Pro Se

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Appellate Division Affirms Civil Commitment of Sex Offenders

The Appellate Division, First Department, has upheld the Governor's authority to civilly commit sex offenders under provisions of the Mental Hygiene Law, reversing a lower court which had held that the Governor had no such authority. State of New York ex rel Harkavy v. Consilvio 812 N.Y.S.2d 496 (1st Dep't 2006).

The lower court ruling held that the Governor could not order civil commitments of inmates under the provisions of Article 9 of the Mental Hygiene Law. Instead, the court ruled, any such commitments must proceed under Correction Law § 402, which provides greater protections to inmates, including the right to contest the commitment in court before it happens. The court also suggested that proceedings under the Mental Health Law might violate the due process clause and it ordered several inmates released from civil commitment.

The Governor appealed that decision, however, and obtained a stay before it could be effectuated. In the new decision, the Appellate Division overruled the lower court's decision, and held that the Governor is fully authorized to seek the civil commitment of a person about to be released from prison, who allegedly suffers from a mental illness and is believed to be a danger to himself or others under the procedures laid out in Article 9 of the Mental Hygiene Law. The Court also found no due process problems with the procedures authorized by that statute.

In light of the new decision from the Appellate Division, the Governor appears to have a "green light" to continue his policy of civilly committing sex offenders after their terms of incarceration have expired.

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A MESSAGE
from
SUSAN JOHNSON, EXECUTIVE DIRECTOR

The Need for External Prison Oversight

Recently, I attended a three-day conference in Austin, Texas, entitled, "Opening Up a Closed World: What Constitutes Effective Prison Oversight?" The conference brought together a distinguished group of prison advocates, prison officials, and political and academic professionals from all over the world. We discussed the need for external scrutiny as well as various forms of prison oversight.

Oversight is not a goal in and of itself; it is one means of achieving the goals of transparency and accountability. There are many separate functions of oversight and each needs to be strong and specific. Regulation, audit, accreditation, investigation, reporting, inspection, and monitoring are all ways of implementing oversight in our prisons. Litigation is another way in which we achieve the goals of transparency and accountability. Oversight can be both internal and external. No one entity can serve each function of oversight, but a combination of many different agencies that are able to fulfill separate functions results in helping to create a prison system that is transparent and accountable.

In New York State, we have the Correctional Association, a watchdog agency that was created in 1846, and has a special legislative privilege that allows it to inspect prisons and to report its findings and recommendations for improvements to policy makers and the public. Because of its unique authority to enter prisons, the Correctional Association is able to "shine a spotlight in the dark corners of the prison system, counter debilitating conditions and promote effective prison programs." http://www.correctionalassociation.org. The Correctional Association often publishes reports on various aspects of prison life that result in pressure being put on DOCS to improve conditions. However, the Correctional Association has no enforcement authority. There is also the Commission on Correction that, among other things, promulgates minimum standards for the management of correctional facilities, and evaluates, investigates, and oversees correctional facilities. However, the Commission on Correction also has no enforcement authority.

If the Correctional Association or the Commission on Correction finds problems in a correctional facility, they can report on them and make recommendations as to how to fix those problems, but it cannot force DOCS to fix those problems. This is why organizations such as Prisoners' Legal Services and Prisoners Rights Project are so important. Without organizations such as these, there would be no way to hold DOCS accountable when it fails to comply with minimum standards or when it violates the constitutional rights of prisoners.

External oversight of prisons is essential. Although New York has made some inroads in terms of promoting external oversight of our prisons, we have a long way to go. Many of the articles in this issue of ***Pro Se*** emphasize the need for more complete and in-depth external prison oversight. Dostoevsky said that the degree of civilization in a society is measured by the way it treats its prisoners. It is important for all of us to be constantly vigilant in our support of and demand for external oversight of our prisons in order to ensure that we, as a society, become more, not less civilized.

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In the last issue of ***Pro Se*** (Winter 2006), we gave extensive coverage to Governor's Pataki's efforts to civilly commit sex offenders after their terms of incarceration had expired and to the legal issues raised by those efforts. Inmates interested in learning more about this issue, and about their rights if confronted with a civil commitment recommendation, should consult that issue. Additional issues are available upon request to Prisoners' Legal Services of New York, 114 Prospect Street, Ithaca, NY 14850. Inmates concerned that they may be subject to a civil commitment, particularly inmates convicted of a sex offense who are nearing the end of their term, should contact the office of Mental Hygiene Legal Services closest to them: 60 Madison Ave., 2nd floor, New York, NY 10010; 170 Old Country Rd., Mineola, NY 11501; 40 Steuben St., Suite 501, Albany, NY 12207; or 50 East Ave., Suite 402, Rochester, NY 14604.

Rockefeller Reform Provisions Stymied? CASAT Orders and A-II Re-Sentencing Affected

Two important provisions of last year's Rockefeller Drug Law Reform Act (the "DLRA") have become tangled in confusion--and litigation--over their eligibility requirements. The two provisions are those allowing A-II drug offenders to be re-sentenced and permitting sentencing courts to order DOCS to enroll certain drug offenders in CASAT, the Comprehensive Alcohol and Substance Abuse Treatment Program. As a result of the confusion, the benefits of those provisions may not be reaching many of the inmates they were intended to benefit.

A-II Drug Offender Re-Sentencing

The first provision of the DLRA to become ensnarled in confusion over its eligibility requirements is that concerning re-sentencing of certain A-II drug offenders.

The DLRA reformed the Rockefeller-era drug laws by creating a new, determinate sentencing scheme for drug offenses which reduced the sentences for most drug offenses. It also allowed anyone convicted of an A-I drug offense prior to the sentence reduction to petition their sentencing court for one of the new, lesser sentences.

Last August, the Legislature passed an extension of the DLRA allowing certain A-II drug offenders to also petition their sentencing courts for re-sentencing. The A-II provisions, however--unlike the provisions for A-I offenders--did not allow *all* A-II offenders to petition their sentencing courts. Instead, it contained certain eligibility requirements. Among them was a requirement that the offender be "more than 12 months" from being an "'eligible inmate' as that term is defined in Correction Law § 851(2)" to apply to be re-sentenced.

Correction Law § 851(2), in turn, defines an "eligible inmate" as a person "who is *eligible for release on parole* or who *will become* eligible for release on parole or conditional release within two years."

Therefore, to be eligible for re-sentencing, the A-II offender must be "more than twelve months" from "eligible for release on parole" or *becoming* "eligible for release on parole or conditional release within two years."

But what exactly does this mean?

Inmates have argued that it means that A-II drug offender need only be more than one year from their parole eligibility date to be eligible for re-sentencing (*i.e.*, "more than twelve months" from being "eligible for release on parole").

Many District Attorneys, however, as well as DOCS, have interpreted the statutory language to mean that an A-II drug offender must be more than *three years* from a parole eligibility date to be eligible for re-sentencing (*i.e.*, "more than 12 months" from being "within two years" of parole eligibility).

Under that interpretation, many fewer A-II drug offenders--by some calculations as many as 500 fewer--will be eligible for re-sentencing.

Unfortunately, litigation over the issue has thus far favored the DOCS and District Attorneys' interpretation of the law. Although at least one lower court ruled in favor of the "one year" interpretation (See, *e.g.*, People v. Perez, Ind. No. 6848/04 [Sup Ct., N.Y.Co., Jan. 24, 2006] [Soloff, J.]), the Appellate Division, First Department, recently held firmly in favor of the "three year" interpretation."These statutes," the Court wrote, "although not a model of clarity, when read together, require that, in order to be eligible for re-sentencing, an A-II offender may not be eligible for parole *within three years*." People v. Bautista, 809 N.Y.S.2d 62 (1st Dep't 2006).

Because the Bautista decision is an appellate level decision, it is binding on all cases that arise in the First Department (which includes Manhattan and the Bronx). It also effectively overrules lower court decisions from those boroughs (including Perez) that held in favor of the one-year interpretation.

The good news is that the Court of Appeals has accepted leave to review Bautista. Prisoners' Legal Services has submitted a "friend of the court" brief arguing in favor of the "one year" interpretation of the statute. A decision can be expected sometime over the summer.

Practice Pointer: *If you were convicted of an A-I or A-II drug offense and have an indeterminate sentence, you may be eligible for re-sentencing to a lesser, determinate sentence under the provisions of the Rockefeller Drug Law Reform Act. You should contact the Public Defender or Legal Aid Society in the county in which you were convicted. A complete list of Public Defenders and Legal Aid Societies is available from Prisoners' Legal Services of New York, 114 Prospect St., Ithaca, NY 14850.*

Court Ordered CASAT

The second provision of the DLRA to become ensnarled in litigation concerns CASAT orders.

The DLRA added a new subsection (6) to Penal Law § 60.04 to allow sentencing courts to order DOCS to enroll certain drug offenders in CASAT. The new statute, however, makes such orders conditional upon the inmate meeting the "statutory eligibility criteria" for CASAT.

But what are the statutory eligibility requirements for CASAT? This turns out to be a difficult question.

DOCS' regulations describe CASAT as a "three phase program." Phase One consists of intensive drug therapy "provided…in an alcohol and substance abuse treatment correctional annex." Phase Two consists of "a transitional period…[which] would include transfer to a work release facility for employment and placement in appropriate community-based programs…or participation in a residential treatment facility day reporting center program, or other employment and program arrangements recommended by the community-based treatment provider." Phase Three consists of "an aftercare component in the community under parole supervision…" See, 7 N.Y.C.R.R. § § 1950.2.

