicable to his literature, and that Rule 105.2 was unconstitutionally vague. His arguments were ultimately rejected by the Appellate Division 4th Department in a six-word decision: "Determination affirmed and amended petition dismissed." Matter of Shakur v. Goord, 306 A.D.2d 958 (4th Dep't 2003).

At the third hearing, Mr. Shakur once again requested that the material be given to the FMRC. Instead, the hearing officer adjourned the hearing, reviewed the materials himself and, upon reconvening, found Mr. Shakur guilty of violating Rule 105.12 and imposed a penalty of 60 days keeplock.

Oddly, a month after the third hearing, Mr. Shakur's cell was searched again, and again "New Afrikan literature" was confiscated from his cell, but this time his request that the FMRC review the material was honored. The FMRC reviewed the material, found that three pages would "incite disobedience and violence," but approved the remainder of the material.

In November 2002, Mr. Shakur sued alleging, among other things, due process and equal protection claims and a violation of his First Amendment right to freedom of speech. The district court dismissed Mr. Shakur's complaint with prejudice and he appealed.

The Decision

The Second Circuit U.S. Court of Appeals affirmed the district court's dismissal of the due process and equal protection claims but reversed

the district court's finding with respect to Mr. Shakur's First Amendment claim. The Second Circuit held that Mr. Shakur stated a legally sufficient claim by alleging in his complaint that Rule 105.12 is unconstitutional; and that, in the alternative, the defendants were not authorized to confiscate his property under Rule 105.12, and that "such confiscations were improperly made for reasons of personal prejudice as opposed to legitimate penological interests."

The Complaint Stated A Claim With Respect to The Constitutionality of Rule 105.12

Writing for a unanimous court, Judge Wesley noted that "an across-the-board exclusion of materials of 'unauthorized organizations' may not be rationally related to any governmental objective." 391 F.3d at 115. He continued: "Assuming that Rule 105.12 is targeted at the legitimate goal of securing prisons, we are not sure how a complete ban on the materials of 'unauthorized organizations' is rationally related to that goal. The district court articulated no such relationship, and none appears to us on the face of the regulation."

In analyzing a First Amendment claim asserted by a prison inmate, the court applies a reasonableness test. Turner v. Safley, 482 U.S. 78, 89 (1987). Turner requires the court to address three questions:

1. "whether the governmental objective underlying the regulations at issue is legitimate and neutral, and [whether] the regulations are rationally related to that objective;"

2. "whether there are alternative means of exercising the right that remain open to prison inmates;" and

3. "the impact that accommodation of the asserted constitutional right will have on others (guards and inmates) in the prison." Id. at 417-418.

In answering the first question, the Second Circuit looked to the Supreme Court case of Thornburgh v. Abbot, 490 U.S.401 (1989). In Thornburgh, the Supreme Court was faced with a challenge to prison regulations that permitted the warden to reject certain publications based upon an "articulated standard." It was the fact that there was such an "articulated standard" that allowed the Court to uphold the regulations. Judge Wesley noted that the Court "was 'comforted by the individualized nature of the determinations required by the regulation,' and that the regulations 'expressly reject[ed] certain shortcuts that would lead to needless exclusions.'" 391 F.3d at 115 citing, Thornburgh, 490 U.S. at 416-417. Judge Wesley, relying on Thornburgh, found that: "Rule 105.12, by contrast, does not provide any standard against which DOCS officials will conduct an individualized review of the publication in question. Indeed, the 'needless exclusions' apparently made possible by Rule 105.12 exceed even the exclusions that the Supreme Court suggested would be unconstitutional in *Thornburgh*."

With respect to the second Turner factor, the Court was concerned with the fact that there was no evidence in the record of any alternative avenues by which Mr. Shakur "might exercise his right to free expression." 490 U.S. at 116. Finally, with regard to the third Turner factor, the Court noted that with each prison having a media review committee, there was "an obvious alternative" to outright confiscation. 490 U.S. at

116. The Court concluded: "Thus, with regard to the constitutionality of Rule 105.12, the present complaint cannot be dismissed on its face because none of the Turner factors facially favor DOCS." 391 F. 3d at 116.

The Complaint Stated A Claim That The Confiscation of New Afrikan Literature Was Unconstitutional

Again applying the Turner factors, the court noted that the first Turner factor requires a "neutral" objective. "[T]he Supreme Court has distinguished actions pursuant to neutral objectives from actions pursuant to 'personal prejudices.'" 391 F.3d at 116, citing, Thornburgh, 490 U.S. at 416 n. 14.

Noting that "a failure to abide by established procedure or standards can evince an improper objective," Judge Wesley found that the failure of the defendants to follow their established procedure of referring questionable material to the existing FMRC "suggest[s] that their confiscations were not made pursuant to legitimate and neutral penological objectives." Judge Wesley went on: "This conclusion is buttressed by the fact than an eventual FMRC review of Shakur's materials–in the single instance where FMRC review occurred–ended in approval of the vast majority of those materials." The court therefore concluded that "if Rule 105.12 did not authorize defendants' confiscations, Shakur's complaint states a legally sufficient claim of unconstitutional infringement of his First Amendment right to free expression." 391 F. 3d at 117.

The court also reinstated a claim based on Mr. Shakur's right to freely exercise his religion as a Muslim and his rights under the Religious Land Use and Institutionalized Persons Act of 2002, claims based on his allegedly having been denied permission to attend a Muslim holiday feast in the prison.

DOCS Abandons Argument of Failure to Exhaust to DOJ in ADA Cases

Rosario v. Goord, —F.3d—, 2005 WL 477847 (2d Cir.) (March 2, 2005)

The plaintiff, an inmate in NYS DOCS, filed an action alleging violations of both Title II of the Americans With Disabilities Act (ADA), 42 U.S.C. §§12101 *et seq.*, and Section 504 of the Rehabilitation Act, 29 U.S.C.§794. The defendants asserted that the plaintiff's action should be dismissed for failure to exhaust because, although he had complied with DOCS internal grievance process, he had failed to lodge a complaint with the Department of Justice (DOJ), which has a complaint procedure for people who believe they have an ADA claim.

The district court dismissed the plaintiff's action on failure to exhaust grounds and the plaintiff appealed. However, after the case was briefed, the defendants moved to vacate the district court's decision and represented to the court that they would withdraw the DOJ exhaustion defense in this action. "They further represented that the defense will be withdrawn in any pending litigation in which liability against DOCS and its agents is asserted under the ADA and that DOCS does not now intend to assert the defense in any such future litigation." The plaintiff consented to this motion and, in response, the Second Circuit granted the defendant's motion and remanded the case to the district court.

Prisoner Articulates First Amendment Retaliation Claim Sufficient to Survive Dismissal Motion

Gill v. Pidlypchak, 389 F.3d 379 (2d Cir. 2004)

The plaintiff, an inmate, filed a *pro* se action alleging, among other things, that the defendants retaliated against him for filing numerous grievances. He asserted that one of the ways in which the defendants retaliated was by filing false misbehavior reports against him that resulted in his being placed in keeplock. The district court dismissed the entire action finding, with respect to the First Amendment retaliation claim, that "[Mr.] Gill had commenced at least four additional lawsuits and at least thirty-five institutional grievances against the Department of Correctional Services...since the asserted retaliation,"...and therefore "the alleged adverse action did not have an actual deterrent effect on his exercise of First Amendment rights." Id. at 380. Mr. Gill appealed.

In its decision, the Second Circuit explored the history of retaliation cases, noting that "to sustain a First Amendment retaliation claim, a prisoner must demonstrate the following: '(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 the adverse action.'" Id. at 380, citing, Dawes v. Walker, 239 F.3d 489, 492 (2d Cir. 2001) The court noted that there was little dispute that Mr. Gill had met the first and third prongs of the Dawes test. "The basic question we face here is whether the defendant's action was meaningfully 'adverse' although it did not ultimately dissuade the plaintiff from exercising his rights under the First Amendment." Id. at 380-381.

