Pro Se

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Supreme Court Upholds Law Protecting Inmates' Religious Freedom

The Supreme Court this term upheld an act of Congress which grants heightened protection to inmates' religious practices.

The decision, *Cutter v. Wilkinson*, 125 S.Ct. 2113 (2005), upheld the constitutionality of the Religious Land Use and Institutionalized Persons Act ("RLUIPA").

The RLUIPA states that there must be a "compelling" reason for any government action which "substantially burdens" free exercise of religion, and the burden imposed must be the "least restrictive means" by which the government can meet its interest.

Ordinarily, government actions which burden the constitutional rights of inmates will be upheld if they are "reasonably related to legitimate security concerns." *See Turner v. Safley*, 482 U.S. 78, 107 S.Ct. 2254 (1987). RLUIPA thus provides greater protection for the free exercise of religion than that provided to the other constitutional rights of inmates.

The prisoner-plaintiffs in the case included a Satanist, a Wiccan, followers of the Asatru religion, and members of the Church of Jesus Christ Christian.

A previous version of the law, known as the Religious Freedom Restoration Act, had been struck down because the Court found that Congress had exceeded its power to pass laws effecting the states. Specifically, the Court found that Congress had not adequately established that inmates' religious freedom was significantly burdened by prison administrators.

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Before passing RLUIPA, Congress held hearings on the state of religious freedom in prison. The hearings showed many instances in which prison administrators imposed barriers to inmates' free exercise of religion which were frivolous, arbitrary, or unrelated to any legitimate governmental interest.

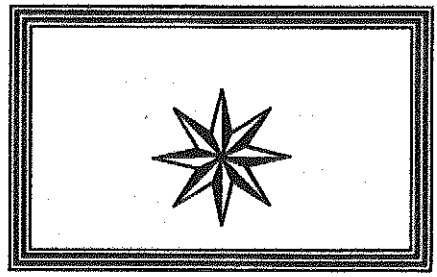
The hearings showed that in Ohio, prison administrators refused to provide Muslims with Hallal food, even though it provided Kosher food to Jewish inmates. In Michigan, prison officials prohibited the lighting of Chanukah candles, even though "smoking" and "votive candles" were permitted. In Oklahoma, a priest responsible for communications between Roman Catholic dioceses and corrections facilities testified that there "was [a] nearly yearly battle over the Catholic use of Sacramental Wine ... for the celebration of the Mass," and prisoners' religious possessions, such as the Bible, the Koran, the Talmud, or items needed by Native Americans, "were frequently treated with contempt and were confiscated, damaged or discarded." In yet another prison, Congress found that prison officials refused to provide sack lunches to Jewish inmates to enable them to break their fasts after nightfall.

The Supreme Court found that RLUIPA was constitutional, in part, because Congress had shown the need for it. It also found that the law did not violate the "establishment clause", *i.e.*, that part of the First Amendment which prohibits the government from "establishing" a religion because it does not favor any particular religion, but merely seeks to alleviate the "exceptional" government-created burdens placed on the practice of religion in the prison environment.

"The 'free exercise of religion,'" wrote the Court, "often involves not only belief and profession but the performance of physical acts such as assembling with others for worship service or participating in sacramental use of bread and wine. [RLUIPA] covers state-run institutions [such as prisons] in which the government exerts a degree of control unparalleled in civilian society and severely disabling to private religious exercise. [It] thus protects institutionalized persons who are unable freely to attend to their religious needs and are therefore dependent on the government's permission and accommodation for exercise of their religion."

That said, the Court cautioned that RLUIPA does not "elevate accommodation of religious observances over an institution's need to maintain order and safety." "Our decisions," wrote the Court, "indicate that an accommodation of [religious rights] must be measured so that it does not override other significant interests."

Despite this caveat, RLUIPA provides inmates with a stronger tool for challenging prison policies that unnecessarily or arbitrarily inhibit their religious practices. (The statute can be read at 42 U.S.C. § 2000cc-1(a)(1)-(2).)



NEWS AND BRIEFS

Restrictions and Rhetoric Intensify Around Sex Offenders

Following several high-profile cases around the nation, in which convicted sex-offenders were accused of assaulting children, legislators around New York are preparing a new wave of restrictive legislation concerning sex-offenders. For example, Binghamton's City Council recently passed an ordinance restricting the movement of persons convicted of sex crimes, barring them from being within a quarter-mile radius of schools, day-care centers, playgrounds, and parks. (A map of the city showing the zones from which sex-offenders would be excluded under the ordinance shows that virtually the entire city is off-limits.) Proponents of the ordinance concede that it is probably illegal and the issue is likely to end up in City Court, which is itself within a zone from which offenders are barred.

Similar local legislation has been introduced in Staten Island and is being considered elsewhere. An Albany County legislator, for example, is planning to introduce a ban on sex offenders "living within a mile of schools, bus stops, day care facilities, or playgrounds."

Besides banishing persons convicted of sex offenses from specified areas, those who believe that current restrictions are not enough have proposed tracking them with global positioning technology, increasing the use of web sites about offenders, and other measures. Several proposals would increase the availability of information about offenders. For instance, Monroe County is considering the possibility of making available to individuals the same access to information about Level 2 sex offenders as they have to information about sex offenders in the Level 3 category. *See related story, page 18*

Rockefeller Drug Reform Has Limited Effects

Pro Se reported the details of last year's reform of the draconian Rockefeller Drug Laws in our previous issue (Spring, 2005). Advocates for drug law reform, however, have long said that the new law was only a beginning, not the end, of what is needed. These assertions are being borne out as the modest effect of the legislation is being realized. A recent news item in the Times-Union Newspaper, for instance, recognized that "the failure of the new law to address all but the stiffest of drug penalties is hurting even those few the limited measure was designed to assist." The article went on: "Of the 446 Class A-1 offenders in the prison system when [Governor] Pataki signed the new law, 66 have been re-sentenced, but only 21 have been released as of April 30." Moreover, while the reform bill provided for some reductions in the sentences required for future Class B through E drug offenders, those reductions were not made retroactive to offenders currently serving time under the prior scheme, meaning that the prison population remains swollen with drug offenders serving needlessly long sentences. (In 1980, only 11 percent of those incarcerated were drug felons; in 2003, drug felons comprised 38 percent of the prison population, of whom over 70 percent have never been convicted of a violent felony.) *See related story, page 20*

Mental Health Law Firm

Prisoners' Legal Services Focuses on Mental Health Law

The last decade has seen a significant rise in the number of inmates in the Department of Correctional Services' ("DOCS'") custody with serious mental illness. Many such inmates have a limited ability to control their behavior and cope with the stresses of a prison environment. As a result, they are over-represented in disciplinary and other forms of isolated confinement, a situation which can further endanger their mental health. Statistics show that a disproportionate number of inmate suicides occur in isolated housing.

Prisoners' Legal Services has a long-standing commitment to providing representation to inmates with mental illness and ensuring that they receive appropriate mental health services while incarcerated. As part of that work, PLS litigated and settled the class action Anderson v. Goord, which concerned the placement of mentally ill inmates in SHU at Auburn and Green Haven prisons. PLS is also one of several agencies co-counseling DAI v. OMH, a class action addressing the custody and treatment of inmates with mental illness in isolated housing units (including SHU, keeplock, and administrative segregation) throughout the state.