DOCS has historically treated CASAT as if it were a temporary release program. It has required inmates interested in CASAT to meet the statutory eligibility requirements for work-release. The statutes governing temporary release programs grant DOCS virtually complete discretion to determine who is admitted to such programs. (See, for example, Correction Law § 855.) As a result, when, over the past year, DOCS was confronted with court orders that they admit inmates into CASAT, provided they met the "statutory eligibility criteria" for the program, it took the position that the "statutory eligibility criteria" amounted to its discretion. It has argued that it retains final discretion to decide who is and is not admitted to CASAT regardless of whether a court has ordered the inmate enrolled.

Inmates have countered that regardless how DOCS has historically treated CASAT, it is not a temporary release program. They have pointed out that Correction Law § 851(9), which defines temporary release programs, does not include CASAT. They have argued that the broad statutory

discretion that DOCS has over admission to the temporary release programs does not apply to CASAT. Rather, inmates have argued, the"statutory eligibility criteria" for CASAT should be limited to those that govern admission to an "alcohol and substance abuse treatment annex" under Correction Law § § 2(18) and 851(2). These statutes state that an inmate who has been convicted of a drug offense is eligible for placement in a correctional annex if he or she is within 30 months of a parole eligibility date.

Therefore, inmates have argued, if a court has ordered that he or she be admitted to CASAT and the inmate meets the statutory eligibility requirements for transfer to a correctional annex, DOCS should have no further discretion to refuse to comply with the court order.

Litigation over this issue has so far produced mixed results. In the only reported decision, Matter of Bailey v. Joy, 810 N.Y.S.2d 644 (Sup. Ct. West. Co. March 1, 2006) (Loehr, J.), the court upheld the inmates' arguments. The Court held that "to accept DOCS' position would be to return the ultimate decision making concerning CASAT enrollment to DOCS thereby effectively repealing" the new statute.

Other unreported cases, however, have rejected Bailey's reasoning. In Hines v. Goord, Index # 2006-0273 (Sup. Ct. Onondaga Co. March 16, 2006) (Brunetti, J.), for example, a court refused to enforce a CASAT order over DOCS' objections, despite the fact that the inmate met the eligibility criteria for transfer to a correctional annex--and despite the fact that the case was heard by the same judge who had issued the order in the first place.

Since no appellate level decisions on this issue have yet been issued on this question, inmates with court-ordered CASAT, who are denied CASAT by DOCS and who believe that their court order entitles them to CASAT, will continue to have to litigate this issue on a case-by-case basis.

Practice pointer: *Prisoners Legal Services has heard from a number of inmates who state that they were granted a CASAT order as part of their plea bargain only to be denied CASAT when they got to DOCS. In some cases, we have heard that inmates in these circumstances have been able to re-open their plea negotiations and obtain a lesser sentence, on the ground that the CASAT order is unenforceable. Since the law regarding the enforceability of a judicial CASAT order remains undecided, inmates who obtained a CASAT order as part of plea bargain and who have been denied CASAT by DOCS may wish to consider contacting their public defender or sentencing court to determine whether they can re-open their plea.*

Trial Begins in Case Challenging Treatment of Mentally Ill Inmates

On April 3, 2006, trial began in the case of Disability Advocates, Inc. v. New York State Office of Mental Health, et al. in the Southern District of New York. This statewide action seeks declaratory and injunctive relief on behalf of all prisoners with mental illness in DOCS' custody. The Plaintiff is Disability Advocates of New York, which has statutory authority to pursue lawsuits to ensure the protection of individuals with mental illness who are receiving care and treatment in New York State, including prisoners housed in DOCS' custody.

The suit alleges that both DOCS and the Office of Mental Health ("OMH") inflict cruel and unusual punishment on prisoners with mental illness, act with deliberate indifference to their serious medical needs, and discriminate against them on the basis of their disability by frequently confining them in isolated settings, including Special Housing Units (SHU) and keeplock confinement, and denying them proper mental health treatment and housing. The suit alleges that this treatment violates the Eighth Amendment to the United States Constitution, Title II of the Americans with Disabilities Act, and § 504 of the Rehabilitation Act.

The case was filed in May 2002. Extensive document discovery, prison inspections, and inmate interviews have taken place since that date. Furthermore, numerous state officials and inmate witnesses have had their depositions taken.

During the first phase of the trial, the Plaintiff presented a portion of its case. Testimony was taken from the Executive Director of Disability Advocates, Inc., psychiatric experts, a security expert, the Correctional Association of New York, and several inmate witnesses. Additionally, the court conducted inspections of three maximum security prisons and one medium security prison with the Plaintiff's and Defendants' counsel and officials from DOCS and OMH in attendance.

Trial was adjourned and will reconvene in the fall.

The Plaintiff is represented by Prisoners' Legal Services of New York, the Prisoners' Rights Project of the Legal Aid Society, Disability Advocates, Inc., and the law firm of Davis Polk & Wardwell, which is assisting the non-profit organizations on a pro bono basis.

FEDERAL CASES

Inmate's Allegation of Sexually Suggestive Pat-Frisk Is Sufficient, if True, to Establish Eighth Amendment Violation

Rodriguez v. McClenning, 399 F.Supp.2d 228 (S.D.N.Y. 2005)

Inmates often complain that they have been pat-frisked in an abusive or offensive manner by guards. But when do pat-frisks give rise to an Eighth Amendment claim? In the case below, the district court identifies a fact pattern that, it finds, supports an allegation that the pat-frisk violates the Eighth Amendment.

The facts, as alleged in the complaint, were these: Plaintiff Rodriguez, an inmate, complained that on November 10, 2001, he was selected for a pat-frisk by Defendant McClenning, a Correction Officer. McLenning told Rodriguez that he was being frisked because McClenning had received information that Rodriguez brought contraband into the yard the previous day. According to Rodriguez, McClenning directed him to assume a pat-frisk position against the wall. He then put on unauthorized black leather gloves (instead of the latex gloves usually used for pat-frisks) and started punching his fists together in an intimidating manner. He then told Rodriguez to keep his arms and legs stretched out and if Rodriguez felt "[McClenning's] hands in [Rodriguez's] ass…don't think about screaming because no one is going to help." McClenning then conducted the pat-frisk in an inappropriate manner that included caressing Rodriguez's chest and repeatedly groping his genitals and buttocks. Rodriguez told McClenning that the pat-frisk was being conducted in an inappropriate manner and that he would agree to a strip search if McClenning thought that he was hiding contraband. McClenning responded that he "prefer[red] it this way, it's more fun."

The question at issue in the case was whether McClenning's alleged conduct, if true, amounted to a violation of the Eighth Amendment. (The Eight Amendment to the U.S. Constitution prohibits the infliction of "cruel and unusual" punishment.)

Eight years ago, in Boddie v. Schnieder 105 F.3d 857 (2nd Cir. 1997), the Second Circuit addressed a case in which a female Correction Officer allegedly made a pass at an inmate. According to the inmate, she squeezed his hand, touched his genitals, and said, "You know you're [sic] sexy black devil, I like you." Two weeks later, she allegedly ordered him to take off his sweatshirt and then pushed herself up against him in a hallway, "bumping into [his] chest with both her breasts." The Boddie Court found, "[t]here can be no doubt that severe or repetitive sexual abuse of an inmate by a prison officer…constitute[s] an Eighth Amendment violation." The Court held, however, that the abuse alleged in that case was insufficiently serious to give rise to a constitutional claim.

The Rodriguez Court found inmate Rodriguez's claims very similar to the allegations in Boddie. But, the Court held, the law has changed since Boddie was decided. In 1998, for instance, at the time Boddie was decided, 15 states did not prohibit sexual contact between prison employees and inmates. Since then, 11 of these 15 states have

outlawed such contact and only four states fail to outlaw such behavior. According to the Court, this change "demonstrates a national consensus that any sexual assault of a prisoner by a prison employee constitutes cruel and unusual punishment." Given the evolving societal standards illustrated by the change in the legal landscape, the Court continued, Officer McClenning's alleged conduct would, if true, constitute a violation of inmate Rodriguez's Eighth Amendment rights. Therefore, the Court held, the suit should proceed.

Practice Pointer: *This case, like many federal cases, was decided on a summary judgment motion. In a summary judgment motion, the defendant argues that even if all the facts alleged by the plaintiff were true, they would not establish a violation of federal law and therefore the case should be summarily dismissed. The question in a summary judgement motion is always a hypothetical one: Would the facts,* ***if true****, establish a violation of the law? Winning a summary judgment motion is not the same as winning the case. The plaintiff must still show, by a preponderance of the evidence, that the facts he or she has alleged are true.*

STATE CASES

Disciplinary Cases

There were an unusual number of drug-related cases reported this quarter, many involving inmates charged with smuggling or attempting to smuggle drugs into their correctional facilities. The inmates in these cases found little sympathy in the courts.

Drug Possession: Drugs Found in Inmate's Cell Belong to Inmate; Inmate Waived Other Defense by Failing to Raise Them at the Hearing

Matter of Diaz v. Goord 807 N.Y.S.2d 730 (3rd Dep't 2006)

After the Petitioner was found unconscious in his cell and transported to a local hospital, a search of his cell revealed 22 packets containing a powdery substance which later tested positive for heroin. The Petitioner was found guilty of drug possession in a Tier III hearing. On appeal, the Court held that the Misbehavior Report, together with the testimony of its author, provided substantial evidence of the Petitioner's guilt. The Petitioner's assertion that anyone could have thrown the drugs into his cell presented a credibility problem for the Hearing Officer to resolve against him. His claims, *i.e.*, that he was not provided with certain documentary evidence and that there was an inadequate chain of custody for the drug test, were not presented at the hearing and were, therefore, waived.