The term "adverse action" has been defined by the court as "retaliatory conduct 'that would deter a similarly situated individual of ordinary firmness from exercising...constitutional rights.'" Id. at 381, citing, Davis v. Goord, 320 F.3d 346, 353 (2d Cir. 2003).The court noted that although Plaintiff Gill may have continued to file grievances after the alleged retaliation, the fact of the matter is that he should not be penalized by responding "to retaliation with greater than 'ordinary firmness.'" Id. at 384. The court found that Mr. Gill alleged: 1) a protected activity: using the grievance system; 2) adverse action that would have deterred a prisoner of ordinary firmness from coming forward: defendants filed false misbehavior reports which resulted in his placement in keeplock, and; 3) "a causal connection between the protected activity and the adverse action." Id. at 384. In deciding a case on a motion to dismiss, the court need only decide whether the "complaint itself is legally sufficient." Id. 384, citing, Goldman v. Belden, 754 F.2d 1059, 1067 (2d Cir. 1985). Since Mr. Gill's complaint included all the elements necessary to state a First Amendment claim for retaliation, the Court vacated that part of the judgment which dismissed plaintiff Gill's First Amendment claim and remanded the case to the district court.

District Court

District Courts Address More PLRA Issues

Although the Second Circuit issued five decisions on various aspects of the PLRA exhaustion defense in August 2004 (reported on in ***Pro Se*** Vo. 14 No. 3), which, to some extent, clarified its application, DOCS continues to raise failure to exhaust as a defense and district courts

continue their attempts to ferret out the applications of, and exceptions to, the PLRA exhaustion requirement.

Borges v. Piatkowski, 337 F. Supp. 2d 424 (W.D.N.Y. 2004)

In Borges v. Piatkowski, district court Judge Larimer was faced with the issue of how to determine whether an administrative remedy was actually "available" to the plaintiff inmate. The facts of the case are as follows: In August 1996, Plaintiff Borges, while an inmate at Southport Correctional Facility, had a wisdom tooth (#32) pulled by a dentist, Dr. Lax. Apparently, during the procedure, "a dental drill burr broke off and was left in the tooth socket without plaintiff's knowledge." 337 F. Supp. 2d at 425. Subsequently, the plaintiff began experiencing pain in the area of his mouth where the tooth was pulled. He repeatedly advised the defendant, Dr. Piatkowski, a dentist at the clinic, of the pain he was experiencing. The defendant repeatedly told the plaintiff that the cause of his pain was his wisdom teeth. Finally, in April 1998, almost twenty months later, Defendant Piatkowski referred the plaintiff to an outside hospital for evaluation, but he was not actually seen at the hospital until August 1998. In the meantime, in May 1998, the defendant removed a "flap of tissue" at tooth # 16 but continued to fail to address area #32. When the plaintiff was eventually seen at the outside hospital, an x-ray was taken and it was determined that there was a foreign object and a "reactive lesion" in the area where the plaintiff was experiencing pain.

Oddly, the plaintiff was never told of the existence of the foreign object, but rather was advised that he had a "cyst" where the wisdom tooth had been and that he would be called back to the hospital for treatment. The defendant was advised of the "reactive lesion," but there was a question as to whether defendant was also advised of the foreign object that was found during the x-ray. Regardless, it was undisputed that the defendant never advised the plaintiff of the "reactive lesion," did nothing to "remove the foreign object or otherwise treat the reactive lesion,"..."never called [the] plaintiff out for an examination or for another x-ray" and never treated the plaintiff again. Id. at 425-426.

In October 1988, the plaintiff was transferred to Attica, where he was subsequently seen by Dr. Heinzerling who performed an x-ray, found the foreign object, and advised the plaintiff of the foreign object and the reactive lesion. Finally, "[o]n September 30, 1999, the object was surgically removed from plaintiff's mouth." Id. at 426.

The plaintiff thereafter sued, alleging deliberate indifference to his medical needs. The defendants asserted the defense of failure to exhaust under the PLRA. There was no dispute that the plaintiff did not file a grievance against the defendant. The plaintiff defended his failure to exhaust, alleging that no administrative remedies were "actually 'available' to him because he did not learn of the foreign object and reactive lesion until November 1998," far beyond the 14-day time limit for filing a grievance. Id. at 426. The defendant argued that the plaintiff knew he had a "cyst," that the defendant did not test him for the "cyst," and that the plaintiff had two months to file a grievance before he was transferred out of Southport. The court agreed with the plaintiff.

The court noted that there was no evidence that the plaintiff knew that the defendant "received and reviewed the consultation report." Id. at 427. In terms of the plaintiff's failure to complain while at Southport, the court noted, "[g]iven that it took plaintiff almost four months after he was referred to Strong to be examined

there, it is not surprising that plaintiff did not complain about the fact that his condition was not being treated in the two months he remained at Southport." Id. at 427. By the time the plaintiff learned about the foreign object in his mouth and of the possibility that the defendant may have known about it, the fourteen-day time limit for filing a grievance had passed. "Thus there was no further 'possibility of some relief' for plaintiff...Therefore, plaintiff had no available remedy to exhaust, as there was no mechanism in which to file a grievance about Dr. Piatkowski's alleged deliberate indifference to his medical needs." Id. at 427.

Brownell v. Krom, —F. Supp. 2d —, 2004 WL 2516610 (S.D.N.Y.)(Nov. 8, 2004)

In Brownell v. Krom, Plaintiff Brownell, an inmate, made a request under the Freedom of Information Law ("FOIL") for all documents pertaining to his 1976 trial and conviction. He received these documents and upon reviewing one of the enclosed transcripts, believed he had grounds to challenge his conviction. In 1999, he filed a state court motion to vacate his conviction. It was denied in September 1999. He then began to work on a federal habeas corpus petition based on the same exculpatory evidence.

On June 9, 2000, the plaintiff was transferred from Woodbourne to Eastern Correctional Facility and at the time of his transfer, he had fourteen bags of personal property, which included voluminous legal papers he intended to file in connection with a federal habeas corpus petition. Subsequently, Mr. Brownell was advised that only three of his fourteen bags of property were present, and he began to make inquiries to locate the remaining eleven bags of personal property. Ultimately, he was advised by the Inmate Grievance Program Supervisor that the proper procedure would be for him to file a grievance regarding the loss of his property. He filed a grievance, noting that most of his personal property had been lost, and that "this includes all of my legal work amounting to thousands of pages. I was in the process of filing a federal habeas corpus petition." The action requested was: "To find my property via a thorough investigation."

The plaintiff pursued his grievance through each of the three levels of the New York State Department of Correctional Services' Inmate Grievance Program, and ultimately received a final decision from the Central Office Review Committee (CORC), the highest level of the Inmate Grievance Program, which noted that Mr. Brownell had filed a claim for reimbursement for lost property, that the claim had been denied, and that he had the opportunity to appeal the denial of the property claim.

At the time he filed his grievance, Mr. Brownell did not know who was responsible for losing his property or how it was lost. After his grievance was denied, Mr. Brownell looked for the property on his own and, although he did not locate the property, he did find out the names of some of the officers who were apparently responsible for transporting his property.