Last year, PLS opened a mental health law unit. The unit focuses on the extensive mental health work being performed at PLS. It monitors the settlement of the Anderson case, litigates the DAI case, and advocates for inmates with mental illness housed in SHU.

Monitoring *Anderson v. Goord*

The Anderson settlement required DOCS to follow extensive new procedures in disciplinary cases in which an inmate's mental health may be at issue, both in determining the extent to which the inmate be held responsible for his or her behavior, and in assessing the penalty to be imposed. (The new procedures are codified at 7 NYCRR 254.6[b] - [g].) It also required the establishment of "Special Housing Case Management Committees," joint DOCS/Office of Mental Health ("OMH") panels, which discuss the conduct and mental health status of SHU inmates who are on the OMH caseload and which may recommend changes, including a reduction of sentence time. (Earlier articles detailing the terms of the Anderson settlement can be found in the Winter, 2004 and Winter, 2005 issues of ***Pro Se***.)

Under the terms of the settlement, PLS has been monitoring how DOCS handles the new procedures. The monitoring job starts with the collection and recording of a huge amount of data. Over the last year, the mental health unit reviewed nearly 300 Tier III hearings for inmates with mental health problems at Auburn and Green Haven prisons. The unit reviews both the confidential clinical testimony given at disciplinary hearings as well as those segments of the hearing that are not considered confidential. The non-confidential parts of the hearing include the reading of inmate's rights, the testimony of non-clinical witnesses, documentary evidence and the reading of the disposition. The Hearing Officer's conduct of these parts of the hearing is reviewed to determine whether the Hearing Officer is

complying with the new hearing procedures required by Anderson and the extent to which he or she seemed to consider the inmate's mental status. The unit also reviews confidential clinical evidence given about the inmate's mental status. Under the settlement, a Hearing Officer is required to consider clinical testimony from OMH about an inmate's mental health before rendering a decision. PLS's mental health unit scrutinizes the quality of the testimony given by mental health staff and the Hearing Officers' responses to it.

The mental health unit also reviews the minutes of Case Management Committee ("CMC") meeting and presents our findings and recommendations to the Anderson defendants. CMC minutes are reviewed to determine if inmates are being properly monitored at Green Haven and Auburn. This review includes taking note as to the frequency in which inmates are reviewed by the CMCs, the adequacy of the review, CMC recommendations as to the suspension or reduction in SHU time, and CMC recommendations restoring privileges to inmates in SHU.

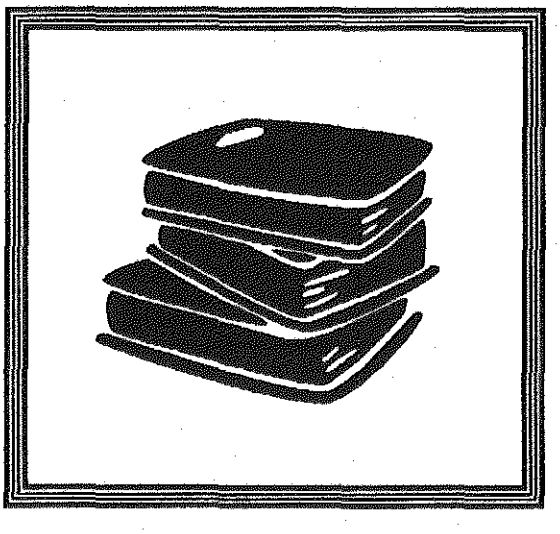
Litigating *Disability Advocates Inc. v. New York State Office of Mental Health et al.*

In addition to monitoring Anderson, PLS's mental health unit, in conjunction with the Legal Aid Society, Disability Advocates, Inc., and a private law firm, Polk & Wardwell, litigates this class action against the New York State OMH and DOCS. The lawsuit, filed three years ago, seeks systemic relief for inmates with serious mental illness confined in DOCS' custody.

Since the case was filed, we have conducted prison inspections with psychiatric and security experts at eleven prisons and the Cental New York Psychiatric Center, interviewed approximately 360 inmates, reviewed the mental health records for 730 inmates and taken close to forty depositions.

During the course of that time, the State has taken steps which acknowledge the need to make greater efforts to serve inmates with mental illness. It recently opened a Behavioral Health Units ("BHU") at Great Meadow and Sullivan Correctional Facilities, a residential therapeutic program designed to help inmates "who have been in SHU often for long periods of time" to "eventually return to General Population or other appropriate programs in the Department of Correctional Services (DOCS)." We are currently gathering additional information about the BHU program.

PLS will continue to focus on the needs of inmates in DOCS' custody with mental illness through litigation and advocacy efforts. As an agency, we are strongly committed to improving the care and treatment for this population.



Federal Cases

Supreme Court Decisions

Due Process: Court Holds Minimal Procedures Sufficient for "Supermax" Assignment

Wilkinson v. Austin, 125 S.Ct. 2384 (June 13, 2005)

The Supreme Court held this term that minimal, "informal" procedures are sufficient to protect the due process rights of an inmate prior to his placement in Ohio's "supermax" correctional facility. The procedures approved by the Court are significantly less than those that would be required to take away an inmate's good time or revoke his parole, even though conditions in the "supermax" at issue are extremely harsh.

The Court described the conditions in the "Ohio Super-Maximum Prison" ("OSP") as follows:

> [A]lmost every aspect of an inmate's life is controlled and monitored. Inmates must remain in their cells, which measure 7 by 14 feet, for 23 hours per day. A light remains on in the cell at all times, though it is sometimes dimmed, and an inmate who attempts to shield the light to sleep is subject to further discipline. During the one hour per day that an inmate may leave his cell, access is limited to one of two indoor recreation cells.
>
> Incarceration at OSP is synonymous with extreme isolation. In contrast to any other Ohio prison, including any segregation unit, OSP cells have solid metal doors with metal strips along their sides and bottoms which prevent conversation or communication with other inmates. All meals are taken alone in the inmate's cell instead of in a common eating area. Opportunities for visitation are rare and all events are conducted through glass walls. It is fair to say OSP inmates are deprived of almost any environmental or sensory stimuli and of almost all human contact. Aside from the severity of the conditions, placement at OSP is for an indefinite period of time, limited only by an inmate's sentence. For an inmate serving a life sentence, there is no indication how long he may be incarcerated at OSP once assigned there.

The due process clause of the fourteenth amendment states that the government cannot take away "life, liberty or property" without providing "due process of law." "Due process of law" refers to the procedures the government must follow before "taking" someone's life, liberty or property. The procedures may range from mere notice that the government intends to take a particular action up to a full trial of the sort required to put someone in prison. The Supreme Court has developed "balancing tests" to determine how much process must be provided prior to any given "taking." The tests usually weigh the nature of the interest at stake, *i.e.*, life, liberty or property, against the strength of the state's interest in taking and the value, in terms of correct decision-making, of providing more process.

The first question in this case was whether inmates even had a liberty interest in staying out of OSP. In the past, the Court has held that only conditions of confinement that impose an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life" will give rise to a liberty interest. Here, the Court had no trouble finding that the harshness of OSP met that test, and that, therefore, inmates were entitled to some process prior to being placed there. The next question was, How much process?