Drug Smuggling: Transcript of Telephone Call Supported Smuggling Charge

Matter of Hayes v. Goord, 807 N.Y.S.2d 309 (3rd Dep't 2006)

The Petitioner in this case was charged with conspiring to introduce drugs into the facility, smuggling, and making a third-party telephone call after he was heard in a monitored telephone conversation instructing his wife to bring drugs into the facility. When his wife was confronted by Correction Officers on her visit, she surrendered two balloons that she had concealed in her genitals, the contents of which later tested positive for marijuana and cocaine. The Petitioner appealed, after being found guilty in a Tier III hearing. On appeal, the Court found that the Misbehavior Report, the transcript of the telephone conversation,

and other documentary evidence fully supported the charges. The Petitioner's objection to the Deputy Superintendent being the Hearing Officer, on the grounds that he was involved in the investigation, was rejected. The Deputy Superintendent explained that he was not involved in the investigation and that his only knowledge of the incident was that a visitor had been arrested. There was no evidence that his determination flowed from any alleged bias.

Drug Testing: Failure to Properly Admit Drug Test Results Held Harmless Error, Where Other Evidence Supported Hearing Officer's Finding of Guilt on Drug Possession Charge

Matter of Dumpson v. Goord, 807 N.Y.S.2d 723 (3rd Dep't 2006)

A Correction Officer alleged that he observed the Petitioner, an inmate, attempting to place something down his pants during a visit. He recovered four purple balloons containing a substance which lab tests later showed to be marijuana. The Petitioner was charged with refusing a direct order, violating visiting room procedures, and possession of a controlled substance. After being found guilty in a Tier III hearing, he filed an Article 78 proceeding. The Court found that lab test results should not have been entered in evidence because the record reflected that the Petitioner did not receive all the necessary documents regarding the testing (See, 7 N.Y.C.R.R. 1010.5). But, the Court continued, the hearing was supported by substantial evidence nonetheless: The Petitioner's visitor, called by the Petitioner as a witness, testified that she brought the marijuana to him during the visit. This testimony, coupled with the videotape of the visit and the testimony of other witnesses, was sufficient to support the charge even without the drug test results.

Drug Testing: Test Results Were Irrelevant to Smuggling and Conspiracy Charges

Matter of Lovett v. Goord 807 N.Y.S.2d 728 (3rd Dep't 2006)

Correction Officers discovered a plan by the Petitioner and his girlfriend to smuggle drugs into the facility. They confronted the girlfriend in the visitor processing room, where she surrendered a condom containing what officials later identified to be heroin. After a Tier III hearing, the Petitioner was found guilty of smuggling and conspiracy to introduce narcotics into the facility. He appealed. The Court found his claim, *i.e.*, that the test results should not have been admitted because the proper test forms had not been submitted, unpersuasive because the Petitioner was charged only with smuggling and conspiracy to introduce drugs into the facility, *not* with the actual possession of drugs (*compare with* Dumpson v. Goord, above). The Court further found that the Misbehavior Report, the testimony of its author, and the documentary evidence which included an incriminating statement from the Petitioner's girlfriend, constituted sufficient evidence of guilt. The Court also rejected the Petitioner's claim that he was denied adequate employee assistance. Any deficiencies in the assistance provided were remedied by the Hearing Officer, who obtained certain documents requested by the Petitioner and adjourned the hearing to allow him time to review them.

Drug Use: Defenses of Contamination and Inadequate Employee Assistance Fail

Matter of Hayes v. Goord, 807 N.Y.S.2d 739 (3rd Dep't 2006)

The Petitioner's urine tested positive for cocaine and opiates. His defense, that the sample was

contaminated because the cup fell in the toilet before he filled it, was contradicted by testimony from a Correction Officer. It thus created a credibility issue which the Hearing Officer was free to resolve against him. His claim that the employee assistant was inadequate because he failed to explain the charges and the drug testing procedures was also found unavailing: First, the record revealed that he fully understood the charges. Second, he obtained favorable testimony from material witnesses and the relevant drug testing documents that he requested. Accordingly, the Court held, he failed to show that he was prejudiced by the assistant's alleged inadequacies.

***Practice Pointer**: In order to sustain a claim that the employee assistance was inadequate, you must be able to show that your ability to defend yourself was prejudiced by the alleged inadequacy. Very few cases alleging inadequate employee assistance are successful.*

Employee Assistance: Inmate Who Was Neither Illiterate, Non-English Speaking, nor Sensorially Disabled Was Not Entitled to an Employee Assistant.

Matter of Alston v. Goord, 807 N.Y.S.2d 202 (3rd Dep't 2006)

An inmate who allegedly wrote a letter to his brother in which he threatened to kill another inmate was charged in a Misbehavior Report with "threats" after the letter was intercepted by DOCS. After being found guilty in a Tier III hearing, he appealed, arguing that he had not been provided with an employee assistant. The Court held that given that the Petitioner was not illiterate, non-English speaking, sensorially disabled, charged with drug use, or confined pending the hearing, he was not entitled to an employee assistant pursuant to Title 7 N.Y.C.R.R. 251-4.1(a).

***Practice Pointer**: The "N.Y.C.R.R." stands for "New York Code, Rules and Regulations." It contains the administrative regulations of all state agencies. Regulations are a source of law one step below statutes and one step above agency directives. They are promulgated by the agencies themselves pursuant to authority granted by statutes and, once promulgated, are supposed to be binding on the agency. Title Seven of the N.Y.C.R.R. contains DOCS' regulations. It should be found in most prison law libraries. (DOCS' Directives are often repetitions of what is contained in the regulations, although there are also some variations , and the Directives cover a broader range of topics.)*

Seven N.Y.C.R.R. Part 251-4.1 states:

"(a) An inmate [in a Tier III hearing] shall have the opportunity to pick an employee from an established list of persons who shall assist the inmate when a Misbehavior Report has been issued against the inmate if:

(1) the inmate is either illiterate or non-English speaking; or

(2) the inmate is sensorially disabled (in which case the inmate will be provided reasonable accommodations including, but not limited to, the provision of a qualified sign language interpreter for a deaf and hard of hearing inmate who uses sign language to communicate); or

(3) the inmate is charged with drug use as a result of a urinalysis test; or

(4) the inmate is confined pending a superintendent's hearing to be conducted pursuant to Part 254 of this Title.

(b) In other cases where a Misbehavior Report has been issued, the Review Officer or

Hearing Officer, in his absolute discretion, may offer an inmate the opportunity to pick an inmate assistant where such assistance would enable the inmate to adequately comprehend the case in order to respond to the charges."

Remedies: Expungement v. New Hearing

Matter of Alvarez v. Goord, 813 N.Y.S.2d 564 (3rd Dep't 2006)

The Petitioner was charged with drug possession and smuggling after he engaged in a phone conversation with two individuals during which he allegedly made plans to have drugs smuggled into the facility. At his Tier III hearing, Petitioner Alvarez requested the testimony of a woman that had been caught smuggling drugs into the facility where he was incarcerated. Although the Hearing Officer had a variety of means with which to contact the requested witness directly, he failed to make a meaningful effort to obtain her testimony. Mr. Alvarez was found guilty of the charges and after an unsuccessful administrative appeal, filed an Article 78 requesting expungement for the denial of his due process and regulatory rights to call witnesses.

The Supreme Court in Albany County agreed that the Hearing Officer did not make reasonable efforts to contact the witness directly but determined that a rehearing, not expungement, was the appropriate remedy. On appeal, Mr. Alvarez challenged solely the appropriate remedy for the denial of his requested witness, arguing that the violation required expunction. In similar situations across the state, some courts have found this violation to be one of a constitutional dimension requiring ordered expungement, while others have found only a regulatory violation requiring a rehearing, and still others have found some varying combination of the two, adding to the confusion surrounding this issue. This case clarified the confusing, and often contradictory, area of law on the appropriate remedies for a witness denial.

While the Third Department affirmed the lower court's decision, it also used this case as an opportunity to attempt to "clarify the parameters of constitutional violations requiring expungement." Accordingly, the Court held that expungement is required only in those situations where a "clear constitutional violation" has occurred. The court then gave two examples of what type of facts would constitute a "clear constitutional violation." First, the court held, it is a "clear constitutional violation" if a Hearing Officer engages in an actual outright denial of a witness "without a stated good-faith reason, or lack of any effort to obtain a requested witness's testimony." Second, if "an inmate witness initially agreed to testify and later refuses without a reason, a Hearing Officer must personally attempt to ascertain the reason for the inmate's unwillingness to testify…" A "Hearing Officer's failure to make [such] a personal inquiry," held the court, "constitutes a regulatory violation tantamount to a constitutional violation."[Citing *inter alia*, Matter of Hill v. Selsky, 19 A.D.3d 64 (2005)] (but See, Matter of Higgins v. Selsky, reported below.) In both of these situations, expungement is required. The Court then held that, as in the case of Mr. Alvarez, "most other situations constituted regulatory violations, requiring annulment of the determination but not mandating expungement."

Petitioner Alvarez was represented by PLS

Matter of Higgins v. Selsky, 811 N.Y.S.2d 470 (3rd Dep't 2006)

The Petitioner, an inmate, was charged with assault, making threats, and refusing a direct order. The Petitioner was found guilty and the determination was upheld on administrative appeal. The Petitioner, however, then asked for reconsideration, noting that the Hearing Officer had failed to adequately inquire into witnesses' alleged refusals to testify. In response, Defendant Selsky

reversed the disposition and ordered a new hearing. At the new hearing, the Petitioner was again found guilty. After exhausting his administrative remedies, the Petitioner filed an Article 78 in Supreme Court, arguing that expungement of the original charges, not a rehearing, should have been ordered. The supreme court dismissed the petition and he appealed.