Plaintiff Brownell then sued, claiming in his §1983 action "that the loss of his legal materials prevented him from filing a habeas petition based on prosecutorial misconduct; effectively denying his right of access to the courts." The defendants made a motion for summary judgment on the grounds that Plaintiff Brownell had not exhausted his administrative remedies because, although he filed a grievance, he "never alleged a deliberate or malicious disposition of the property or named the individual defendants..." The district court dismissed the plaintiff's action, noting that although Mr. Brownell utilized all three levels of the Inmate Grievance program, he

did not satisfy the PLRA exhaustion requirement because his grievance did not name the officers subsequently identified as defendants, nor did it "assert the denial of his right of access to the courts." The court noted: "After discovering the identities of some of those responsible, his failure to name defendants or raise the denial of right of access to the courts issue in the Inmate Grievance Process means that he failed to exhaust his administrative remedies with respect to that claim against those officers." Noting, however, that it was definitely reasonable for "[Mr.] Brownell to surmise that his property grievance, by implication, exhausted the remedies necessary to bring the current claims against the defendants," the court ordered that the dismissal be without prejudice.

Mr. Brownell has filed a Notice of Appeal and his case is presently pending before the Second Circuit U.S. Court of Appeals.

The plaintiff is being represented by Prisoners' Legal Services and The Legal Aid Society, Prisoners' Rights Project.

State Cases

Criminal Procedure

People v. Cooper, 787 N.Y.S.2d 861 (St. Law. Co., Jan. 21, 2005) (Rogers, J)

Alleging pre-indictment delay in prosecution, the defendant, an inmate, moved to dismiss an indictment charging him with promoting prison contraband. While at Gouverneur Correctional Facility, the defendant was indicted for possessing contraband, to wit: a 6½-inch sharpened metal rod.

The court, in determining whether the indictment should be dismissed because of an unwarranted delay, addressed the following questions:

1. the extent of the delay;
2. the reason for the delay;
3. the nature of the underlying charge;
4. whether there has been an extended period of pretrial incarceration; and
5. whether there is any indication that the defense has been impaired by the delay.

As to the extent of the delay and the reason for the delay, the court found that there was a delay of more than fifteen months between the date of the incident and the date of the indictment. Of that time, the court found that approximately one year was chargeable to the people, since there was no explanation for a seven-month delay in beginning a state police investigation of the incident; nor was there any explanation for an almost five-month delay in presenting the case to the grand jury after the investigation had begun.

With respect to the nature of the underlying charge, the court noted that it was serious. The court also noted that there had been an extended period of pretrial incarceration, as the defendant had been incarcerated both while still serving his original sentence and solely on the charge. The court also found that the defense had been impaired by the delay, since the defendant could no long name any possible witnesses. The court dismissed the indictment, holding that "[o]ne year of delay, coupled with no explanation other

than for a few days' time to obtain and file reports, coupled with impairment of the defense, and with significant incarceration due solely to the new charge, is unreasonable." In cautioning prison officials regarding the prosecution of inmates on criminal charges while in prison, the court noted: "If prison officials want to pursue criminal prosecution for alleged offenses occurring within the prison, in addition to the significant disciplinary remedies available to them internally, it is important to make a greater effort to process the referral to police agencies on a timely basis, and for those agencies to complete their investigation and report to the district attorney promptly."

Disciplinary

Civil Procedure: Court Continues to Reject 'Mailbox Rule'

Matter of Blanche v. Selsky, 786 N.Y.S.2d 589 (3d Dep't 2004)

After the petitioner, an inmate, was found guilty at a Tier III disciplinary hearing and his guilty determination was upheld on administrative appeal, he filed an Article 78. The respondent, in turn, filed a motion to dismiss, alleging that the proceeding was barred by the statute of limitations. The statute of limitations for filing an Article 78 is four months. See, CPLR §217. The petitioner received the decision on his administrative appeal on January 22, 2003. His petition and supporting papers were not received in the County Clerk's office until June 9, 2003. Since his papers were received beyond the four-month statutory period, the Appellate Division held that the Supreme Court was correct in dismissing his petition.

The petitioner attempted to argue that his action should have been deemed timely commenced because he deposited his papers in the prison mail system, together with the necessary disbursement forms, on May 16, 2003, six days before the expiration of the statute of limitations. The petitioner also argued that if the action was deemed to be untimely, the untimeliness was attributable to prison officials who delayed mailing his papers out. Relying on James v. Goord, 722 N.Y.S.2d 609 (3d Dep't 2001) and Grant v. Senkowski, 721 N.Y.S.2d 597 (2001), the court rejected these arguments. "'[W]e have declined to adopt a 'mailbox rule' even when the verified petition, accompanied [by the necessary papers], was placed in the prison mailing system prior to the expiration of the limitations period.'" The court then noted that it simply found no merit to the petitioner's argument that the delay was caused by prison officials.

Drug Testing: Chain of Custody in Emit Test Upheld

Matter of Saif'ul'bait v. Goord, 788 N.Y.S.2d 712 (2005)

The petitioner was charged with and found guilty of unauthorized use of a controlled substance after a urinalysis test proved positive for opiates. The determination was upheld on appeal, but reversed by the Supreme Court after petitioner filed an Article 78 on the grounds that there was an inadequate foundation for the admission of the test results. The respondent appealed.

The Appellate Division reversed. In reviewing the record, the court noted that, "[c]ontrary to Supreme Court's finding, petitioner was duly served with all [necessary] documentation and they were both part of the official hearing record and freely available for [the] petitioner's inspection." Notably, the court

found that it was from reading those very documents that the petitioner raised his objection concerning the chain of custody problem. Apparently, there was a two-hour lapse between the collection of the specimen and its testing. However, the officer who collected and tested the sample was called as a witness by the hearing officer, and he testified that "he had kept the sample secured and in his immediate presence for the two hours in question before conducting the test and destroying the specimen." This testimony, the court found, was sufficient to satisfy any question concerning a chain of custody.

Mitigating Circumstances: Court Finds Hearing Officer Considered Reason Why Inmate Was Out of Place and Sufficiently Mitigated the Penalty Imposed

Matter of Wooley v. Miller, 786 N.Y.S.2d 591 (3d Dep't 2004)

The petitioner, an inmate at Eastern Correctional Facility, concerned about the welfare of a fellow inmate, "barged into the correction officers' station in an agitated manner" and advised the officers that there was an inmate on the cell block that needed medical assistance. He was then given a direct order to leave the office, with which he complied. However, he continued to complain that his fellow inmate needed medical help.

As a result of this incident, the petitioner was given a misbehavior report charging him with being out of place. He was found guilty at his hearing, the determination being upheld on administrative appeal. He thereafter filed an Article 78 proceeding challenging the determination. The Supreme Court granted the respondent's motion to dismiss and petitioner appealed. The Court affirmed. "To the extent that petitioner maintains that the reason for his being out of place (that he was procuring medical help for a fellow inmate) should have mitigated his conduct, the record reflects that such factor was considered in the imposition of the penalty," held the Court.

Notice: Inaccuracies in Misbehavior Report Do Not Render It Ineffective

Matter of Moore v. Senkowski, 785 N.Y.S.2d 605 (3d Dep't 2005)

The petitioner, an inmate, was involved in an argument with a female training supervisor, during which he allegedly refused her order to return to work and made a threatening comment. He was thereafter given a misbehavior report. The description set forth in the report referred to a rule violation concerning lying and gave the wrong rule violation number for refusing to obey a direct order. Regardless, the petitioner was found guilty at his hearing and this decision was upheld on administrative appeal. The petitioner appealed.

The court rejected the petitioner's argument that the inaccuracies in the misbehavior report resulted in him not being given proper notice of the charges. The court stated: "[A]lthough the description set forth in the misbehavior report erroneously referred to the rule prohibiting lying and inaccurately referenced the rule number corresponding to refusing a direct order, this did not render the misbehavior report defective as the three rules that petitioner was charged with violating were clearly set forth in the rule violation portion of the report, together with the date, place and time of the incident, so as to provide him with sufficient notice."