Ohio determines who gets placed in OSP as follows: First, a security level recommendation is made to a three-member Classification Committee. Then, the Classification Committee reviews the proposal and holds a hearing. An inmate is provided with written notice of the hearing, which summarizes the conduct or offense triggering the classification review. The inmate may attend the hearing and may "offer any pertinent information, explanation and/or objections to [OSP] placement," but he may not call witnesses. If the Committee recommends a change in classification which will result in an OSP placement, the recommendation is forwarded to the warden, who must give final approval. If the warden approves the placement, a copy of the recommendation, setting forth the reasons for the decision, is given to the inmate. The inmate then has 15 days in which to appeal the recommendation to the Bureau of Classification. If both the warden and the Bureau approve the classification, the inmate is transferred to OSP. Once assigned to OSP, inmates receive another review within 30 days of their arrival and then annually thereafter.

The Court in Wilkinson weighed three factors in assessing whether this process was adequate: first, the nature of the liberty interest affected; second, the risk of an erroneous deprivation of liberty with the procedures in place; and third, the government's interest, including the fiscal and administrative burdens that additional procedural requirement would involve.

Applying those factors, the Court found that Ohio's process was sufficient. With respect to the first factor, the Court held that, although an inmate's interest in avoiding an erroneous placement at OSP was "more than minimal," the interest had to be seen in the context of the prison system as a whole: "The liberty of prisoners is curtailed by definition," the Court noted. What was at issue in this case was merely a change in the conditions of confinement, not freedom from all confinement. Therefore, the Court reasoned, the process provided need not be as extensive as that provided when the right at stake is the right to be free from all confinement (such as, for example, in a parole revocation hearing, or in a disciplinary hearing where good time is at stake).

With respect to the second factor, the Court found that Ohio's policies minimized the risk of an erroneous placement in OSP by providing multiple levels of review by various decision makers, and by providing inmates with notice of the grounds for the placement and a fair opportunity for rebuttal, as well as a placement review 30 days after the initial assignment.

With respect to the final factor, the Court found that Ohio's interest in protecting its staff, the public, and other inmates was paramount: "Ohio's first obligation must be to ensure the safety of guards and prison personnel,

the public, and the prisoners themselves," wrote the Court. "Prison security, imperiled by the brutal reality of prison gangs, provides the backdrop of the State's interest." The Court wrote that were the State required to provide additional procedures before ordering a transfer to OSP, such as the right to call witnesses, both the objective of controlling the prisoner and its greater objective of controlling the prison could be defeated.

"Where, as here," the Court concluded, "the inquiry draws primarily on the experience of prison administrators, and where the State's interest implicates the safety of other inmates and prison personnel," informal, non-adversary procedures "provide the appropriate model."

Note: The question of whether conditions in the OSC may violate the Eighth Amendment's ban against cruel and unusual punishment were not presented in this case.

Second Circuit Decisions

The Second Circuit Court of Appeals is the Federal Appeals Court with jurisdiction over federal cases that arise in New York. It is the level of court directly below the Supreme Court. Its decisions are considered precedent in New York and must be followed by the federal district courts in New York.

Denial of Hepatitis-C Medication May Violate Eighth Amendment: Case Should Go To Jury

Johnson v. Wright, 412 F.3 3a8 (2d Cir. 2005)

Inmate Johnson suffers from Hepatitis C. Over a period of approximately two years, his doctors repeatedly recommended that he be placed on Rebetron therapy to treat his Hepatitis C condition. DOCS, however, has a policy that "generally forbids the prescription of Hep C medication to any prisoner with evidence of active substance abuse within the preceding two years." Since Johnson had, on *one* occasion, approximately twelve months earlier, tested positive for marijuana use, DOCS over-ruled the advice of the doctors and refused to prescribe Johnson with the requested treatment. Johnson sued, claiming deliberate indifference to his medical needs.

A district court rejected his claim. The court held that DOCS officials were not deliberately indifferent to Johnson's serious medical needs because their refusal to treat him was medically justifiable. Their treatment (or lack thereof) was consistent with the DOCS' Practice Guideline and the Guideline "was based on medical evidence that was apparently reliable at the time." "[B]ecause defendants reasonably could have believed that the policy embodied in the Guideline was medically justified, Johnson necessarily could not prove that they acted with deliberate indifference in initially refusing to prescribe Ribavirin to him." (***Pro Se*** reported the district court decision in our October, 2004 issue.)

The 2d Circuit reversed. The question, the Court held, "is not whether the Guideline's substance abuse policy is *generally* justifiable, but whether a jury could find that the application of the policy in *plaintiff's* case could have amounted to deliberate indifference to plaintiff's medical needs." Here, the Court found, "[b]ecause the defendants reflexively applied DOCS policy in the face of the unanimous, express, and repeated...recommendations of plaintiff's treating physicians, including prison physicians, we believe a jury could reasonably

find that the defendants here acted with deliberate indifference to the plaintiff's medical needs."

A jury, the Court noted, could find that "the defendants sincerely and honestly believed that they were required to comply with the substance abuse policy articulated in the Guideline and that applying this policy was, in plaintiff's case, medically justifiable." However, the Court pointed out, a jury could just as easily find that "defendants here *did*...know of, and disregard an excessive risk to, plaintiff's health."

Practice pointer: *An inmate complaining about medical care in federal court must prove that DOCS was "deliberately indifferent" to a "serious" medical need in order to prevail. A "serious" medical need is one which presents "a condition of urgency," or that "may produce death, degeneration, or extreme pain." To act with "deliberate indifference," prison personnel must have both known of and disregarded "an excessive risk" to the plaintiff's health. This is a greater showing than mere negligence. The prisoner must show that the defendant was both "aware of facts from which the inference could be drawn that a substantial risk of serious harm exist[ed], and [that the defendant drew] the inference." See Farmer v. Brennan, 511 U.S. at 834 (1994)*

Note: *DOCS' policy of limiting Hepatitis-C treatment to persons with active substance abuse within the preceding two years remains controversial, a controversy* ***Pro Se*** *reported on at greater length in our Fall, 2003 issue. In that issue, we also reported on two State court challenges to the policy. In one of those cases, In re Application of Domenech, the inmate succeeded in reversing DOCS' decision to exclude him from treatment. That case was recently affirmed by the Appellate Division. We report the decision in this issue, at page 19.*

Jury Instructions Upheld In Eighth Amendment Use of Force Case

Baskerville v. Mulvaney, 411 F.3d 45 (2nd Cir. June 3, 2005)

The question in this case was: What exactly must an inmate prove to win an Eighth Amendment excessive use-of-force claim?

Plaintiff Baskerville alleged that two correction officers used excessive force against him in violation of the Eighth Amendment, and subjected him to racial discrimination and religious retaliation in violation of his Fourteenth and First Amendment rights. Baskerville alleged that the defendants used excessive force during a take down based on their suspicion that he was in possession of contraband, repeatedly hitting him on the head and neck while saying, "All of you niggers think you are something special talking that Farrakhan shit...Call Farrakhan now." The case went to trial. At the conclusion of the trial, the court instructed the jury on what it would have to find in order to find the defendants liable. We quote the court's instructions at length because they are instructive. The court stated:

> To establish a constitutional violation under the Eighth Amendment a plaintiff must meet both an objective and a subjective requirement. To satisfy the objective requirement the plaintiff must prove that the violation is sufficiently serious or harmful enough by objective standards. The objective component is "context specific, turning upon 'contemporary standards of decency.'" **Hence, a *de minimis* [minimal]use of force**

will rarely be sufficiently serious or harmful enough. In other words, not every push or shove, even if it may later seem unnecessary, violates a prisoner's constitutional rights.