Relying on the Court of Appeals case, Matter of Dawes v. Coughlin, 612 N.Y.S.2d 337 (1994), the Appellate Division held that, "[b]y seeking reconsideration and being granted a rehearing, petitioner was afforded a full and fair opportunity to present his case. Inasmuch as the administrative determination was not final when reconsideration was granted, even errors of constitutional magnitude may be addressed and corrected at the rehearing."

Substantial Evidence: Hearsay Held Admissible to Show Temporary Release Violation

Matter of Johnson v. Goord, 810 N.Y.S.2d 255 (3rd Dep't 2006)

A co-worker's allegation that the Petitioner, who was participating in a temporary release program, possessed a gun while at work, resulted in a Misbehavior Report and a Tier III disciplinary hearing in which the Petitioner was found guilty of violating temporary release regulations. The Petitioner challenged the hearing in an Article 78 proceeding. The Court found that the Misbehavior Report and the hearing testimony constituted sufficient evidence to support the charge and that no procedural errors had been committed. Although the name of the co-worker who reported the incident was not revealed to the Petitioner, the Parole Officer who investigated the allegation testified. This testimony, although hearsay, included specifics as to the date, time, and location of the incident. This detailed information, as well as other testimony at the hearing corroborating the sequence of the events reported by the Parole Officer, provided the Hearing Officer sufficient basis to assess the reliability and credibility of the hearsay.

Practice Pointer: *"Hearsay" is "secondhand information." It occurs when a person relays information NOT about something he personally saw or heard, but about something someone else told him or said they saw. For example, Joey tells you that Junior said he saw Jerry go through a red light. The statement that Jerry went through the red light is hearsay, because it is merely Joey's account of what Junior told him he saw, rather than Junior's personal account of what he saw.*

Hearsay has historically been considered unreliable in most legal proceedings, in part, because the person against whom it is admitted (Jerry, in the above example) has no opportunity to cross-examine the person who made the statement (Junior).

Courts have long held that hearsay statements are admissible in prison disciplinary hearings, however, so long as the Hearing Officer has some basis upon which to assess the reliability of the statement. In this case, the co-worker's allegation that the Petitioner brought a gun to work was hearsay--because it was presented by the Parole Officer, not the co-worker himself. The Court found, however, that both the degree of detail in the Parole Officer's statement about what the co-worker said he saw, along with additional information in the record which corroborated the statement, provided sufficient basis upon which the Hearing Officer could find the statement reliable.

Substantial Evidence: Weapons Charge Not Supported by Evidence

Matter of Green v. Goord 807 N.Y.S.2d 729 (3rd Dep't 2006)

The Petitioner, an inmate, was charged with assaulting his cellmate and with possession of a weapon after he threw hot water on him, causing

burns to his face and neck. A search of the cell also revealed an altered hot pot and a pair of nail clippers in a sock. On appeal, the Court found that the weapons charge was not supported by substantial evidence: hot water is not a "weapon." The remaining charges, however, were supported by the Misbehavior Report, the documentary evidence, and testimony at the hearing. Nevertheless, because a loss of good time was imposed and the weapons charge was dismissed, the hearing was remitted to DOCS for a redetermination of the penalty.

Substantial Evidence: "Solicitation" Charge Dismissed for Lack of Evidence

Matter of Keesh v. Goord 807 N.Y.S.2d 733 (3rd Dep't 2006)

The Petitioner's cell was searched when he was suspected of possessing gang-related materials. Various documents were recovered, including a photocopy of the cover of a book entitled the "Holy Blackness," authored by the Petitioner, as well as a blank order form. As a result of the search, the Petitioner was charged with engaging in unauthorized organizational activities, practicing martial arts, disorderly conduct, and solicitation. He was found guilty of all charges except for disorderly conduct. On administrative appeal, two of the remaining charges were dismissed, leaving only the charge of solicitation.

The prison disciplinary rule prohibiting solicitation states: "Inmates shall not request or solicit goods or services from business or any person other than immediate family members without the consent and approval of the facility superintendent or designee." See, 7 N.Y.C.R.R. 270.2(B)(4)(ii).

According to the Misbehavior Report in this case, the solicitation charge was premised upon correspondence to and from a printing company indicating a transaction for the printing of the book "Holy Blackness." The transaction had not been authorized by the Superintendent. The correspondence, however, was not included in the record of the hearing. Although the Correction Officer who prepared the Misbehavior Report testified that the photocopy of the book cover and blank order form were the documents he used to support the charge, those documents, standing alone, did not establish that the Petitioner was in contact with a printing company for the purpose of either having the book printed or ordering copies of it, and there simply was nothing else in the record to substantiate this charge. Consequently, the hearing was dismissed.

Substantial Evidence: Charges of Altering an Item and Stealing a Television Were Not Supported by the Misbehavior Report

Matter of Hemphill v. Selsky 808 N.Y.S. 2d 503 (3rd Dep't 2006)

The Petitioner was searched after a Correction Officer received a confidential tip that he might have a weapon. After he initially resisted the frisk, a one-and-a-half-inch razor was found in his pocket and a Misbehavior Report was written. A later search of his cell resulted in additional charges that he possessed an altered heating element, along with a television that belonged to another inmate, and a small stone which could be used to sharpen a weapon. The two Misbehavior Reports were considered in a single hearing and the Petitioner was found guilty of all charges.

On appeal, the Court held that the first Misbehavior Report was supported by sufficient evidence in the form of the Report itself, the supporting memoranda, and the testimony at the hearing. The Petitioner's contention that the Hearing Officer failed to assess the reliability of the confidential informant was irrelevant: There was no need for the Hearing Officer to do so, since the

determination of guilt resulted from the discovery of the weapon, not from the confidential tip.

The second Misbehavior Report, however, was unsupported by substantial evidence. Although the Report gave the Petitioner adequate notice of the charges, the Court found that it was not sufficiently detailed "to constitute the type of relevant proof that a reasonable mind would accept as adequate to support the determination at issue." It consisted of nothing more than a conclusory statement that the altered heating element and the television had been found in the Petitioner's cell and the Petitioner's denial of the charges. There was no evidence or testimony to substantiate how the heating element was altered, or if the television was stolen. Consequently, the Court returned the hearing to DOCS for reconsideration of the penalty.

Substantial Evidence: Inmate Guilty of Assault, Notwithstanding Testimony of Victim to the Contrary

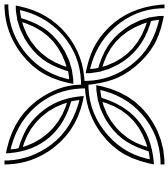
Matter of Vassell v. Goord 807 N.Y.S.2d 737 (3rd Dep't 2006)

The Petitioner was charged with slashing another inmate with a razor blade and then running from the scene and throwing his weapon in another inmate's cell with instructions to flush it down the toilet. After being found guilty in a Tier III hearing, he filed an Article 78 proceeding. The Court held that the hearing was supported by substantial evidence in the form of the Misbehavior Report, the testimony from a Correction Officer who witnessed the incident, and documentary evidence. The victim's testimony, that the Petitioner was not his assailant, was contradicted by the testimony of the Correction Officer, who said he saw the Petitioner "clear as day." The conflicting testimony therefore presented a credibility issue which the Hearing Officer was free to resolve against the Petitioner. The Petitioner's claim that the Hearing Officer erred by failing to consider the medical report portion of the Unusual Incident Reports to determine the source of the victim's injury was unavailing, as the Report supported the determination by reflecting the size of the laceration and that, following the slashing, 12 stitches were required to close the victim's wound. The Petitioner's further claim that his employee assistant was inadequate was also rejected. Although the employee assistant was unable to provide the Petitioner with either the videotape of the incident or the unusual incident report, the Hearing Officer obtained these items and allowed the Petitioner to review them during the hearing. In addition, the Hearing Officer located the inmate in the cell in which the weapon was thrown and he testified in the Petitioner's favor. Thus, any alleged deficiency in the assistant's inability to procure the witness was resolved at the hearing.

Substantial Evidence: Inmate Guilty of "Falsely Reporting An Emergency"

Matter of Winbush v.McGinnis 811 N.Y.S.2d 149 (3rd Dep't 2006)

The Petitioner, an inmate, reported that he fell out of bed and was experiencing chest pain. He told the nurse who responded that he was dehydrated because his water had been turned off. The nurse, however, found no signs of dehydration or chest pain. She therefore wrote a Misbehavior Report charging the Petitioner with "falsely reporting an emergency." The Petitioner was found guilty of these charges at a Tier II hearing. On appeal, the Court found that the nurse's Misbehavior Report and testimony constituted sufficient evidence to support the charge.



Substantial Evidence: Weapon Found in Inmate's Cell Not Necessarily His

Matter of Fernandez v. Goord, 809 N.Y.S.2d 685 (3rd Dep't 2006)

When Correction Officers searched the Petitioner's cell, acting on information received from a confidential informant, they recovered a sharpened plastic object concealed in his mattress. Then, as the Petitioner was exiting the cell, he allegedly attempted to strike one of the officers. As a result, he was charged in a Misbehavior Report with assault and possessing a weapon. He was found guilty of both charges following a Tier III hearing. On appeal, however, the Court dismissed the weapons charge due to the "brief period of time that the Petitioner was in control of his cell."