Seven Day Rule: Only Applies to Initial Hearings not Rehearings

Matter of Spaulding v. Goord, 789 N.Y.S.2d 758 (3d Dep't 2005)

The petitioner, an inmate, filed an Article 78 proceeding after he was subjected to a rehearing on disciplinary charges, challenging the rehearing on timeliness grounds. The petitioner alleged that his rehearing was not commenced within the "seven days of the Superintendent's receipt of notice that a rehearing had been ordered by the court...as required by 7 NYCRR 251-5.1(a)." The Supreme Court granted the petition and the respondent appealed.

7 NYCRR 251-5.1(a) states in pertinent part: "Where an inmate is confined pending a superintendent's hearing, the hearing must be commenced as soon as is reasonable practicable following the inmate's initial confinement...but, in no event may it be commenced beyond seven days of said confinement..." In relying upon the "express language" of 7 NYCRR 251-5.1(a), the Third Department held that the regulation only applies to hearings, not "rehearings." The court also noted that DOCS has a 1984 memo which addresses the specific circumstances which occurred in this case. The memo, from Director of Special Housing Donald Selsky to all Superintendents, provides that rehearings "should be conducted in accordance with the timeliness requirements stated on the court-order or Departmental Review Board order," and that 7 NCYRR 251-5.1 only applies if there are no time limits set forth in those documents. In this case, a memo from Mr. Selsky's office was sent on September 5, 2004 ordering that a rehearing had to be commenced within seven days of receipt of that memo. The petitioner's rehearing commenced on September 11, "well within this time period," held the court.

Substantial Evidence: Absence of Tattooing Paraphernalia Does Not Invalidate Charge of Tattooing Fellow Inmate

Matter of Vasquez v. Goord, 787 N.Y.S.2d 909 (3d Dep't 2005)

The petitioner, an inmate, was charged with and found guilty of tattooing another inmate. The petitioner challenged the finding on the grounds that there was no evidence of any tattooing paraphernalia in his cell. The Third Department, Appellate Division, was unpersuaded. "Despite the absence of any tattooing paraphernalia found in the petitioner's cell, the misbehavior report, hearing testimony and confidential information provide substantial evidence to support the determination of petitioner's guilt," held the court.

Substantial Evidence: Fact That Petitioner Never Actually Received Money For Legal Services Does Not Preclude a Finding of Guilt on Charges of Soliciting

Matter of Karlin v. Goord, 785 N.Y.S.2d 595 (3d Dep't 2004)

The petitioner, an inmate, was the subject of a Superintendent-ordered mail watch because the petitioner had received arson information through the mail. During the watch, correction staff found letters indicating, among other things, that the petitioner was charging inmates for legal services and that his girlfriend had set up a post office box and a checking account. The petitioner was subsequently charged with, and found guilty of, soliciting, smuggling, violating facility correspondence procedures, and providing unauthorized legal assistance. His

administrative appeal was unsuccessful and his court challenge ensued.

The court was not swayed by the argument that the charges were unwarranted because the petitioner never received any money. "The fact that petitioner never actually received any money for legal services rendered does not preclude the finding of guilt as the evidence established that petitioner's objective was to receive compensation," the court held.

Substantial Evidence: Insufficient Evidence to Support Charges of Interference with Employee, Creating a Disturbance and Destruction of State Property

Ramirez v. Schultz, 787 N.Y.S.2d 57 (2d Dep't 2004)

The petitioner, an inmate, was charged with and found guilty of interference with an employee, creating a disturbance, and destruction of state property. The charges stemmed from an incident during which the petitioner, acting as a negotiating representative for an inmate committee, tore up a requisition form and put it in a trash can. The form was for a monetary donation from the committee for an upcoming family-day picnic.

At the outset, the respondent conceded that the charge of creating a disturbance was not supported by substantial evidence, but defended the finding of guilt on the remaining charges. The court, however, found that, since there was no allegation that the petitioner had any physical contact with any employee nor did he engage in any behavior that interfered with the employee performing his duties, there was also no support for the "interference with an employee" charge. Additionally, the tearing up of the requisition form was found by the court to be inconsequential, as the petitioner had the authority of his committee to withdraw the donation, and thus, the form that it was written on was no longer of any value. "Under the circumstances, the tearing up of this useless paper, followed by the petitioner depositing it in a trash can, is not equivalent to the destruction of valuable state property," wrote the court.

Substantial Evidence: Nonspecific Nature of Alleged Threatening Language Insufficient to Support Charge

Matter of Allen v. Goord, 788 N.Y.S.2d 511 (3d Dep't 2005)

While a correction officer was handing out razors to inmates in their cells, Petitioner Allen, who was double-celled with an inmate, advised the officer that his cellmate needed to be immediately moved from his cell. There was a discrepancy in the stories of the correction officer and the petitioner regarding whether the petitioner said that there would be "serious bloodshed" or whether he said there would be serious "problems" if the inmate was not removed, but there was no dispute that the petitioner wanted his cellmate moved. The petitioner asserted that his request must have been misinterpreted by the correction officer, and that his plea was for assistance not an indication that *he* intended to cause anyone harm.

At his subsequent disciplinary hearing on charges of making threats, the petitioner elicited testimony from two facility employees verifying that he [petitioner] had previously notified staff of his cellmate's intimidating nature and had requested to be transferred out of his cell. The petitioner also requested that the author of the misbehavior report be called as a witness, but the Hearing Officer indicated that he felt that the

petitioner had presented "two very good witnesses," that they were "very clear," and testimony of the reporting officer might be redundant, although he was the only eyewitness to the event. The petitioner then agreed that the reporting officer's testimony was not required.

The court noted that, even though a misbehavior report alone can constitute substantial evidence, "here, the nonspecific statement made by petitioner and the conclusory determination of what the reporting correction officer 'must have thought' were insufficient to provide substantial evidence to support the determination of guilt." Moreover, no evidence was presented at the hearing to refute the petitioner's defense that "his statement was not intended as a threat." In fact, the only testimony that was given supported the petitioner's defense. The court also commented on the petitioner's apparent waiver of his right to call witnesses, noting that "given the questionable comments by the Hearing Officer, we cannot say that [the] petitioner's waiver of his right to call a witness was knowingly and intelligently made."

Substantial Evidence: Petitioner's Defense of Misidentification Merely Presents Issue of Credibility

Matter of Ratliff v. Goord, 785 N.Y.S.2d 614 (3d Dep't 2004)

A correction officer wrote a misbehavior report against Petitioner Ratliff, alleging that he observed Mr. Ratliff throwing punches at an unknown correctional employee during a disturbance in the yard. Mr. Ratliff also allegedly refused direct orders to stop. The report charged Mr. Ratliff with "assault, refusing a direct order and engaging in violent conduct."

Mr. Ratliff was found guilty at his hearing and the determination was affirmed on appeal. Mr. Ratliff then filed an Article 78, asserting that the hearing officer's disposition was not supported by substantial evidence. Mr. Ratliff claimed that it was a case of mistaken identity, and the fact that the author of the misbehavior report was unable to describe what Mr. Ratliff looked like during a telephonic interview demonstrated that the officer did not know who Mr. Ratliff was. The court was not swayed. Holding that the case merely presented an issue of credibility, the court noted: "Although the officer was initially unable to describe petitioner during his telephonic testimony at the disciplinary hearing, he later appeared at the hearing and positively identified petitioner as the individual he saw throwing punches at the staff member." The court failed to note, however, that when the officer appeared at the hearing to identify Mr. Ratliff, the Hearing Officer had each person identify himself, and then addressed Mr. Ratliff by name before eliciting testimony from the officer.