To meet the subjective requirement, the plaintiff must prove that one or more of the defendants had a wanton state of mind when they were engaging in the alleged misconduct. Wantonness turns upon whether the force was applied in a good-faith effort to maintain or restore discipline, or maliciously or sadistically to cause harm. To determine whether the defendants acted maliciously you should base your determination on factors including: 1, the extent of the plaintiff's injuries; 2, the need for the application of force; 3, the correlation between the need and the amount of force used and the threat reasonably perceived by the defendants; 4, any efforts made by the defendants to temper the severity of a forceful response. You may also consider whether the force was applied in order to retaliate against the plaintiff for his religious expression or to discriminate against him on the basis of his race. If an evaluation of these and/or other factors leads you to conclude that one or more of the defendants acted maliciously, wantonness has been established and an Eighth Amendment violation has occurred. If, on the other hand, reflection upon these factors leads you to find that the defendants acted in a good-faith effort to maintain and restore discipline, no constitutional violation has occurred because the subjective component of the claim has not been satisfied.

In order for the plaintiff to prove that one or more of the defendants violated his Eighth Amendment right to be free from excessive force, the plaintiff must prove by a preponderance of the evidence both the objective and subjective requirements.

The jury found against Baskerville. Baskerville appealed. In his appeal, he argued that the court's instructions were too restrictive. According to Baskerville, the court should have instructed the jury that even a minimal amount of force could sustain an Eighth Amendment violation, so long as the actions of the officers were malicious or sadistic. The 2d Circuit disagreed.

In Hudson v. McMillian, 503 U.S. 1, 112 S.Ct. 995 (1992), the Supreme Court indicated that there could be a case where *"de minimis"* force might be enough to sustain an Eighth Amendment claim. Here, however, the Court found that the use of force alleged by Baskerville was not *de minimis* and therefore, there was "no danger that the jury might have considered the conduct at issue to have been 'malicious,' yet not sufficiently serious to meet the objective test as described by the court."

Baskerville also argued that the district court had erred by instructing the jury that if it found no excessive use of force, then it need not consider claims of religious retaliation. The 2d Circuit rejected this argument, as well.

The court held that there may be cases where a push or a shove might not be enough force to state an excessive use of force claim, but still be actionable if motivated by racial discrimination or religious retaliation. Here, however, the instructions explicitly allowed the jury to consider 'whether the force was applied

in order to retaliate against the plaintiff for his religious expression or to discriminate against him on the basis of his race.' This instruction provided the jury with adequate opportunity to consider the defendants' possible motivations and to find that their conduct was "malicious and sadistic" if it was motivated by Baskerville's race or religion.

DOCS Wins Case On Restricted Diet

Phelps v. Kapnolas, 308 F.3d 180 (2d Cir. 2002) on remand to 2005 WL 1313444 (W.D.N.Y. June 1, 2005)

The constitutionality of DOCS' use of the "loaf" diet continues to be a source of controversy and litigation. The "loaf," a bland and solid concoction of flour, milk, yeast, sugar, salt, margarine, potatoes, and carrots, is used by DOCS as a punishment for inmates in extreme cases. An inmate on the loaf is suspended from the regular prison food service and given only the "loaf" three times a day. DOCS argues that nutritionists have analyzed the loaf and reported that it meets health and dietary standards. A number of inmates, however, have argued that being placed on the loaf amounts to cruel and unusual punishment.

In this case, which ***Pro Se*** has been following since our March, 2003 issue, inmate Phelps alleged that his placement on the diet for fourteen days was "cruel and unusual" because it failed to meet proper nutritional standards, caused him to lose over thirty pounds, and caused severe abdominal pain and emotional distress.

Phelps won a preliminary round in 2002, when the 2d Circuit Court of Appeals ruled that his complaint stated a claim because he alleged the defendants "knew or recklessly disregarded that the restricted diet...was nutritionally inadequate" and knew their actions "were likely to inflict pain and suffering and extreme emotional distress."

Upon remand, however, the district court dismissed his complaint without ruling on the underlying constitutional claims. It dismissed on the grounds that none of the defendants he named were personally involved in his placement on the loaf, or that they were entitled to qualified immunity.

The "personal involvement" of each defendant is required in a federal Section 1983 lawsuit. It is not enough to merely sue the State of New York. (This is because the Eleventh Amendment to the Constitution grants the states immunity in federal court.) Instead, the lawsuit must name particular defendants, and each defendant must have some personal involvement in the matter being complained of.

In Colon v. Coughlin, 58 F.3d 865 (2d Cir. 1995), the court held that the personal involvement of a defendant can be established in one of five ways: 1) the defendant participated directly in the alleged constitutional violation; 2) the defendant, after being informed of the alleged constitutional violation, failed to remedy it; 3) the defendant created a policy or custom under which the allegedly unconstitutional practices occurred; 4) the defendant was grossly negligent in supervising subordinates who committed the wrongful acts; or 5) the defendant exhibited deliberate indifference to the rights of inmates by failing to act on information indicating that unconstitutional acts were occurring.

In Phelps, there were four defendants:

Kapnolas, Delaney, McGinnis, and McClellan. Defendant Kapnolas wrote the misbehavior report which resulted in Phelps being placed on the loaf. However, Phelps admitted at his deposition that Kapnolas had nothing to do with him being placed on the diet. Kapnolas argued, and the Court found, that he didn't know that Phelps would be placed on the diet as punishment and, even if he did, he was not aware of any nutritional deficiencies associated with the diet.

Another defendant, Delaney, was the Hearing Officer at the disciplinary hearing which resulted in the loaf diet being imposed. The court noted that even if Delaney knew of the restricted diet order, Phelps failed to introduce evidence that "Delaney knew of and disregarded an excessive risk to plaintiff's health or safety, or that she was both aware of facts from which the inference could be drawn that a substantial risk of serious harm existed and that she drew that inference."

Defendant McGinnis was the Superintendent of the facility. Phelps testified that he wrote letters to McGinnis complaining that the loaf was "rotten." The court found that the evidence in the record before it failed "to establish that McGinnis was put on notice of the constitutional nature of the complaint, or that the food being served to plaintiff on the restricted diet was causing him to receive inadequate nutrition."

Even if the defendants had sufficient personal involvement, the court continued, they would be entitled to qualified immunity. A prison official is entitled to qualified immunity when "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Here, the court found that the defendants should be "permitted to rely on the DOCS' directive requiring that inmates be given a sufficient quantity of wholesome and nutritious food." Since there was no evidence on the record that any of the defendants personally knew that the loaf did not provide adequate nutrition, the court found that there was no basis to conclude that any of the defendants acted in an "objectively unreasonable manner." In making this determination, the court relied, in part, on the fact that there has not yet been any other cases finding that DOCS' "loaf" diet is nutritionally deficient.

Note: *The court came to a different conclusion in Rodriguez v. McGinnis, 2004 WL 1145911 (W.D.N.Y.) (May 18, 2004). In that case, which also involved a restricted diet, the court concluded that the defendants were not entitled to qualified immunity. The court held: "At the time of the alleged incidents it was well established that deliberately denying an inmate adequate food and deliberately failing to address serious medical concerns could violate the inmate's constitutional rights." Unlike the plaintiff in Phelps, the plaintiff in Rodriguez submitted expert testimony on the nutritional inadequacy of the diet, Mr. Rodriguez's medical condition, his inability to eat the diet, and the defendants' apparent knowledge that numerous inmates, including Mr. Rodriguez, had claimed to be unable to stomach the diet. This evidence created a question of fact as to whether the defendants should have reasonably believed that they were not violating plaintiff Rodriguez' constitutional rights by imposing the restricted diet. We reported on Rodriguez in the October, 2004 issue of* ***Pro Se****.*

Court Holds Pro Se Complaints Governed by Minimal Standards

Phillips v. Girdich, 408 F.3d 124 (2d Cir. 2005)

Plaintiff Clifton Phillips was incarcerated at Upstate. He wanted to file a lawsuit against his jailers but he had no access to an attorney. He initiated his lawsuit *pro se* by filling out a form called "Inmate Civil Rights Complaint Pursuant to 42 U.S.C. § 1983."