Practice Pointer*: This is an unusual result. Typically, if contraband is found in an area which you control, i.e., your cell, your locker, or your cube, that will be considered sufficient evidence to support a finding in a disciplinary hearing that the contraband belonged to you. Here, however, the Court emphasizes the "brief period" in which the inmate occupied the cell. (Compare this case with Diaz v. Goord, reported above, page 7, or See, Ameen v. Selsky 807 N.Y.S.2d 318 [3rd Dep't 2006] also reported this quarter, in which the Court held that the fact that a six-inch nail, taped at one end, was found in the Petitioner's locker, reasonably supported an inference that it belonged to the Petitioner.)*

Timeliness of Hearing: An Untimely Extension Doesn't Invalidate This Hearing

Matter of Brooks v. Goord, 807 N.Y.S.2d 721 (3rd Dep't 2006)

The Petitioner, an inmate, was found guilty in a Tier III hearing of assaulting another inmate. He challenged the hearing on the ground that it was not concluded within 14 days. The Court rejected his claim. Although the Hearing Officer's request for the extension was late, this was simply due to the unavailability of clerical staff. In addition, the hearing had been adjourned numerous times to accommodate the Petitioner's request for many witnesses, and he did not object to the late extension until all of his witnesses had testified and the hearing was complete. Finally, the time requirements within which to conclude a prison disciplinary hearing are directory, not mandatory, and the Petitioner was not prejudiced by the late extension. There was, therefore, no basis for disturbing the determination.

Witnesses: Recantation Merely Raises Issue of Credibility

Matter of Vizcaino v. Selsky 808 N.Y.S.2d 825 (3rd Dep't 2006)

By monitoring inmate telephone calls, investigators with DOCS' Inspector General's ("IG's") office learned that the Petitioner, an inmate, was ordering narcotics from his brother to supply to others in his correctional facility. According to the IG, the inmate would tell his brother to drop off a certain quantity of heroin packaged in a particular manner to a person who would then smuggle it into the facility. A Misbehavior Report was premised on this information, as well as on the fact that a woman who had been caught smuggling heroin into the facility admitted that she had obtained the heroin from the Petitioner's brother. At a Tier III hearing, however, the woman recanted her testimony. The Petitioner was nevertheless found guilty of conspiring to introduce narcotics into the facility. He subsequently challenged the hearing an Article 78 proceeding. Held: The Misbehavior Report, together with the testimony of its author--the IG's investigator, and the confidential information obtained directly by the Hearing Officer from

another investigator, provided substantial evidence of the Petitioner's guilt. The fact that the woman recanted her testimony at the hearing and testified that she did not know either the Petitioner or his brother merely created a question of credibility for the Hearing Officer to resolve. The Hearing Officer did not need to take additional steps to assess the reliability of the confidential testimony, inasmuch as he spoke directly to the investigator who had personally monitored the Petitioner's conversations with his brother. Finally, the Petitioner was not denied the right to call witnesses: The Hearing Officer obtained the testimony of all witnesses requested by the Petitioner except that of the Petitioner's brother. The Hearing Officer made reasonable and substantial efforts to obtain the testimony of the brother by making numerous, unsuccessful attempts to contact him by telephone.

Other State Cases

Article 78 Proceedings: Statute of Limitations

Matter of Loper v. Selsky 810 N.Y.S.2d 525 (3rd Dep't 2006)

An Article 78 proceeding must be commenced within four months from the date the Petitioner receives notice of the final administrative decision on the action he is challenging. See, N.Y. Civil Practice Law and Rules ("CPLR") § 217. An inmate's petition is considered "commenced" on the date the county clerk *receives* the petition "in valid form"--**not** upon *mailing* the petition. See, Grant v. Senkowski, 95 N.Y.2d 605 (2001).

In this case, the Petitioner, an inmate, received notice of denial of his administrative appeal of a disciplinary hearing on November 5, 2005. He filed an Article 78 petition on March 3, 2005. However, the petition was rejected by the Washington County Clerk due to his failure to include the necessary poor persons documents and fee. (See, CPLR § 1101[f]). He re-filed correctly on March 11, 2005. The lower court dismissed his petition as untimely. The Appellate Division affirmed. Because the March 3, 2005 petition did not include the mandated supporting documents and filing fee, it was not filed on that date in a "valid form." The new filing, on March 11, was late, and had to be dismissed.

Practice Pointer*: If you are filing an Article 78 proceeding, try to file well in advance of the four-month deadline to avoid just the kinds of problems that derailed this case. If you are unsure about the procedure or what documents are required, request Prisoners' Legal Services handout, "How to File an Article 78 Proceeding."*

First Amendment; Religious Expression

Jewish Inmate's Request to Worship in an Area Free of Other Religious Icons Mooted By Transfer

Matter of Parilla v. Donelli 807 N.Y.S.2d 488 (3rd Dep't 2006)

The Petitioner filed a grievance requesting that Jewish inmates be provided a place to worship separate from inmates of other religions so as not to be subjected to the symbols of other religions. The grievance was granted in part, in that officials agreed to cover Christian religious symbols during Jewish ceremonies, but it was otherwise denied, in that DOCS refused permission to hold services in another room. The Petitioner then commenced an Article 78 proceeding. The Court held that the proceeding was made moot, however, by the Petitioner's transfer to a different facility where he is able to attend Jewish services in a general-purpose room that contains no permanent religious icons.

Inmate Receives no "Special Accommodations" to Practice "Tulukeesh"

Matter of Allah (a/k/a Tyheem Yefya Keesh) v. Goord 810 N.Y.S.2d 235 (3rd Dep't 2006)

The Petitioner, an inmate, filed a grievance seeking special accommodations to practice "Tulukeesh," a religion which he created. His grievance was denied, except to the extent that he was allowed to practice his religion in the privacy of his own cell within established facility operational procedures. On the Petitioner's appeal, the court affirmed DOCS' decision. A review of the record demonstrated that DOCS carefully considered the Petitioner's requests for special accommodations and responded in a reasonable and appropriate manner. DOCS took no position in acknowledging any particular religion, but advised the Petitioner that, in accordance with facility directives, his requests for a special dietary menu, observance of self-created religious holidays, and opportunities to hold congregational services and other classes would be considered upon direction from an approved outside cleric or spiritual adviser. In the interim, the Petitioner was permitted to practice his religion within his cell. The Court found that this was neither arbitrary nor capricious.

Freedom of Information Law

Matter of Argentieri v. Goord, 807 N.Y.S.2d 445 (3rd Dep't 2006)
Matter of John H. V. Goord 809 N.Y.S.2d 682 (3rd Dep't 2006)

A pair of unfavorable Freedom of Information Law ("FOIL") decisions were decided this quarter, both restricting the rights of inmates to obtain information concerning investigations conducted by the IG's office of DOCS. The cases are disappointing because they appear to limit a 2003 decision, Beyah v. Goord (766 N.Y.S.2d 222) which seemed to expand those rights. In Beyah, the Court held that various records associated with an IG investigation, including employee accident reports, employee interviews, the report of complaint progress, index sheets, and receipt of complaint documents, were disclosable under FOIL, as were employee training records and a prison directive pertaining to the maintenance of log books.

In Argentieri v. Goord, an inmate's mother had filed a complaint with the IG's office concerning a Misbehavior Report received by the inmate. The inmate's mother alleged that the Misbehavior Report was retaliatory. When the IG later found her complaint unfounded, she sought the records of the investigation. The Court rejected her request. It followed the 1988 Court of Appeals decision in Prisoners' Legal Services v. DOCS, 73 N.Y.2d 26, and held that the records sought were "personnel records" under Civil Rights Law § 50-a(1), and therefore exempt from disclosure. "Since practically all of the documents sought by the Petitioner were generated as a result of his mother's complaint of misconduct against Correction Officers, Respondents properly denied access to certain portions of the contents of the Inspector General's investigative file." The Court distinguished Beyah on the grounds that "that case involved employee interviews relating to a prison inmate's injury," whereas this case involved complaints of employee misconduct, "the very types of documents that Civil Rights Law § 50-a(1) was designed to protect."

In Matter of John H., the Petitioner submitted a FOIL request in November 2003, seeking investigative reports, interviews, and related documents generated in response to his allegation that he was sexually assaulted by a Correction Officer while incarcerated at Green Haven. DOCS denied his request, as well as his administrative appeal of that denial. He then commenced an CPLR Article 78 proceeding challenging DOCS' determination. The lower court granted the petition and directed DOCS to disclose the relevant

documents, subject to redaction of any reference to Correction Officers' home addresses, phone numbers, Social Security numbers, dates of birth, or other identifying information. The Appellate Division, however, reversed. On reviewing the documents *in camera* (in secret), the Court found that their disclosure could "endanger the life or safety of a person" and were therefore subject to one of the exemptions from the disclosure requirements of FOIL

***Practice Pointer**: New York's Freedom of Information Law can be found in the Public Officer's Law, at Section 87. It generally requires all State agencies to make available for either copying or inspection all records within the agency's possession unless the record falls into one of several categories of exemptions. The four most common exemptions are those which exempt from disclosure documents which, if disclosed:*

- *would constitute an unwarranted invasion of personal privacy;*
- *are compiled for law enforcement purposes and which would:*
  - *i. interfere with law enforcement investigations or judicial proceedings;*
  - *ii. deprive a person of a right to a fair trial or impartial adjudication;*
  - *iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or*
  - *iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures";*
- *could endanger the life or safety of any person; or*
- *are inter-agency or intra-agency materials [e.g., internal policy memos or discussions] which are not:*
  - *i statistical or factual tabulations or data;*
  - *ii. instructions to staff that affect the public; or*
  - *iii. final agency policy or determinations.*

The statute also prohibits disclosure of documents whose disclosure is specifically prohibited by some other state or federal statute. Civil Rights Law § 50-a(1) protects the confidentiality of employee personnel records. In Prisoners Legal Services v. DOCS, 73 N.Y.2d 26 (1988), the Court of Appeals held that complaints made against Correction Officers by inmates were personnel records under the Civil Rights Law, and therefore were exempt from disclosure under FOIL.