The petitioner filed a motion for leave to appeal to the Court of Appeals. In his motion, the petitioner argued: the officer's statement that he identified Mr. Ratliff could not constitute substantial evidence because the alleged identification was inconsistent with other statements made by the same officer; the Hearing Officer had a duty to engage in further inquiry because the officer's identification of an inmate was disputed; the means by which the officer allegedly identified the inmate was not described in the record; and the officer's in-person identification of Mr. Ratliff was so unduly suggestive that it could not constitute substantial evidence. The motion for leave was denied.

The petitioner was represented by Prisoners' Legal Services.

Substantial Evidence: Smuggling and Possession Charges Annulled Due To Lack of Proof Petitioner Was Intended Recipient of Contraband

Matter of Santiago v. Goord, 785 N.Y.S.2d 597 (3d Dep't 2004)

A correction officer observed and retrieved an envelope attached to a drag line on the floor in a hallway where an inmate, Mr. Santiago, was being housed. The contents of the envelope tested positive for marijuana. The drag line was apparently in plain view of the petitioner's cell and the petitioner was thereafter charged with various rule violations, including smuggling and possessing a controlled substance. He was subsequently found guilty of those charges, which was upheld on appeal.

The petitioner filed an Article 78, arguing that the record lacked substantial evidence to support the charges. The report that was served on the petitioner did not allege that the author saw the petitioner smuggle the controlled substance, nor did it allege that the controlled substance was ever in petitioner's possession. Instead, it simply stated that the author observed the envelope attached to the drag line and that "upon reviewing a videotape of the area, he concluded that the envelope was attempting to be passed to the cell in which petitioner was housed." The author of the misbehavior report did not testify at the hearing, but the hearing officer also reviewed the videotape and concluded that "it depicted a drag line being maneuvered between petitioner's cell and that of another inmate at least three times..."

When the case went before the Appellate Division, the court also reviewed the videotape, but it came to a different conclusion. The court noted: "Based upon our in camera review of the videotape, however, we find that it is inconclusive. Absent proof that petitioner was the intended recipient of the envelope, substantial evidence does not support...the determination..." The court annulled the determination and ordered that all references to the smuggling and possession of a controlled substance charges be expunged from the petitioner's record.

Vagueness of Rule: Court Holds DOCS Disciplinary Rule Regarding Work-Stoppages Provides Adequate Notice

Matter of Garrett v. Goord, 788 N.Y.S.2d 461 (3d Dep't 2005)

The petitioner, an inmate, was charged with violating the prison Disciplinary Rule 104.12, which prohibits inmates from "leading, organizing, participating in or urging other inmates to participate in a work-stoppage, sit-in, lock-in or other action which might be detrimental to the order of the facility." Title 7 NYCRR 270.2[B][5][iii]. The facts that gave rise to this charge are as follows: The petitioner, while an inmate at Gowanda Correctional Facility, went with 95 other inmates to a scheduled prayer service at the facility's mosque. When they all arrived, it was noted that only 81 of the 96 inmates had obtained prior permission to attend the service. The 15 inmates who did not have prior permission were taken to a nearby room and told that unless they could obtain immediate permission to attend, they would be returned to their housing unit. Upon hearing of this situation, the petitioner allegedly stood inside the Mosque and said "if [they]...are not going to be allowed to participate in the services, then we are all going to leave..." The 15 inmates were not able to obtain permission and thereafter all the inmates left. Mr. Garrett was then charged with violating Disciplinary

Rule 104.12.

At his subsequent disciplinary hearing, the petitioner was found guilty and filed an unsuccessful administrative appeal. He then filed an Article 78 proceeding, challenging the Tier III disposition and asserting, among other things, that the rule violation with which he was charged was impermissibly vague. The Supreme Court dismissed his petition and he appealed.

The respondent initially argued that the petitioner had waived his challenge to the vagueness of the rule violation by failing to raise it at the hearing. The lower court rejected this argument, finding that "he [petitioner] complained at every stage of this proceeding, that he had no notice that he was engaging in prohibited conduct." However, the court went on to find that "'[a] disciplinary rule [will be found to] meet [] due process...requirements if it gives inmates adequate notice of prohibited conduct tending to threaten the security and order of a correctional facility.'" The court then concluded that the rule in question "meets this test."

Witness Refusal to Testify: Notation on Employee Assistant Report Held Insufficient

Matter of Martinez v. Goord, 780 N.Y.s.2d 337 (3d Dep't 2005)

The petitioner, an inmate, was charged with various rule violations. Following a disciplinary hearing and unsuccessful administrative appeal, the petitioner filed an Article 78 challenge, alleging that he was denied his right to call witnesses. The petitioner had requested that various witnesses be interviewed by his employee assistant, but apparently two of those witnesses advised the employee assistant that they refused to testify. With respect to at least one of the witnesses, the petitioner objected at the hearing to the witness's refusal to testify, noting that the witness's testimony was crucial to proving his innocence. The hearing officer responded by advising the petitioner that "because the employee assistant form indicated the witness's unwillingness to testify, there was nothing he could do to procure the witness's testimony."

The court reversed the hearing officer, noting that "[i]t is well settled that '[t]he hearsay report of a correction officer that a witness refuses to testify unaccompanied by any reason from the witness proffered to the hearing officer for such refusal is not a sufficient basis upon which an inmate's conditional right to call witnesses can be summarily denied.'" (Citations omitted.) However, the court remanded the case for a new hearing because the petitioner did not dispute that there was sufficient evidence in the record to support the disposition.

Parole/Conditional Release

Parole: Rehearing Ordered Due to Failure of Parole Board to Consider All Relevant Statutory Factors

Cappiello v. New York State Board of Parole, 6 Misc. 3d 1010(A), 2004 WL 3112629 (N.Y. Co., Nov. 30, 2004) (Wetzel, J.) {**Unpublished Decision**}

The petitioner, an inmate, sued the respondent, the Board of Parole, alleging that the respondent's decision to deny him parole was arbitrary and capricious and requesting, among other things, that the court require the Parole Board to conduct a new hearing in accordance with the factors set forth in Executive Law §259-I.

The petitioner is serving a sentence of 15

years to life on a felony murder charge, together with a lesser concurrent term on other related charges. At the time of his conviction in 1977, the petitioner was only eighteen (18) years old and had no prior criminal record. After being in prison for over seventeen years, the petitioner was placed in a Work Release Program at Queensboro Correctional Facility. As part of the program, he spent five days a week living at home with his wife and working and two days a week at the correctional facility. He progressed in his job as a Youth Outreach Worker for the Safe City Café Street Program, ultimately becoming the director of the program which "'serviced the largest number of youth in the New York City area.'" His status on work release remained and remains unchanged: he still lives at home with his wife, works five days a week, and reports to the facility two nights a week.

The Petitioner appeared before the Parole Board seven times, each time being summarily denied parole. In the first four appearances he was given a 24-month hold, and in the six and seventh appearances he was given an 18-month hold. Most recently, he appeared in September 2003 and the Board "inexplicably imposed a 24-month hold once again. " At that hearing, substantive testimony, ten pages in length, was given: eight pages dealing with his 1976 crime, and two pages addressing other "relevant statutory factors," such as "his performance on Work Release, his gainful employment while on Work Release, his residence at his wife's home in Staten Island, his plans for the future, and the fact that he had no disciplinary infractions in the program since his last Board appearance." Near the end of the hearing, the Board asked the petitioner whether there is "'anything else...that you think is important for us to take into consideration as we look at your case today,'" and the petitioner then directed the Board's attention to "the voluminous written material submitted in connection with his interview." The Board failed to ask the petitioner anything about the written materials and denied parole based upon the circumstances surrounding his instant offense. After filing an unsuccessful administrative appeal, the petitioner brought an Article 78 proceeding.