Phillips named several administrators at Upstate as defendants. He then wrote more than ten single-spaced pages stating why he was suing. He submitted the form, plus the ten pages, as his complaint. The complaint alleged that he had been denied contact visits and subjected to a pattern of harassment because of his race. Most of the ten pages contained, according to the court, "a litany of allegations purporting to demonstrate that black inmates were treated differently than white inmates." It asserted three legal claims: "systematic harassment" in violation of the Eighth Amendment's ban on cruel and unusual punishment; a denial of contact visits in violation of the First Amendment; and race and gender discrimination in violation of the Fourteenth Amendment.

The District Court rejected the complaint as confusing and inadequate. It ordered Phillips to file a new complaint that included "a corresponding number of paragraphs ... for each allegation, with each paragraph specifying (i) the alleged act of misconduct; (ii) the date on which such misconduct occurred; (iii) the names of each individual who participated in such misconduct; (iv) where appropriate, the location where the alleged misconduct occurred; and (v) the nexus between such misconduct and Plaintiff's civil and/or constitutional rights." After Phillips failed to file a complaint that satisfied the court, the court dismissed his claim. Phillips appealed.

The question before the Second Circuit was: What are the minimal standards for a *pro-se* complaint? Another question was: Can a district court dismiss a complaint simply because it is not artful? The court held that the standards for a *pro-se* complaint are minimal, and that the lower court was mistaken in dismissing the complaint.

"The claims of *pro-se* litigants should be construed liberally," wrote the court. They should not be dismissed unless "it is clear that the plaintiff would not be entitled to relief under any set of facts that could be proved consistent with the allegations." "Federal rules of procedure," continued the court, "command us never to exalt form over substance." Lower courts should, therefore, "excuse technical pleading irregularities as long as they neither undermine the purpose of notice nor prejudice the adverse party." Specifically, the rules requiring that a complaint be separated into numbered paragraphs were designed only to "facilitate the clear presentation of the matters set forth," so that allegations might easily be referenced. They should be read only as a guideline to ensure that complaints are "simple, concise, and direct." "Where the absence of numbering or succinct paragraphs does not interfere with one's ability to understand the claims or otherwise prejudice the adverse party, the pleading should be accepted."

Phillips' complaint met minimal standards. It named particular defendants and it contained specific allegations about their conduct which, read liberally, supported the

legal claims he was making. His complaint about racism, for instance, was supported by his allegations that white inmates who had engaged in misbehavior similar to his had not lost their contact visiting privileges, while he had. The court wrote:

> Although Phillips' allegations were not neatly parsed and included a great deal of irrelevant detail, that is not unusual from a *pro-se* litigant. As long as his mistakes do not prejudice his opponent, a plaintiff is entitled to trial on even a tenuous legal theory, supported by the thinnest of evidence. To the extent that the court below demanded something more than Phillips provided, it erred.

District Court

Inmate Was Not Denied Access To Court

Davidson v. Murray, 371 F.Supp.2d 361 (W.D.N.Y. 2005)

An inmate who has filed many lawsuits recently lost a case in the federal District Court for the Western District Court of New York in which he claimed that prison administrators had denied him adequate access to court. The court found that the alleged refusal by corrections officers at Attica to respond to inmate Davidson's requests for legal writing supplies and certain law books did not violate his right of access to court.

Although the United States Constitution guarantees prisoners a "meaningful right of access to the courts," the court found that this does not translate into an "abstract, freestanding right" to have a law library or legal assistance. In other words, the court found, "prison law libraries and legal assistance programs are not ends in themselves, but only the means for ensuring a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts." In order to establish a violation of the right of access to the courts, an inmate must show more than a refusal to provide legal materials. He must demonstrate "actual injury," that is, "that a non-frivolous legal claim had been frustrated or was being impeded" due to the actions or inaction of prison officials.

In Mr. Davidson's case, the court noted that despite the inmate's claim of denial of access to the courts, he had filed fifteen federal civil rights actions in the district courts during the three years he was Attica, at least sixteen appeals in the Second Circuit of Appeals, and eighteen claims in New York State courts. In the present case, moreover, he had made more than one hundred written submissions to the court in the form of letters, motions, affidavits, memoranda of law, and others. Under the circumstances, the court found that no reasonable juror could conclude that Davidson had been denied adequate access to the courts. It dismissed his suit.

State Cases

Discipline

Court Outlines Rules Governing "Witness Refusal" Cases

Matter of Hill v. Selsky, 795 N.Y.S. 2d 794 (3d Dep't 2005)

The confusing law of "witness refusal" cases--disciplinary cases in which an inmate's proposed witness refuses to testify--has been clarified, or at least consolidated, by the court in Matter of Hill v. Selsky. The question in Hill was: What must a Hearing Officer do to protect an accused inmate's right to obtain testimony in his defense when a proposed inmate witness refuses to testify? The answer: It depends.

The facts of the case are as follows: Petitioner Hill was charged with failing to produce a urine sample after he allegedly dribbled water from his mouth into the specimen cup. He denied the charge and the matter proceeded to a superintendent's hearing. Prior to the hearing, he asked his employee assistant to interview two potential witness, both inmates at the same facility. Both of the potential witnesses told the assistant that they would testify. On the day of the hearing, however, the corrections officers sent to escort the witnesses to the hearing room reported that they had both refused to testify, and that they also refused to give a reason for their refusal to testify. The Hearing Officer then sent a sergeant to interview the witnesses. The sergeant also reported that the witnesses refused to testify and refused to provide a reason for their reluctance. The hearing then proceeded without the witnesses and Hill was found guilty. In his subsequent Article 78 proceeding, he argued that the Hearing Officer was required to personally interview the witnesses to verify that they were refusing to testify or to ascertain their reasons for refusing.

The court looked upon the case as "an opportunity to set forth the circumstances in which a Hearing Officer conducting a Tier III prison disciplinary proceeding must personally ascertain the reasons for the refusal of an inmate witness to testify on behalf of the charged inmate." Prior cases, the court found, had established the following rules:

- If there has been *no* inquiry into the reason for the witness's refusal to testify, a deprivation of the inmate's right to present witnesses will be found, regardless of whether the witness had previously agreed to testify or not.
- If the witness did not *previously* agree to testify *and* a reason for his refusal to testify appears in the record, no violation of the right to call witnesses will be found.
- If the witness did not previously agree to testify and *no* reason for the refusal appears in the record, the Hearing Officer must conduct an inquiry into the reason for the refusal; however, an inquiry through a correction officer will be sufficient.
- If the refusing witness previously *agreed* to testify and subsequently refuses to do so, the Hearing Officer is not required to conduct a personal inquiry, so long as: 1) a genuine reason for the witness's refusal appears in the record; *and* 2) the Hearing Officer made a sufficient inquiry through a correction sergeant to determine the authenticity of that reason. *However*, the mere statement by a witness that he "[did] not want to be involved" is not a sufficient reason to excuse a *personal* interview by the Hearing Officer.
- If the refusing witness previously agreed to testify and now refuses to do so and gives no reason for the refusal, the Hearing Officer must personally ascertain the reason for the

inmate's unwillingness to testify. If, however, the Hearing Officer conducts a personal interview with the witness but is unable to elicit a genuine reason for the witness's reluctance to testify, the charged inmate's right to call witnesses will have been adequately protected.