Parole/Conditional Release

Parole Board Reversed for Failing to Consider Sentencing Court's Recommendation

McLaurin v. State Board of Parole, 812 N.Y.S.2d 122 (2d Dep't 2006)

Executive Law § 259-i(2)(c)(A) requires the Division of Parole to consider several specific factors when determining whether to grant or deny parole. Specifically, the statute states that the Board of Parole must consider:

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

(ii) performance, if any, as a participant in a temporary release program;

(iii) release plans including community resources, employment, education and training, and support services available to the inmate;

(iv) any deportation order issued by the federal government against the inmate while in the custody of the Department of Correctional Services and any recommendation regarding deportation made by the commissioner of the Department of Correctional Services pursuant to § 147 of the Correction Law; and

(v) any statement made to the board by the crime victim or the victim's representative, where the crime victim is deceased or is mentally or physically incapacitated. It also requires that, in most cases, the Board consider additional factors listed in Executive Law § 259-i (1)(a). These include the seriousness of the offense with due consideration to the type of sentence, length of sentence, *and any recommendation of the sentencing court.*

Criminal Procedure Law § 380.70 provides that, "in any case where a person receives an indeterminate or determinate sentence of imprisonment, a certified copy of the stenographic minutes of the sentencing proceeding...must be delivered to the person in charge of the institution to which the defendant has been delivered."

In McLaurin v. State Board of Parole, the Court found that the Parole Board had failed to consider the recommendations of the sentencing court. The Board argued that minutes of the sentencing court were unavailable at the time of the hearing, but the Court found that this was no excuse, given the requirements of Criminal Procedure Law § 380.70. The Board argued that, even if it had erred in failing to obtain the sentencing minutes, the case was now moot because, since the hearing at issue in this case, the Petitioner had received another hearing. But, the Court found, "[S]ince it is [clear] from the statements at oral argument that the Board *still* does not have the [minutes of the sentencing hearing] and thus has not considered them, this matter presents an exception to the mootness doctrine because the substantial issue presented is likely to recur." Therefore, the Court reversed the Board decision and ordered that a new hearing, with the sentencing minutes, be held within 30 days.

Parole Board Reversed for Failing to Consider Statutory Criteria

Matter of Prout v. Dennison, 809 N.Y.S.2d 261 (3rd Dep't, 2006)

The Petitioner in this case is serving a term of 15 years to life in prison after pleading guilty to murder in the 2nd degree. In November 2003, after 25 years of incarceration, he made his sixth appearance for release on parole. After a hearing, the Board of Parole denied his request and ordered him held for an additional 24 months.

As noted in the case reported above, Executive Law § 259-i(2)(c)(A) contains several specific criteria that the Board must consider in determining whether to grant parole. It also states, more broadly: "Discretionary release on parole shall not be granted merely as a reward for good conduct or efficient performance of duties while confined but after considering if there is a reasonable probability that, if such inmate is released, he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society and will not so deprecate the seriousness of his crime as to undermine respect for the law."

In this case, the Board's decision stated that "discretionary release is contrary to the best interest of the community " and "is not appropriate, as this deprived [sic] indifference to life is not consistent with community standards and interests, and release would not serve society " At issue was whether this

"nonstatutory, conclusory" language reflected adequate consideration of the statutory criteria.

The Court held that it did not. "The Board's terse decision," wrote the Court, "lacking any analysis of statutory and regulatory criteria makes it impossible for this Court to give meaning to the language used by the Board." Because the Board's decision contained no explanation of how or whether it was related to the statutory factors, the Court was "left to speculate as to whether the Board imposed a higher standard for release--to wit, that the Petitioner had some burden to demonstrate that his release would somehow enhance society." Consequently, the Court reversed the decision.

One judge dissented. He noted that, "[t]here is no requirement that the Board discuss all of the statutory factors in its written determination, as long the 'appropriate factors [are] discussed and considered' at the parole hearing" and that "the Board [is not] required to give each statutory factor equal weight." Moreover, the dissent wrote, "in reviewing challenges to a Board determination, courts are not limited solely to its decision, but can consider as well the transcript of the entire hearing to determine whether the proper statutory factors were considered."

In this case, the dissent found, "the Board made a proper inquiry into the Petitioner's institutional record and release plans, as well as the heinous nature of the crime" and "the language employed by the Board reasonably comports with the standards governing parole release." "[T]he Board is not required to literally conform its decision to the language outlined in the statute."

Imposition of 'Special Conditions' Prevents Inmate's Conditional Release

Matter of Breeden v. Donnelli, 808 N.Y.S.2d 839 (3rd Dep't 2006)

The Petitioner, who is incarcerated for a sex offense, was not released on his conditional release date due to his failure to fulfill a 'special condition' of the Parole Board that he secure a "suitable residence." The Court here rejected his claim that he has a right to be conditionally released. The Board is authorized to impose special conditions which must be satisfied prior to an inmate's release from prison, the Court notes, citing Executive Law § § 259-c9(2), 259-g, and Matter of Wright v. Travis, 746 N.Y.S.2d 850. The only question that may be addressed by the Court is whether the conditions imposed by the Board are rational. Where, as here, the Court held, the inmate has a history of multiple sex offenses and has previously violated parole, a condition requiring that he secure an approved residence prior to his release is rational.

Programs

Assignment to Sex Offender Counseling Was Not 'Arbitrary and Capricious'

Matter of Matos v. Goord, 811 N.Y.S.2d 480 (3rd Dep't 2006)

The Petitioner in this case pled guilty to robbery in the first degree in satisfaction of a multi-count indictment and was sentenced to 15 years in prison. As part of his incarceration, it was recommended that he participate in the Sex Offender Counseling Program (hereinafter, "SOCP"). The Petitioner questioned the recommendation on the ground that he was not convicted of a sex offense. The Deputy Commissioner of Programs informed him that the recommendation was appropriate based upon the circumstances of his offense and the facts contained in the pre-sentence investigation report. The Petitioner filed a grievance in connection with the matter, which was ultimately denied by the CORC. He then commenced an Article 78 proceeding to challenge the determination. The Court upheld the recommendation. "In order to prevail," the Court wrote, "the Petitioner [would have to] demonstrate

that the administrative determinations at issue are arbitrary and capricious or are without a rational basis." DOCS' regulations state that persons who are not convicted of sex offenses may be eligible to participate in SOCP if "there is evidence that a sex crime or the attempt to commit a sex crime did occur in the course of the instant offense and as documented in the Pre-Sentence Report or other related documents." In this case, the Petitioner's Pre-Sentence Report indicated that he had displayed a razor while committing the robbery and forced the female victim into her car where he fondled her breasts and demanded that she perform oral sex on him. Consequently, the Court held, the referral to the SOCP was rational. The Court did note that "the Petitioner cannot be compelled to attend the program," however his refusal "may have potentially adverse effects on such matters as his eligibility for parole and participation in the family reunion program.

Good Time Withheld For Failure to Complete Sex Offender Program

Matter of Edwards v. Goord 808 N.Y.S.2d 841 (3rd Dep't 2006)

The Petitioner, an inmate serving a sentence for several sex offenses, initially saw a Time Allowance Committee at Attica, which recommended no loss of good time. He was then transferred to Gowanda, which conducted an independent review of the Petitioner's record and recommended that five years and eight months of good time be withheld based upon the Petitioner's "persistent refusal to participate in a sex offender program." Upon the Petitioner's appeal, the Court affirmed this decision."It is well established that '[g]ood behavior allowances are in the nature of a privilege…and no inmate has the right to demand or to require that any good behavior allowance be granted to him [or her],'" wrote the Court, citing 7 N.Y.C.R.R. 260.2. "The determination to withhold a good time allowance is discretionary in nature and, as long as it is made in accordance with the law, it will not be subject to judicial review. Here, the record evidence demonstrates that the Petitioner, on more than one occasion, refused to participate in a recommended sex offender program. Such refusals provided a rational basis for the withholding of the Petitioner's good time allowance."

Visitation

Lack of Standing to Challenge Visitation Denial

Matter of Grigger v. Goord, 811 N.Y.S.2d 161 (3rd Dep't 2006)

When the Petitioner's mother went to visit the Petitioner, an inmate, she was denied entry to the correctional facility after she tested positive for contact with cocaine on an ion scanner used to screen visitors. The Petitioner filed a grievance as a result, which was ultimately denied by DOCS' CORC. He then commenced an Article 78 proceeding, but the Court held that he lacked standing--that is, he lacked grounds to sue on his mother's behalf. The Court explained: Prison inmates do not have a right to visitation that is protected by the federal or state constitution (*citing*, Matter of Encarnacion v. Goord, 778 N.Y.S.2d 562 [2004] which in turn cites the Supreme Court case Kentucky v. Thompson 490 U.S. 454 [1989]). The "privilege" of visitation, the Court stated, is afforded only by DOCS regulations and can be restricted as described in 7 N.Y.C.R.R Part 200.5. Both visitors and inmates have the right to administrative and judicial review of a restriction to ensure that it complies with their regulatory rights, but the basis for standing to seek judicial review of such a restriction is an injury "in fact" caused by the action or policy in question.

The Court held that the Petitioner could not claim standing based upon his loss of visitation

privileges with his mother because it was *her* ability to visit, rather than *his* privilege of receiving her as a visitor, that was restricted after the ion scanner found traces of cocaine on her person Although, the Court held, he was "indirectly" affected by that incident, he cited "no actual or reasonably probable occasion when use of the scanner has or will deprive him of his own visitation privileges." In the absence of a qualifying injury, he had failed to establish his standing to challenge the use of the ion scanner.