In his petition, the petitioner argued that because the Board failed to apply the relevant statutory factors and instead focused solely on his criminal offense, the Board's decision was arbitrary and capricious. The petitioner also argued that the 24-month Board hold was excessive. The court agreed with the petitioner, vacated the Board's decision, and ordered the Board to provide the petitioner with an immediate new hearing, during which the Board would comply will all the statutory requirements.

The court acknowledged that there is no "inherent constitutional right to parole," but in New York State we do have a statutory scheme which "creates a legitimate expectation of early release from prison" and which, in turn, creates a "liberty interest which is entitled to constitutional protection." The court noted that Executive Law §259-i(2)(c)(A) sets forth three standards that place limits on the otherwise broad discretion that the Board has in making parole determinations. The Executive Law mandates that a denial of parole "must be reasonably predicated on one or more of these three qualitative standards:

1. whether, if released, the inmate will live and remain at liberty without violating the law;

2. whether the inmate's release will be incompatible with the welfare of society; and

3. whether release will not so deprecate the seriousness of the crime so as to undermine respect for law."

Executive Law §259-i(2)(c)(A) also mandates that the Board consider certain factors in determining whether to grant parole release in accordance with the standards. Those factors include:

1. the institutional record including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy, and interpersonal relationships with staff and inmates;

2. performance, if any, as a participant in a temporary release program; and

3. release plans including community resources, employment, education and training, and support services available to the inmate."

Although the Parole Board does not have to specifically refer to each of these factors or give each factor equal weight, it must, at the very least, consider each factor.

In this case, the court found that "it does not appear that respondent made any attempt to determine whether parole was appropriate according to any of the three statutorily acceptable standards." The court noted that the petitioner was given a sentence by a judge after hearing and weighing all of the evidence, which should have resulted in the petitioner being eligible for parole after serving 15 years in prison. However, "[i]n 2003, after serving 27 years in prison, [the] petitioner was denied parole based solely on the severity of the crime for which he was originally convicted. The Parole Board's failure to qualitatively determine whether petitioner presented a current danger to society, based on all of the relevant statutory factors, was a clear abdication of its statutory duty," held the court.

The court's frustration with what it saw as a cursory rejection of the petitioner's application for parole was apparent when the judge not only ordered a new parole hearing but also required the Board to state on the record whether its members had read all of the submitted documents. "Apparently, it is respondent's position that it is not responsible for reading and incorporating submissions as part of its deliberative process," wrote Justice Wetzel. "Therefore, it is the direction of this court that at the de novo hearing, [the] petitioner shall inquire on the record of the Parole Board whether they have read all of the materials submitted by [the] petitioner, and [the] petitioner shall ask that the Parole Board acknowledge or deny reading those materials on the record."

Conditional Release: Invalid Conditional Releases Revoked by Court; Former Inmates Ordered to Surrender Themselves

In re Velella v. New York City Local Conditional Release Commission, et al., 788 N.Y.S.2d 8 (1st Dep't 2004)

Five petitioners, former inmates, filed Article 78 challenges to the determinations of the respondent, the Conditional Release Commission, which advised the petitioners that their conditional releases were invalid and which directed the petitioners to surrender themselves to state custody. For three of the petitioners, it was determined that their applications for conditional release were incorrectly considered prior to the required statutory expiration of 30 days of incarceration. The other two petitioners

were released on re-applications for release, which were subsequently determined to be invalid because they had reapplied less than 60 days after their first applications were submitted.

The Supreme Court, New York County (Wilkins, J.) dismissed all of the petitions and directed the petitioners to surrender themselves to custody. They appealed. The Appellate Division, First Department affirmed the lower court's decision, finding that "statutory mandates were not followed [and thus] the orders granting conditional releases were illegal." The court noted: "While a government agency cannot reopen an application and change a valid, final order absent statutory authority, an agency has the power to set aside a determination on the ground of a significant irregularity." (Citations omitted). The court also noted that because the respondents' interpretation of the Correction Law was a reasonable one, it warranted deference. In addition, the court pointed out that the "[p]etitioners did not have a substantive due process right to the protection of conditional release orders that were illegal."

Pro Se Practice

The Reform of the Rockefeller Drug Laws

On December 14, 2004, Governor Pataki signed into law the Rockefeller Drug Law reform bill commonly referred to as the Drug Reform Act (DRA). This new law altered the punishments for most narcotics crimes, in most cases reducing the punishment, but in some cases increasing it. Under the new law, the 15-to-life to 25-to-life sentences required under the 1973 laws for the highest level, Class A-1 drug crimes, were cut to 8 to 20 years. It is estimated that over 400 inmates who are now in prison for Class A drug offenses are eligible under the DRA to petition to be resentenced. Many advocates for reform of the Rockefeller drug laws complain that the DRA does not go far enough.

We have received numerous questions concerning the DRA, including what types of cases are affected by the DRA and whether the recently enacted changes will be applied retroactively to defendants who were not sentenced prior to the effective date of the statute. This article is meant to offer answers to some of the most frequently asked questions regarding the DRA, and to provide you with an update on the status of the law when interpreting whether the new law should be applied retroactively.

Does the DRA Revised Sentencing Scheme Apply to All Drug Offenses?

The DRA calls for determinate sentences for all drug offenses. The sentencing section applies to all offenses committed on or after January 13, 2005, and perhaps crimes committed prior to that date (see last section below).

Class A felony convictions will be punishable as follows:

Class A-1 Drug Offenses	**Determinate Sentence Range**
First Felony Offense	Between 8 and 20 years
Second Felony (prior non-violent)	Between 12 and 24 years
Second Felony (prior violent)	Between 15 and 30 years

Plus 5 years post-release supervision (all cases)

Class A-11 Drug Offenses	**Determinate Sentence Range**
First Felony Offense	Between 3 and 10 years
Second Felony (prior non-violent)	Between 6 and 14 years
Second Felony (prior violent)	Between 8 and 17 years

Plus 5 years post-release supervision (all cases)

Class B through E level drug and marijuana offenses:

First Felony Offender		**Determinate Sentence Range**
Class B		Between 1 and 9 years
Class B	(sale in or near school grounds)	Between 2 and 9 years
Class C	(imprisonment not mandatory)	Between 1 and 5½ years
Class D	(imprisonment not mandatory)	Between 1 and 2½ years
Class E	(imprisonment not mandatory)	Between 1 and 1½ years

Plus post-release supervision
Class B or C - Between 1 and 2 years
Class D or E - 1 year

Second Felony Offender (prior non-violent)	**Determinate Sentence Range**
Class B	Between 3½ and 12 years
Class C	Between 2 and 8 years
Class D	Between 1½ and 4 years
Class E	Between 1½ and 2 years

Plus post-release supervision
Class B or C - Between 1½ and 3 years
Class D or E - Between 1 and 2 years

Second Felony Offender (prior violent)	Determinate Sentence Range
Class B	Between 6 and15 years
Class C	Between 3½ and 9 years
Class D	Between 2½ and 4½ years
Class E	Between 2 and 2½ years

Plus post-release supervision
Class B or C - Between 1½ and 3 years
Class D or E - Between 1 and 2 years

Can I File a Petition for Resentencing?

If you are currently serving A-I felony sentences for a drug offense, you may petition for resentencing under the new determinate scheme beginning January 13, 2005. The law requires that you be in the custody of the Department of Correctional Services; those on parole are not eligible for resentencing. The law grants you the right to assigned counsel to prepare the resentencing application and to advocate for a determinate sentence under the new scheme. Counsel fees for such representation will be a county charge. Whenever possible, your application will be assigned to your original sentencing judge. Otherwise, it will be randomly assigned to a new judge.