Here, the court held that the case fell into the last of the above categories. The two witnesses had previously agreed to testify but, when the time came, refused and would give no reason for their refusal. Under the circumstances, the Hearing Officer was obliged to personally interview the potential witnesses to try to determine what caused them to change their minds. "Petitioner's right to call witnesses was not adequately protected by third-person interviews because the Hearing Officer lacked the opportunity to judge the authenticity of the witnesses' refusals." Accordingly, the hearing was reversed.

***Practice pointer**: If all of these rules sound confusing it is because they are. They represent an accumulation of rules derived from many different cases over a long period of time. Nevertheless, this is a "good-as-it-is-likely-going-to-get" summary of the current state of the law of "witness refusal" cases. If you have a case involving a witness who refused to testify, read the above rules carefully to determine under which category your case falls.*

Denial of Assault Victim's Medical Records Held Harmless Error

Matter of Cody v. Goord, 794 N.Y.S. 2d 149 (3d Dep't 2005)

Petitioner Cody was found guilty of assaulting a staff member. After he filed an Article 78 proceeding, the court found that there was strong evidence to support his guilt, including the testimony of the officer who was assaulted. The Petitioner complained, however, that it had been an error for the Hearing Officer to refuse to allow him to view the medical records of the assaulted correction officer's injuries. The court agreed. "[A]lthough [the medical records were] not dispositive of Petitioner's guilt or innocence of the assault on staff charge, they were relevant thereto." But, the court continued, the Hearing Officer's error in failing to provide them "was harmless in light of the overwhelming evidence of Petitioner's guilt and the fact that [he] did not rely on the subject medical records as part of the basis for determination."

***Practice Pointer**: Courts have given conflicting answers to the question of whether the medical records of an assault victim are relevant in the disciplinary hearing of the accused assailant. In addition to this case, the court in both Brown v. Goord, 750 N.Y.S.2d 800 (3d Dep't 2002) and Auricchio v. Goord, 713 N.Y.S.2d 888 (3d Dep't 2000), held that the failure to provide medical records of assault victims was in error, but in each of these cases, the error was deemed harmless (in Brown because the evidence was contained in other documents in the record; in Auricchio, as in this case, because of the "overwhelming evidence" of the Petitioner's guilt.) Other cases have held that injuries of the victim are irrelevant to the question of whether an assault occurred. **See** Quiles v. Goord, 705 N.Y.S.2d 256 (3d Dep't 2000); Irby v. Kelly, 556 N.Y.S.2d 409 (3d Dep't 1990)*

A Night on the Town?

Matter of Calhoun v. Selsky, 795 N.Y.S.2d 406 (3d Dep't 2005)

Petitioner Calhoun left the correctional facility where he was incarcerated, having obtained a pass for an overnight visit home. When he returned, he was charged with having absconded from temporary release. At his disciplinary proceeding, he testified that a counselor gave him permission to leave the facility overnight in return for a payment of $120.00. The Hearing Officer found him guilty and the court affirmed. The record indicated that Calhoun had been advised during orientation that inmates were only eligible for overnight passes after 30 days of incarceration. Calhoun was not eligible for a pass because he had not been at the facility for 30 days. This, together with his admission that he had paid a counselor for the pass, constituted substantial evidence of his guilt.

There is no word in the decision of what became of the Corrections Counselor.

Parole

Rare Occurrence: Court Reverses Board of Parole, Orders New Hearing

Matter of Wallman v. Travis, 794 N.Y.S. 2d 381 (1st Dep't 2005)

Court decisions over-ruling the Parole Board are not quite as infrequent as sightings of the Dodo bird, but they are few and far between. In general, the courts grant the Parole Board great deference. Court challenges to parole denials are typically rejected with minimal examination of the record and boilerplate language, such as, "The Board [has] considered all [the] relevant statutory factors and there being no showing of 'irrationality bordering on impropriety,' further judicial review is prohibited." *See* Parmes v. Travis, 792 N.Y.S.2d 881 (3d Dep't 2005)

So it was a welcome surprise this quarter when, in Matter of Wallman v. Travis, the court took a close look at a Parole Board decision, and reversed it. The Petitioner was a 64-year-old former attorney serving a 3⅓- to 10-year sentence for stealing from his clients' escrow accounts. While in prison, he had a good disciplinary record and had obtained an Earned Eligibility Certificate. At his parole hearing, he submitted numerous letters from persons supporting his request for parole. He also attempted to explain his misconduct, expressed remorse for his acts, and stated that he intended to fulfill his repayment obligations if and when released.

Nevertheless, the Board denied parole. It wrote that there was a "reasonable probability that [Wallman], if released, would not live and remain at liberty without violating the law," and that his release was "incompatible with the welfare and safety of the community." The Board supported its decision by noting that Wallman's crime involved several million dollars, that the conduct took place over a long period of time, and that the thefts came from "injured persons looking for redress." In addition, the Board found, Wallman showed "limited insight" into his crimes.

The court reversed. Initially, the court noted that the Board's determination that there was a "reasonable probability" that Wallman would not be able to live at liberty without violating the law appeared to be based exclusively on the nature and seriousness of his crime. When a Parole Board decision relies exclusively on the severity of the offense to deny

parole, the court held, it "contravenes the [sentencing] scheme mandated by the [penal law] [and] effectively constitutes an unauthorized re-sentencing of the defendant."

The only other reason for denying parole that was given by the Board was Wallman's alleged lack of insight into his crime. The court found, however, that the Board's conclusion on this issue was both "perfunctory" and contradicted by what had actually happened at the hearing. At the hearing, the court pointed out, the Petitioner had repeatedly shown remorse for his crimes and insight about why they had occurred. The Board's argument to the contrary mis-represented the record. Far from minimizing his conduct, the record showed, Wallman had answered the questions put to him frankly and directly. The Board's arguments to the contrary took his answers out of context and ignored his repeated assertions of personal responsibility. Since there was thus no basis for the Board's assertion that Wallman lacked insight into his crime, and the only other basis for the Board's conclusion that he could not live and remain in society without violating the law was the seriousness of his offense, the decision was "irrational bordering on impropriety."

***Practice pointer**: As this discussion suggests, the standard against which Parole Board decisions are measured is whether they are "irrational bordering on impropriety." This is a very difficult standard to meet. Generally, where there is evidence in the record that the Board considered the factors listed under Executive Law § 259-i(c)(A), the Board's decision will be upheld unless, as indicated, the decision is so irrational as to "border on impropriety." In this case, the Petitioner had an advantage: he had obtained an "Earned Eligibility Certificate" under Correction Law § 805. That statutes provides that persons who have obtained an earned eligibility certificate "shall" be granted parole at the expiration of the minimum term unless the Board makes an additional finding: "that there is a reasonable probability that, if such person is released, he will not live and remain at liberty without violating the law and that his release is not compatible with the welfare of society." Here, the court found that the granting of the Earned Eligibility Certificate "creates a presumption in favor of parole release."*

Failure of Sex Offender to Find "Suitable Housing" Deemed Sufficient Ground for Denial of Conditional Release

Matter of Billups v. New York State Division of Parole, 795 N.Y.S.2d 408 (3d Dep't 2005)

One symptom of the ever-increasing scrutiny of convicted sex offenders (see article, Page 3) has been the imposition by the Division of Parole of stringent "special conditions" upon the conditional release of such offenders. The conditions, which must be met before either parole or conditional release may be granted, typically limit where and with whom the offender may live. In practice, they often have the effect of making release all but impossible.