Practice Pointer*: The Court arguably goes too far in asserting that inmates have no right to visitation that is protected by the federal constitution. The case it cites for this proposition--Matter of Encarnacion v. Goord, 778 N.Y.S.2d 562 (2004)--contains no discussion of the issue, but merely cites the 1989 Supreme Court case, Kentucky v. Thompson (490 U.S. 454). In Kentucky, the Court held that the constitution did not provide a right to "unfettered" visitation and it held that certain regulations of the Kentucky Department of Corrections did not create a federally enforceable right, but it did not hold that inmates had no constitutional right to visitation. In Overton v. Bazetta, 539 U.S. 126 (2003), the Supreme Court's most recent examination of inmate's visitation rights, the Court specifically noted that the Constitution protects "certain kinds of highly personal relationships" and that "outside the prison context, there is some discussion in our cases of a right to maintain certain familial relationships, including association among members of an immediate family and association between grandchildren and grandparents." Although the Court went on to note that "freedom of association is among the rights least compatible with incarceration" and that "some curtailment of that freedom must be expected in the prison context"--and, it ultimately upheld the highly restrictive visitation regulations at issue in that case--it also stated: "We do not hold, and we do not imply, that any right to intimate association is altogether terminated by incarceration or is always irrelevant to claims made by prisoners."*

Court of Claims

DOCS' Refusal to Place Inmate in Protective Custody Insufficient to Show DOCS' At Fault When Inmate Was Later Assaulted

Matter of DiDonato v. State of New York, 807 N.Y.S.2d 456 (3rd Dep't 2006)

The Claimant, an inmate, sought protective custody at Elmira. DOCS denied his request after officials determined that his concerns related to an incident at Sing Sing (allegedly concerning a debt the claimant owed to other inmates for narcotics). DOCS concluded that there was no basis for his assertion that he was at any heightened risk of being assaulted at Elmira. Over a year later, while still incarcerated at Elmira, the Claimant was assaulted--his face was cut--by another inmate who was never identified. He then sued DOCS in the Court of Claims, claiming that DOCS' had failed in its duty to protect him. The case went to trial.

At trial, there was testimony showing that gangs had a significant presence at Elmira and that cutting someone in the manner which the Claimant was cut was an initiation ritual used by the particular gang from which the Claimant had sought protection. On the other hand, there was also testimony suggesting that assaults like the one perpetrated on the Claimant occur for a variety of non-gang-related reasons too. There was no evidence, however, linking the Claimant's unknown assailant to any gang and there was no evidence to support the Claimant's contention that he was at special risk for an attack by a member of a gang at Elmira--beyond what the Court describes as his "unsupported claim that the 1996 Sing Sing incident was gang-related." Under the circumstances, the Court finds, and "affording due deference to the credibility determinations made by the Court of Claims, we

agree…that this evidence is insufficient to sustain Claimant's contention that the assault was the foreseeable result of any breach of duty on [DOCS'] part."

Practice Pointer*: The bar for winning a claim that DOCS' failed in its duty to protect you against an assault by another inmate is set quite high. Although"the State owes a duty of care to safeguard inmates, even from attacks by fellow inmates," that duty does not "render the State an insurer of inmate safety." Rather, the State's duty is merely to protect inmates from risks of harm that are "reasonably foreseeable." The mere occurrence of an inmate assault, without credible evidence that the assault was reasonably foreseeable by DOCS, cannot establish negligence. See, Sanchez v. State of New York, 754 N.Y.S.2d 621. In practice, this standard has often meant that an inmate/victim must present proof that either:*

1) *DOCS had notice that an assault was likely to occur and failed to act;*

2) *DOCS had notice that the assailant was particularly likely to perpetrate an assault and failed to take precautionary measures; or*

3) *that the victim was known to be at a heightened risk and DOCS failed to provide reasonable protections.*

PRO SE PRACTICE

Consecutive Sentences and People v. Richardson

Many inmates write to Prisoners' Legal Services with questions about the way DOCS has calculated their sentence. One of the most common questions concerns consecutive sentences and, specifically, whether their new sentence should be running consecutively to time owed on a previous sentence. The 2003 Court of Appeals decision in People v. Richardson, 100 N.Y.2d 847, has been a particular source of confusion. This article attempts to address some of the common questions and misconceptions about consecutive sentences, and clarify some of the confusion caused by People v. Richardson.

The place to start is with Penal Law § 70.25. That statute contains the basic rules which determine whether a sentence shall run concurrently or consecutively to a previously-imposed sentence.

Penal Law § 70.25(1) states that when a sentencing court imposes a new sentence on a person still subject to a previously-imposed sentence, the sentencing court has the choice to run the new sentence either concurrently or consecutively. The statute then goes on to say that if the sentencing court *fails* to specify how the sentences should run, "they shall run concurrently."

Many inmates have read this language and argued that, because their sentencing judge failed to specify how their new sentence should run with respect to some previously imposed sentence, the sentences must be run concurrently and DOCS, in running them consecutively, is violating the law.

In most such cases, however, the inmate is mistaken.

That is because Penal Law § 70.25(2-a) contains a broad exception to the rule in Penal Law § 70.25(1) for persons convicted as predicate felons. That statute states that when a sentence is imposed pursuant to one of several statutes concerning second or persistent felony offenders--specifically, Penal Law § § 70.04, 70.06, 70.08, 70.10, 70.70[3] and [4], and 70.71[3] and [4]--the court *must* impose a consecutive sentence.

The courts have interpreted this to mean that if you were sentenced as a second or persistent felony offender under one of the specified statutes, DOCS must calculate your new sentence or sentences as running consecutively to any previously imposed sentence--even if the sentencing court failed to specify that it was imposing a consecutive sentence.

For example, in Matter of El Aziz v. Goord, 811 N.Y.S.2d 181 (3rd Dep't 2006) an inmate, convicted in 1968 of numerous felonies, was convicted of several more felonies while on parole in 1985 and was sentenced to a term of 25 to 50 years. He argued that his 1985 sentence should run concurrently with the time left on his 1968 sentences because the sentencing court had failed to specify how they should run. The Court held, however, that since the Petitioner was sentenced in 1985 as a second felony offender under Penal Law § 70.06, Penal Law § 70.25(2-a) required that the 1985 sentence run consecutively to the unexpired portion of his 1968 sentence, regardless of the fact that the sentencing court had failed to specify as much.

So what happened in People v. Richardson? Why has that case caused such confusion?

In Richardson, the Defendant was on parole for a 1979 conviction of murder in the 2nd degree when, in 1995, he was convicted of several more counts of murder in the 2nd degree. The sentencing court imposed a number of sentences for the 1995 charges but it failed to specify how the new sentences should run with respect to the 1979 sentence. When he was returned to DOCS, DOCS calculated the new sentences as if they were concurrent to, not consecutive to, the 1979 sentence. When the sentencing court learned of DOCS' calculation, it issued a new commitment order, specifying that it had intended that the new sentences run consecutively to the time owed on the 1979 sentences, not concurrently. On appeal, the Court of Appeals held that the sentencing court's action amounted to re-sentencing the Defendant, in violation of Criminal Procedure Law § 430.10 and that, because the court failed to specify how the new sentences were to run with respect to the 1979 sentence they must, under Penal Law § 70.25(1), run concurrently.

Since Richardson, many inmates have argued that their sentences, like Richardson's too, must run concurrently with their prior sentences, because their sentencing judge, like Richardson's, failed to specify how the sentences should run. In essence, these inmates argue, Richardson overrules the many decisions, such as El-Aziz, that hold that second or predicate felony sentences are automatically consecutive to any previous sentence.

What this argument overlooks is that there is an important distinction between Richardson and cases such as El-Aiziz. Specifically, the Defendant in Richardson was convicted of an "A-1" felony. Class A-1 felony sentences are imposed pursuant to Penal Law § 70.00, and are not subject to the predicate felony provisions of §§ 70.04, 70.06, 70.08, or 70.10. Therefore, the "mandatory consecutive" provisions of Penal Law § 70.25(2-a) do not apply to A-I sentences. Penal Law § 70.25(1) does apply. If the sentencing court fails to specify how A-I sentences shall run, they must run concurrently.

Richardson, in other words, avoided the automatic imposition of a consecutive sentence because he was convicted of an A-1 felony. The large majority of inmates with predicate convictions, however, are not convicted of A-1 felonies. In those cases, the general rule remains; Penal Law § 70.25(2-a) applies. The sentences must run consecutively as a matter of law--whether or not the sentencing court specified as much.

New York's Discretionary Persistent Felony Offender Law: Still Constitutional

In the Winter 2005 issue of ***Pro Se***, we wrote that the New York State Court of Appeals had granted leave applications in several criminal appeals challenging the constitutionality of the state's discretionary persistent felony offender law, Penal Law § 70.10, and that several district courts had recently ruled that the New York Court of Appeals' 2001 decision in People v. Rosen, holding that the law was constitutional, was an unreasonable application of a clearly established Supreme Court precedent. We promised to update our readers when the decisions were issued in the cases that were then

pending before the New York Court of Appeals. In this article, we review the history of challenges to the constitutionality of the discretionary persistent felony offender law and report on recent developments in this area of the law.