The court "may consider any facts or circumstances relevant to the imposition of a new sentence," including your institutional record. Because the bill provides that no new pre-sentence report be ordered, it will fall to your defense counsel to independently investigate and present facts supporting resentencing. The court must offer you the opportunity for a hearing and allow you to be present. The court may also conduct a hearing to "determine any controverted issue of fact relevant to the issue of sentencing." Unless "substantial justice dictates" that the application be denied, the court must offer you a determinate sentence as an alternative to the 15-to-25-years to life sentence you are now serving. You have the option of accepting or rejecting the new determinate sentence. But in either case, you have the right to appeal from a determinate sentence offered or imposed on the ground that it is harsh and excessive.

What Do I Do If I Believe I Can Be Resentenced Under the DRA?

If you have been convicted of a Class A-I drug crime under the old Rockefeller Drug Laws, and believe that, based upon the information set forth in this memo, the reforms may benefit you, you should do the following:

- ✓ If your conviction was outside of New York City, contact the Chief Defender's office in the county in which you were convicted.
- ✓ If your conviction was in New York City, contact William Gibney, Special Litigation Unit, Legal Aid Society 199 Waters Street, NY, NY 10038.
- ✓ If your case is on appeal, contact your criminal appeals attorney.

Have any changes been made regarding the weight threshold for Class A Drug Offenses?

The bill doubles the weight threshold for the Class A-1 felony of criminal possession of a controlled substance in the first degree (Penal Law § 220.21) from four to eight ounces, and for the Class A-II felony of criminal possession of a controlled substance in the second degree (Penal Law § 220.18) from two to four ounces. But the weight thresholds for sale offenses remain the same. These changes were effective as of the date the bill was signed into law and thus should apply to any case that was pending as of December 14, 2004. If the weight is less than the newly-prescribed amounts, pending A-I and A-II possession indictments should be reduced accordingly.

Does the DRA Affect My Good Time or Merit Time?

Determinate Sentences - All drug offenders serving the new determinate sentences will be eligible for a standard 1/7th reduction of the term as good time. They will also be eligible for an additional 1/7th reduction as merit time. To earn merit time, drug offenders will be required to participate in assigned work and treatment programs, and obtain (a) a GED, or (b) an alcohol and substance abuse certificate, or © a vocational trade certificate, or (d) perform 400 hours in a community work crew.

Indeterminate Sentences - Class A-I drug offenders serving indeterminate sentences may continue to earn up to 1/3 off their minimum terms as merit time, and Class A-II through E drug offenders may continue to earn up to 1/6th off their minimum terms. The bill includes a bonus 1/6th merit time allowance for Class A-II through E felony offenders, *i.e.*, all drug offenders who are not convicted of an A-1 felony, who committed the offense prior to January 13, 2005, and received an indeterminate term. As of December 27, 2004, if you are a drug offender who is incarcerated and serving an indeterminate sentence and who has not yet reached the minimum term, you are eligible for this *additional* credit of 1/6 off of the minimum as possible merit time if you participate in two or more of the above-listed programs. When you first arrived in the Department of Correctional Services, you were given a computation which showed a possible merit time parole board appearance that was computed at 1/6 off of your minimum term. Under the new law, you are eligible for an additional 1/6 off the minimum of any drug conviction for a total of 1/3 off the minimum before the scheduling of a possible parole board appearance. For example, if you have a 3-year minimum term, you would now be eligible for merit release at 2 years.

The merit time change only helps people now in custody serving a sentence and who are still within the time during which early eligibility for possible parole release would be helpful. If you have already served your minimum sentence, it is too late for this provision to help you. Even for those who are potentially eligible, the requirements of merit time are also often difficult to achieve. You must complete your program assignment and not have a serious disciplinary infraction (60 days or more in SHU). If you have questions about these requirements, you should speak with your prison counselor.

Does the DRA Affect Parole on An Indeterminate Sentence?

Effective February 12, 2005, people serving A-I and A-II felony sentences under the old law must have their parole ended after three years of unrevoked supervision. All other drug offenders

must have their parole ended after two years of unrevoked supervision. These provisions should offer some help, for example, to those serving life sentences for A-II felony crimes and for those serving B felony offenses with long maximum terms, provided they are able to remain problem free and not get their parole revoked within the required time limit. If you have questions about the requirements for termination of your parole supervision, you should discuss them with your supervising parole officer.

Does the DRA Affect CASAT or Judicial Placements?

Under the current law, certain non-violent inmates are eligible for the Comprehensive Alcohol and Substance Abuse Treatment program (CASAT) when they are within two years of initial parole eligibility or conditional release (indeterminate and determinate sentences). After six months of prison-based treatment, they are eligible for work release and community-based treatment for an additional 18 months. The Department of Correctional Services selects inmates for participation in the CASAT program.

For drug offenses, the DRA now allows inmates to be eligible for CASAT when they are within 2 years and 6 months of their anticipated parole or conditional release date (giving advance credit for available good time and merit time credits). Second felony Class B drug offenders serving determinate sentences, however, must serve a minimum of 18 months (jail time and prison time) before transfer to a residential treatment program. The law also authorizes judges to select defendants at the time of sentencing for future participation in the CASAT program.

Does the DRA Affect SHOCK or the Willard Drug Treatment Program?

No real substantive changes were made to the eligibility criteria for SHOCK. The statute (Correction Law § 865) has been amended to accommodate the new determinate sentencing scheme. Drug offenders with determinate sentences who are under 40, have never been previously committed to DOCS, and who will become eligible for conditional release within three years may participate in SHOCK. However, second felony Class B drug offenders are ineligible for the program, even if they are within the three-year time frame at the time of DOCS reception. (The new minimum determinate sentence in this category is 3½ years.)

Under the new determinate sentencing scheme, the Willard program will continue to be available to individuals who are convicted of Class E felony drug offenses and, with the consent of the district attorney, Class D felony drug offenses. The law has been clarified to eliminate the confusing restriction on Willard eligibility for those defendants who are "subject to an undischarged term of imprisonment." This language was never intended to mean defendants who were on parole at the time of the instant offense. The amended statute makes clear that only those defendants who are in state prison or "awaiting delivery" to DOCS for another offense are ineligible for Willard placement. These changes became effective January 13, 2005 and apply to offenses committed on or after that date.

What are the effective dates of the New Sentencing Scheme Under the DRA?

The language and structure of the DRA have been interpreted by most judges to mean that

determinate sentences are available only for offenses committed on or after the effective date of the new sentencing provisions, January 13, 2005. This is because the language of the bill regarding determinate sentencing states that it "shall apply to crimes committed on or after the effective date thereof." Moreover, the bill includes other provisions that appear specifically designed to benefit defendants whose crimes were committed prior to that date and who receive indeterminate terms. For example, all Class A-I offenders were automatically eligible for resentencing as of January 13, 2005. All other drug offenders will be eligible to earn merit time equal to ⅓ of their minimum indeterminate terms, as well as early termination of parole, after two or three years of unrevoked supervision.

On the other hand, there have been at least two reported cases where judges have interpreted the DRA to apply to defendants whose crimes were committed before the reforms went into effect but who were not sentenced yet. People v. Luis Estela, (N.Y. Co. Sup. Ct.) (Jan. 2005) (Wetzel, J.), involved a non-violent predicate felon who appeared before Judge Wetzel on two indictments, charging him with one count of Criminal Sale of a Controlled Substance in the 3rd Degree and Criminal Possession of a Controlled Substance in the 3rd Degree. Defendant Estela indicated that he was prepared to plead guilty, but requested that he be sentenced pursuant to the revised Rockefeller drug laws. Sentencing under the DRA could result in a determinate sentence range of 3½ to 12 years, as opposed to being sentenced under the old Rockefeller drug laws which would have resulted in an indeterminate range of 4½ to 9 years, up to 12½ to 25 years.