Critics of the Division have argued that such impossible-to-meet conditions are too often merely a pretext for ensuring that sex offenders are not released at all prior to the expiration of their maximum terms. Critics have argued that such conditions violate both the letter and the spirit of Penal Law § 70.40(1)(b), which states that an inmate serving an indeterminate term who has been granted all of his Good Time "shall" be conditionally released after serving two-thirds of the maximum term. The Board counters, however, that the statute also gives it

the authority to establish "conditions" of release, and that if it establishes conditions which the inmate can not meet, it need not release him.

The courts have consistently upheld the Board in these cases.

In Monroe v. Travis, 721 N.Y.S.2d 377 (2d Dep't 2001), for example, the Division required that the Petitioner secure housing in a residence where a responsible adult lived who was willing to cooperate with the Petitioner's Parole Officer, and which could not be near a potential victim. The Petitioner was unsuccessful in finding housing deemed appropriate by the Division and the Division refused to release him to a homeless shelter. The court held that "contrary to the Petitioner's contention, it is within the discretion of the Division to impose the special condition of securing approved housing, even though the condition must be satisfied before his request of conditional release can be granted."

The present case, Matter of Billups, continues that trend. In this case, the Petitioner's conditional release date was March 13, 2002. The Division refused to release him due to his failure to find what it deemed a "suitable residence." The court broadly affirmed the authority of the Division, holding: "The Division is authorized to impose special conditions upon an inmate's release from prison [and] imposition of the requirement of a suitable residence was rational under the circumstances [of this case]."

Medical Care

State Appeals Court Upholds Lower Court Determination That DOCS' Bar to Hepatitis-C Treatment Constitutes Deliberate Indifference

In re Application of Domenech, 797 N.Y.S.2d 313, (2d Dep't, 2005)

In the Fall, 2003 issue of ***Pro Se***, we reported on two state cases which reviewed DOCS' guidelines for providing Hepatitis-C treatment to prisoners. In People ex rel. Sandson v. Duncan, 761 N.Y.S.2d 379 (3d Dep't 2003), the prisoner sued, claiming that DOCS' refusal to provide him with Hep-C treatment constituted cruel and unusual punishment in violation of the Eighth Amendment. The court found in favor of DOCS. The court reasoned that because the Petitioner had failed to complete a substance abuse treatment program and had continued to use controlled substances, DOCS was medically justified in withholding treatment. Sandson subsequently filed a motion for leave to appeal to the Court of Appeals, which was denied.

Domenech fared better. In Domenech, the inmate also claimed that DOCS' refusal to provide him with Hepatitis-C treatment violated his Eighth Amendment rights. As in Sandson, DOCS denied treatment because of the inmate's history of drug use. The undisputed facts of the case, however, showed that Domenech had been drug free for over thirty years. The lower court found that DOCS' rigid adherence to its guidelines, regardless of the individual circumstances involved in this case, constituted a deliberate denial of medical care in violation of the Eighth Amendment.

The State appealed the lower court's finding. The appellate court has recently issued a decision on the case, affirming the lower court's decision. The court held: "Under the circumstances of this case, the denial of medical treatment to the Petitioner prison inmate pursuant to the appellants' medical treatment

policy constituted deliberate indifference to his medical condition in violation of the U.S. Constitution Eighth Amendment."

Other

Inmate Obtains Reduced Sentence Under Rockefeller Drug Law Reform Act

People v. Carson, 2005 WL 1403776 (June 13, 2005)

In the last issue of ***Pro Se*** (Spring, 2005), we summarized the provisions of the Rockefeller Drug Law Reform Act (the "DRA"), the new law intended to moderate the notoriously harsh sentences required for some drug offenses, particularly A-1 offenses, since the 1970s. The Reform Act has many shortcomings (and many critics; see article, Page 3); however, it is plainly a boon to the 400 or so inmates presently serving 15-to-life or 25-to-life sentences as a result of convictions for A-1 drug offenses. Under the law, they may petition a court to have their sentences reduced to a determinate sentence of between 8 and 20 years.

People v. Carson shows the process in practice. Defendant Carson was sentenced to 15 years to life after being convicted of one count of Criminal Sale of a Controlled Substance in the First Degree in 1999. After passage of the Reform Act late last year, he petitioned the sentencing court to have his sentenced reduced to a determinate sentence within the new guideline range. The act states that the court "shall" grant a re-sentencing petition unless "substantial justice dictates that the application should be denied." Here, the People conceded that "substantial justice" would not be opposed to re-sentencing.

The question remained, however, what the new sentence would be. As noted, the new law gives the court discretion to impose a determinate sentence of anywhere from 8 to 20 years. Carson argued that he should be re-sentenced to the statutory minimum of 8 years. The People urged that he should receive a new sentence of 14 years.

The Reform Act states that when considering a new sentence, the court "may consider any facts or circumstances relevant to the imposition of a new sentence [as well as] the institutional record of confinement of such person..." Carson presented the court with many mitigating facts to support his position that he should be re-sentenced to the minimum term of incarceration of 8 years: he had no prior felony record; the sentence he received of 15 years to life was much harsher than the sentence of 6 years to life received by his co-defendant (who did have a prior felony conviction), especially in light of the fact that the defendant was interested in settling this matter but was forced to trial due to his co-defendant's lack of interest in a plea and the People's choice not to sever the cases; that at sentencing the court was in receipt of nearly 50 letters of support written on his behalf from family, friends, and community members; that his institutional record for infractions is minimal; that he successfully completed numerous rehabilitation, vocational, and educational programs, including earning his GED; that he worked while incarcerated in numerous positions and earned favorable reviews at those tasks; and that should he be

released sooner rather than later, the defendant has employment opportunities waiting for him, a home with his mother, family support, and a family friend who is a social worker who is willing to assist him.

In view of all of these factors, the court granted the defendant's request for an 8-year determinate sentence.

Family of Deceased Inmate Awarded $377,200.00

Arias v. State of New York, N.Y.Ct.Cl. Claim # 97942 (2004)

Pro Se reported in our Summer, 2003 issue that the State of New York had been found liable for the death of William Newborn, an inmate. On July 19, 1997, Mr. Newborn, an inmate with a history of mental illness, told a social worker that if he were denied parole, he would commit suicide. On July 29, 1997, he was denied parole. Three days later, he overdosed on Pamelor, an anti-depressant and one of at least three prescriptions in his possession.

An investigation by the State Commission of Correction Medical Review Board found Green Haven's medical and pharmacy staff deficient in managing Mr. Newborn's medication, especially since they failed to adhere to regulations that all psychotropic medications must be administered by a nurse. In the earlier opinion, the court granted the plaintiff, Mr. Newborn's mother, summary judgment on various theories of negligence, including medical malpractice. The most recent decision deals solely with damages.