Penal Law § 70.10 defines a "persistent felony offender" as a person who stands convicted of a felony after having been previously convicted of two or more felonies. It states that such persons may be sentenced as an A-1 felony offender "if the court is of the opinion that the history and character of the defendant, and the nature and circumstances of his criminal conduct indicate that extended incarceration and life time supervision will best serve the public interest." It thus allows the court to impose a life sentence on a defendant if the defendant has been convicted of two prior non-violent felonies (or one non-violent and one violent felony conviction). For example, under the statute, the court could impose a life sentence on a defendant who has been convicted of a class E felony and has two prior class E felony convictions, even though the statutory maximum for a class E non-violent crime would otherwise be in the range of three to five years. See, P.L. § 70.06(3)(e).

In 2000, the United States Supreme Court reviewed a New Jersey statute requiring a judge to impose a longer sentence if the judge found, by a preponderance of the evidence, that the defendant had committed a hate crime. The Court held that the statute violated the defendant's due process rights because it allowed *the Court*, rather than the jury, to decide whether certain facts existed--in that case, whether the crime was a hate crime--and because it permitted the prosecution to prove those facts by only a preponderance of the evidence, rather than "beyond reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 469 (2000).

Defendants in New York quickly began to challenge New York's persistent felony offender statute under Apprendi, arguing that, just like the New Jersey statute at issue in Apprendi, the persistent felony offender statute allowed the court, rather than a jury, to decide critical facts--specifically, whether the defendants' "history and character" warranted a life sentence--which could result in a greater sentence.

The first "Apprendi" challenge to New York's discretionary persistent felony offender statute to reach the Court of Appeals resulted in a finding that the statute was constitutional. People v. Rosen, 96 N.Y.2d 329 (2001). Under the Court's reading of the statute, the only fact that a judge was required to find prior to sentencing a defendant as a persistent felony offender was whether the defendant had previously been convicted of two felonies. The Court distinguished the statute at issue in Apprendi from New York's discretionary persistent statute by saying that the New Jersey statute required specific fact finding, *i.e.*, whether the crime was racially motivated, while the New York statute only requires a finding that is in keeping with the sentencing functions of the court, *i.e.*, whether an extended period of incarceration and lifetime supervision are in the public interest. Thus, the Court reasoned, PL § 70.10 was not among the statutes that the Supreme Court had found to be unconstitutional in Apprendi.

Subsequently, however, two federal district courts held that the Court of Appeals had unreasonably applied Supreme Court precedent, and ruled that application of the law established by Apprendi v. New Jersey to PL § 70.10 must result in a finding that the statute is unconstitutional. See, Brown v. Greiner, 258 F.Supp.2d 68 (E.D.N.Y. 2003); Rosen v. Walsh, 02 CIV 7782 (S.D.N.Y. 7/17/03). Then, in 2004, three years after it had issued its decision in People v. Rosen, the New York Court of Appeals granted leave petitions in several cases challenging the constitutionality of the statute, suggesting an interest in re-examining its decision in Rosen.

Since the publication of our earlier article, both the Second Circuit Court of Appeals [Second Circuit] and the New York State Court of Appeals [Court of Appeals] have issued additional decisions

in response to defense challenges to the constitutionality of New York's discretionary persistent felony offender law. In the Court of Appeals case, People v. Rivera, 5 N.Y.3d 61, 800 N.Y.S.2d 51 (2005), the Court held that PL § 70.10 bases sentencing solely on the fact that the defendant has a least two prior felony convictions--a matter of record--and thus does not involve the kind of judicial fact-finding that the Supreme Court found to be unconstitutional in Apprendi. Two judges, Judith Kaye and Carmen Ciparick, dissented. Judges Kaye and Ciparick found that the statute requires the sentencing court to find more than prior convictions before it imposes an enhanced sentence. Judge Ciparick wrote, "Where a statute, like ours, considers facts beyond recidivism that were neither proven to the jury beyond a reasonable doubt nor admitted by a defendant for the purpose of enhancing a sentence beyond the statutory maximum, then that statute runs counter to the United States Supreme Court's current interpretation of the Sixth Amendment." Judge Ciparick's analysis was **not** accepted by a majority on the Court.

The Second Circuit, meanwhile, in Brown v. Greiner and Rosen v. Walsh, overruled the prior decisions of the district courts and held that the New York Court of Appeals had not erred in People v. Rosen, when it held that the persistent felony offender law was not unconstitutional under Apprendi. The Court found that it was not unreasonable for the New York Court to have concluded that the persistent felony offender statute, which requires the sentencing judge to determine whether enhanced sentencing would best serve the public interest in addition to conviction of two prior felonies, involves fact finding that is not similar to the fact finding required by the statute at issue in Apprendi, in which the judge had to determine whether the defendant's crime was racially motivated.

The net result of all this litigation is that New York's persistent felony offender law is still constitutional. That is not necessarily the end of the matter, however. Since the Court of Appeals' decision in People v. Rosen, the U.S. Supreme Court has issued several other decisions interpreting and refining its Apprendi decision. See, for example, United States v. Booker, 125 S.Ct. 738 (2005); Blakely v. Washington, 124 S.Ct. 2531 (2004); Ring v. Arizona, 536 U.S. 584 (2002). There are presently several habeas cases in the district courts challenging whether the New York State decisions that were issued after the Supreme Court handed down Booker, Blakely, and Ring were contrary to these new decisions.

COMMENTARY

On Sex Offender Hysteria
by
Jonathan E. Gradess, Executive Director
New York State Defenders' Association

Politics, Not Policy-Making, is Driving Civil Commitment

In the last year the Legislature passed a bill that forbids certain sex offenders from being present within 1000 feet of a school. The effect of this bill is to make thousands of men pariahs in their own communities. It will force them into the gray outskirts of metropolitan areas where, further marginalized, they will be forced underground, unable to travel freely. Then, but a few months ago, yielding to the political attractiveness of the idea, the Legislature made all level 2 and 3 sex offenders register for life on the Sex Offender Registry. We can tell the politicians are polling on this issue because they are not looking for strategies that make sense or are effective and reformative. Sex offenders are the new lepers; the Legislature is dithering over civil commitment in the same way Hawaii dithered over making Molokai a prison for lepers 150 years ago.

Sexual abuse treatment providers, advocates opposing sexual assault, mental health providers, the families of the mentally ill, families of sex offenders, and the legal and civil liberties communities all believe civil commitment of dangerous sex offenders is a misguided policy. Why then have both houses of the State Legislature passed competing draconian civil commitment bills? Answer: November 7, 2006—Election Day. It is election-year polling on the electoral problem of sex offenders, not policy making about the problem of sex offenders, driving this ill-founded idea in Albany.

Civil Commitment Erodes Rather Than Promotes Safety

Sexual abuse treatment professionals believe that the best way to treat sex offenders is to prevent their behavior, closely monitor them in the community, and provide meaningful, ongoing treatment. Up against this common sense proposition are the politicians. They like to say sex offenders have high recidivism rates, can't be treated, and must be locked up to protect the public. The truth is the majority of sex offenses involve people who know or are related to each other and the offenders are never even arrested. Many sex offenses occur between family members; in such cases the threat of civil commitment may actually run the risk of causing victims not to report crimes for fear of the lifetime civil commitment of those family members.

Proposals Based on Myths, Overreaching, and Fiscal Irresponsibility

It is a myth that sex offenders cannot be rehabilitated. Sex offenders represent a wide range of behaviors, many of which are successfully treated. Contrary to popular mythology, the re-offense rates for sex offenders are substantially lower than the rates for many other offenders, lower than that of persons convicted of robbery, burglary, car theft, and weapons offenses, and among the lowest recidivism rates of criminal offendersgenerally. Success has been demonstrated with intensive community treatment in those states that have a multidisciplinary, aggressive system of monitoring, supervision and treatment.

The majority of American states--8 percent--do not have civil commitment laws. Yet touting the "national move toward these laws" (*i.e.*, a minority of 16 states, 2 of which are retreating from the idea already), New York's Governor and Legislature have proposed the broadest and most expensive civil commitment law in the country. The Assembly and Senate bills are both so broad they encompass statutory rape, youthful sexual experimentation, and behaviors that are not likely to be repeated. Unless these bills are more carefully limited, they potentially threaten the lifetime incarceration of thousands of people.

The incarceration of sex offenders in a specialized facility, where treatment, according to the Governor, will cost $200,000 per year per offender, is a waste of money. People who have sexually offended should be monitored and treated along a continuum of care that includes treatment in the community, treatment in prison, and treatment on parole in the community. Sex offender experts say that the group most talked about--"dangerous sexual predators"--is the least amenable to treatment. Yet in the six Conference Committee hearings held so far to "resolve differences between the Assembly and Senate bills," the proponents of lifetime commitment for "dangerous sexual predators" will have none of this truth. Each house outdoes itself urging how little their members know about treating sex offenders and how much each should be willing to spend on this rogue idea, how critical this bill is, and how important—in an election year—public safety is to each of them.

With only eight months left to election, both houses would do well to recognize that even people who want civil commitment and the enhanced treatment of sex offenders find these bills conceptually defective. While the Assembly bill moves toward treatment goals, neither bill assures professionalism in treatment decisions. In the Governor's bill the decision to seek commitment is left exclusively in the hands of law enforcement, while in the Assembly bill law enforcement can override the medical decision recommending against civil commitment. Why the Legislature fears leaving the decision in the hands of professionals can be explained by the power of the tabloids and the banner they carry for this unwise legislation. Far broader than their rhetoric, these bills which pretend to cover only a "small handful of dangerous offenders" actually cover every felony sex offense in the Penal Law.

Even if the bill worked right it would be wrong. Isolating a small handful of generally untreatable people in an expensive facility where they will be held for life on the theory they must be treated skews precious, limited resources that should otherwise be available for treatment of a broader category of sex offenders.

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