The issue before the court was whether the revised sentence structure was applicable to Mr. Estrela, who committed the offenses for which he was charged before January 13, 2005, the effective date of the DRA. Judge Wetzel relied on the Court of Appeals case of People v. Behlog, 74 N.Y.2d 237 (1989), as his authority for applying the new scheme to offenses committed prior to January 13, 2005. In Behlog, the Court of Appeals held that 1985 amendments increasing the dollar amounts of the larceny statutes were "ameliorative" and could be applied to offenses committed prior to the effective date of the legislation. "The rationale for this exception is that by mitigating the punishment the Legislature is necessarily presumed--absent some evidence to the contrary--to have determined that the lesser penalty sufficiently serves the legitimate demands of the criminal law. Imposing a harsher penalty in such circumstances would serve no valid penological purpose" Behlog, 74 N.Y.2d at 240. Judge Wetzel found the logic of Behlog compelling. "It would be illogical to find that the legislative intent was that this defendant should serve a longer period of time than someone who committed exactly the same crime a month or a day later. The compelling rationale of this legislation is that the sentence for this particular crime was excessive and should be reduced, and it is consistent with this legislative intent that this court now apply the well-established principle stated in Behlog. Had the legislature intended otherwise, it is reasonable to assume that they would have used...explicitly restrictive language."

People v. Hasson Denton, et. al., (Kings Co. Sup. Ct.) (Feb. 2005)(Gerges, J), also presented the issue of "whether the ameliorative portions of the recently enacted changes to the Rockefeller drug laws (Drug Reform Act-DRA) are to be retroactively applied to the defendants who have note been sentenced prior to the effective date of the new statute." In an interesting twist, the People initially consented

to the defendants' request to withdraw their not guilty pleas and plead guilty to particular narcotics crimes with the promise of being sentenced under the DRA. But, approximately three weeks later, the People filed an application to withdraw the agreement they had made and permit the defendants to withdraw their guilty pleas or, in the alternative, "sentence the defendants in accordance with the law applicable at the time of the commission of the crimes."

Judge Gerges undertook a thorough analysis of the history of the case law on the issue of applying "remedial statutes to a person who committed a crime before the ameliorative law was enacted," and concluded that "[i]t is clear that the legislature intended to equalize prisoners sentenced under the old law with those sentenced under the new law. It would [be] anomalous if the court were required to sentence the defendants to a harsher sentence only to have the Department of Corrections mitigate the harshness of the sentence by applying the new provisions of the law... Therefore, this court will not interpret the new law to 'waste valuable tax dollars,' to impose an 'inordinately harsh' sentence and to impose a disproportionate sentence of an 'antiquated' law. The legislature has shown that it wished to treat old law offenders equally with new law offenders."

Based upon the language of the DRA, and even considering the opinions of Judge Wetzel and Judge Gerges, it is unlikely that the DRA would be found to apply to defendants who were sentenced before the reforms went into effect.

Conclusion

Drug reform advocates argue that even under the new law, the sentences for first-time Class A offenders are still too long, judges still do not have discretion in sentencing, addicted offenders still do not have the option of being diverted to treatment rather than incarcerated, and there is no funding provided to expand drug rehabilitation programs. Additionally, there has been criticism that the DRA does little to benefit woman prisoners. It is estimated that, at most, one percent of the female drug-crime population will benefit from the DRA, which would result in, at most, 10 female inmates being released due to re-sentencing. A range of factors explains why so few women will benefit from the DRA, including limits to the revisions in the law, the makeup of the prison population, the governor's clemency program, and the complexity of some of the women's cases. Many women will benefit, however, from the section of the DRA that increases the amount of time that can be deducted from sentences for participation in education, drug treatment, and similar programs. For all of its drawbacks, the DRA is a step in the right direction.

Good Luck and Best Wishes To Tom Terrizzi

It is with a deep sense of gratitude that many of us at Prisoners' Legal Services say good bye to our long-time friend, colleague, advocate, and leader, Tom Terrizzi. Tom has served Prisoners' Legal Services for over twenty-nine years. He has dedicated his life to representing indigent people and fighting for justice and civil rights. Tom began working for Prisoners' Legal Services in the late 1970's as a staff attorney in the Ithaca office. He thereafter became Managing Attorney of that office. In the early 1990's, he became Associate Director of PLS, and in 1999, Executive Director.

In his early years as a staff attorney, Tom fought many court battles for New York State inmates, including securing their release from solitary confinement, obtaining jail time credit owed to them, and insuring that their dignity was protected. Tom was instrumental in the case of Hurley, et al. v Coughlin, et al., 549 F.Supp 174 (1982), a case that challenged DOCS' policies and practices regarding strip and body cavity searches. Following a month-long trial in 1982, the Court found DOCS' practices were excessive, degrading, unreasonable, and unjustified in violation of plaintiffs' rights to substantive due process. After trial, a consent decree was entered, and Tom was involved in the filing of various contempt motions concerning violations of that decree. One contempt motion, in 1995, sought changes in procedures regarding videotaping admission strip frisks in the SHU at Albion, a woman's prison. A settlement agreement was reached on approximately 78 claims of improper video taping of strip frisks, which included money damages for those women whose rights had been violated. Another contempt motion regarding strip frisk violations in Fishkill's SHU resulted in the installation of a fixed video system covering the entire SHU.

Tom has been involved in numerous other impact cases that have resulted in improvements to conditions of confinement for inmates in New York State prisons. He worked on Eng, et al. v. Coughlin, et al., 80-CV-385 (W.D.N.Y.) (Skretny, J.), a §1983 class action involving living conditions and treatment of prisoners in Attica's

Tribute Continues on Next Page...

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SHU, Anderson, et al. v. Coughlin, et al. N. D. N. Y., 87-CV-141 (McCurn, J.), a §1983 class action alleging that incarcerating mentally ill people in SHU, punishing them for conduct which is a product of their mental illness, and holding disciplinary hearings when people are not capable of representing themselves violate the 8th and 14th Amendments, and Hughes, et al. v. Goord, et al. 97-CV-643, W.D.N.Y. (Siragusa, J.), a §1983 class action alleging 1st Amendment violations by DOCS' for refusing to permit traditional Native Americans from practicing their religion. Each of these cases resulted in raising the awareness of society to the importance of protecting the constitutional and human rights of all people, and ensuring that all individuals, regardless of their circumstances, retain their dignity.

Tom's leadership and dedication have been an inspiration to those of us at PLS. PLS began operations with 27 attorneys in 1976, a time when the state prison population in New York was approximately 17,000. Twenty years later, with a prison population approaching 70,000, PLS had six offices around the state but only 30 attorneys. This was due to years of budget stagnation and cuts. In 1998, PLS was vetoed out of the budget by Governor George Pataki, and was forced to close its doors. However, due to Tom's fortitude, optimism, and his unrelenting belief that PLS needed to exist, Tom, together with our then-Executive Director David Leven, was able to secure a partial restoration of funding in the Fall of 1999. However, the closure and resulting interruption of services to our clients rocked the foundation of PLS and dimmed the spirit of many prisoners. Rebuilding our program, one which had developed over twenty years into a highly effective prisoner rights organization, due to the collective and extensive experience of attorneys, paralegals, and support staff, was at times overwhelming. Nevertheless, Tom never faltered. The result is that six years later, PLS is alive and well, providing legal advice and representation to thousands of inmates every year.

So, to Tom we say, "Thank you. Thank you for your time and your talents. Thank you for your spirit, your perseverance, and your unrelenting dedication to the causes of justice and human rights. You will be greatly missed."

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