According to the court, after attempting to commit suicide, Mr. Newborn was brought to an outside hospital, where he underwent a tracheotomy and suffered pulmonary thromboembolism and bronchopneumonia. A doctor testified that Mr. Newborn choked to death over two weeks.

The judge awarded $350,000 for Mr. Newborn's suffering during the two weeks he was in the hospital. The court granted no award for lost wages, since Mr. Newborn had been in and out of various institutions since he was 12 years old, and had never earned enough to file a tax return. New York law does not permit damages for the grief suffered by survivors in a wrongful death case, so no additional damages could be given to the family for its suffering. But the court did find one provision that enabled it to award Mr. Newborn's mother $25,000.

Prison regulations clearly state that when an inmate is hospitalized in an outside facility, the next of kin must be alerted. Here, the family knew nothing of Mr. Newborn's overdose and hospitalization until after he had died. The mother, Christine Newborn Arias, testified that she learned of her son's death from a priest.

"She stated she felt overwhelming sadness, anger and guilt," wrote the court. "She stated that if she had been told her son was in the hospital, she would have gone to visit and comfort him. She stated that she lives with anger and guilt every day of her life because her son died all alone."

The total award amounted to $377,200, including damages for Mr. Newborn's pain and suffering, funeral expenses, and the personal claim on behalf of the mother.

Family of Pennsylvania Inmate Awarded 2.5 Million in Wrongful Death Claim

The family of a Pennsylvania woman who suffered a fatal asthma attack while in prison will receive $2.15 million in a settlement of a lawsuit against the State Department of Corrections and a health care provider.

Evidence in a federal lawsuit filed by the family showed that the inmate, Erin Finley, 26, died on August 29, 2002 after medical personnel at the State Correctional Institution at Muncy ignored her repeated pleas for help. She desperately sought medical care for severe asthma she had had since she was a child, but she was repeatedly rejected, based on a prison doctor's belief that she was "faking" her symptoms.

According to the lawsuit, Finley was transferred to SCI Muncy on July 2, 2002. She experienced problems with her asthma and was seen at the prison infirmary. Over the next month, she returned to the infirmary several times, but medical personnel disregarded her complaints.

That disregard was documented by at least three written requests Finley made, in which she begged prison officials to reverse rulings made by Dr. Craig Bardell, an employee of the prison, who prohibited her from having steroids that helped control her asthma.

"I really feel like I am going to die if nothing is done," Finley wrote in a July 24 grievance filed with a prison nurse. "I'm begging you to please help me."

According to the suit, Bardell had ordered the discontinuance of steroids on July 15, saying he believed Finley was overusing and abusing them. He came to that conclusion without having physically examined her. Finley continued to have problems breathing, and on July 27 she wrote another request, asking a different physician to see her "as soon as possible." "My asthma is so bad and Dr. Bardell says I am faking it. I don't know what else to do," the request stated. On the morning of her death, Finley phoned her mother in a hysterical state, saying she could not breathe. At around noon, she was directed to go to the infirmary, where a physician's assistant examined her. The assistant told Bardell that Finley needed to go to the hospital, but he refused to see her and left the prison at 2:40 p.m.. Twenty minutes later, Finley lost consciousness and stopped breathing. She was transported to an area hospital, where she was pronounced dead at 4:11 p.m..

Pro Se Practice

Must DOCS Have a Mail Watch Authorization to Uphold Disciplinary Charges for Correspondence Violations?

This article addresses an inmate's rights if he or she is disciplined pursuant to a facility review of that inmate's incoming or outgoing mail. Procedures for inmate correspondence and facility review of inmate correspondence are set forth in Title 7 New York Code, Rules, Regulations (NYCRR) 720.3 (outgoing mail), and 7 NYCRR 720.4 (incoming mail). If prison officials seek to discipline an inmate based upon a violation of the correspondence regulations, they must be able to show that they have complied with the procedures for review of

inmate correspondence (commonly referred to as "mail watch" procedures) set forth in these regulations.

Pursuant to 7 NYCRR 720.3(e), an inmate's outgoing mail shall not be opened, inspected or read without written authorization from the superintendent. With respect to outgoing mail, a superintendent is only permitted to authorize a mail watch, which involves the opening or inspection of the mail, if there is reason to believe that a law or disciplinary rule has been violated, or that the mail threatens the safety or security of the prison or of any person.

The standards for reviewing incoming mail, set forth at 7 NYCRR 720.4(e), are slightly different. As with outgoing mail, incoming mail may only be read based on the superintendent's written authorization. A superintendent may authorize a mail watch of incoming mail only if there is evidence that the mail may contain plans for sending contraband into or out of a prison, plans for criminal activity, including escape, or any information that would present a clear and present danger to the safety of any person or the security of a prison.

In general, courts have held that prison officials must be able to show that they have followed their own correspondence policies in order to impose discipline based on review of correspondence. Exactly what prison officials must do to show that they have followed their own correspondence regulations is not, however, totally clear. The Appellate Division Fourth Department has spoken to this issue in at least three cases: Knight v. Goord, 681 N.Y.S.2d 719 (4th Dep't 1998); Chavis v. Goord, 697 N.Y.S.2d 409 (4th Dep't 1999); and Ode v. Kelly, 552 N.Y.S.2d 475 (4th Dep't 1990). In Knight, the Fourth Department held that where discipline charges are based on review of an inmate's outgoing correspondence, the hearing record must contain the superintendent's written mail watch authorization, which must explain reasons for the mail watch. There, a Tier III hearing disposition was reversed because the hearing record did not contain the mail watch authorization, and therefore failed to show that prison officials had followed their own procedures for inspecting inmate mail.

In Chavis, the Fourth Department addressed the issue of a facility's review of an inmate's incoming mail. In that case, the court held that 7 NYCRR 720.4(f) "provides that written authorization from the facility superintendent to read incoming correspondence must be placed in the inmate's file and that such authorization must be based upon grounds related to 'safety, security and order.'" Chavis, 697 N.Y.S.2d at 409. Because there was no written authorization allowing the facility to inspect the incoming mail, the court, relying on its earlier decision in Knight, reversed the disciplinary disposition.

In Ode, although a mail watch authorization was apparently included in the record of a Tier III hearing, the hearing disposition was reversed because the mail watch authorization was inadequate. The court held that the authorization did not "set forth specific facts forming the basis for the action," as required by the regulation. Ode, 552 N.Y.S.2d at 475.

The Appellate Division, Third Department, approaches mail watch issues somewhat differently. The Third Department has held that when an inmate is disciplined on the basis of review of his mail, the hearing record

must contain substantial evidence that there was a properly authorized mail watch, although the actual mail watch authorization is not required. Thus, in Knight v. McGinnis, 781 N.Y.S.2d 716 (3rd Dep't 2004), the Third Department found that there was enough evidence to establish an authorized mail watch, through testimony and other evidence, even though the actual mail watch authorization was not in the hearing record. Knight, 781 N.Y.S.2d at 716.

If you are charged with misbehavior based on review of correspondence, you should be sure to request the mail watch authorization or other evidence that would demonstrate that there was a properly authorized mail watch. You can request the mail watch authorization or other evidence from your employee assistant, and if you do not receive this material from your assistant, you can request it directly from the Hearing Officer. If the Hearing Officer denies your request, or if you feel that the evidence does not show that a mail watch was authorized based on the applicable regulations, be sure to object on the record, and raise the issue in your administrative appeal.

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