Pro Se

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LANDMARK SETTLEMENT DECREASES SHU TIME, INCREASES TREATMENT OF PRISONERS WITH SERIOUS MENTAL ILLNESS

After five years of litigation and two weeks of trial, the Department of Correctional Services ("DOCS") and the Office of Mental Health ("OMH") have agreed to settle a lawsuit in exchange for major improvements in psychiatric treatment for New York State prisoners with mental illness.

The lawsuit, Disability Advocates, Inc. v. New York State Office of Mental Health and Department of Correctional Services, alleged that mentally ill prisoners throughout New York did not get needed treatment and that many were instead punished with lengthy stays in Special Housing Units ("SHU") or keeplock, where they suffered severe psychiatric deterioration, including acts of self-mutilation and even suicide.

The settlement requires that DOCS provide prisoners with serious mental illness who are confined in SHU a minimum of two hours per day of out-of-cell treatment and prisoners in the Residential Mental Health Units ("RMHU") receive as many as four hours, in addition to one hour of recreation.

Other provisions call for multiple reviews of the disciplinary sentences of prisoners with serious mental illness for the following purposes: removing them from SHU and other isolated confinement settings; setting limits on the punishment of prisoners with mental illness who hurt themselves because of their illness; setting limits on the use of the "restricted diet," (*i.e.*, a loaf made from bread and

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DEATHS IN THE FAMILY
A Letter From Susan Johnson, Executive Director

This issue of Pro Se celebrates the lives, and mourns the passing, of two persons who were important members of the extended PLS family.

Judy M. worked for PLS for more than thirty years--longer than anyone. Throughout that time, her commitment to and compassion for the men and women we serve never flagged. Judy had an enduring sense of justified anger at the indignities and unfairness inmates often face. Her commitment to our work survived severe budget cuts and even years without funding. But Judy never gave up. Instead, she was determined to work for PLS for as long as physically possible. Judy especially valued the small services PLS provides inmates on a daily basis. While she understood the importance of litigation and class action lawsuits, she believed that litigation was not the only way to serve our clients. Judy knew better than anyone that PLS lacks the resources to represent every inmate who requests assistance. Nonetheless, she tried to provide every inmate who contacted our office a personalized response geared toward addressing the inmate's concern; and, if a phone call could solve an inmate's problem, Judy would not hesitate to pick up the telephone. Toward that end, Judy worked hard to nurture relationships with those at DOCS who performed their jobs professionally and without a bias against inmates. When necessary, Judy would call upon these people to help her obtain the services to which inmates are entitled.

We will mostly miss Judy for her wry sense of humor and easy-going nature. Her humor was just as infectious as her commitment to our clients.

Those of us who knew Judy well knew just how deeply she loved her husband and how devoted she was to her children and grandchildren. There is no question that the joy and love she gained from her family fueled her energy for the often challenging work of PLS.

Judy felt that ***Pro Se*** is one of the most important services PLS provides inmates. Thus, it was not surprising that in cleaning out Judy's office after her death, we discovered that she had saved nearly every edition of ***Pro Se***. She scrutinized each edition after its publication for new information to send inmates or for better responses to questions that our office regularly receives from inmates. We felt that it would be appropriate, therefore, to honor Judy's memory and her commitment to PLS by publishing this edition of ***Pro Se*** in her honor.

Michele Maxian, a brilliant lawyer with tireless energy who never ceased to fight for her clients, died in November 2006 of ovarian cancer at the age of 55.

Michele is best known for the litigation bearing her name that resulted in a ruling by the New York Court of Appeals requiring police to bring suspects before a judge for arraignment within 24 hours of arrest. The case, People ex rel. Maxian on behalf of Roundtree v. Brown, illustrated her creative determination to resolve a problem. It resulted from daily habeas corpus petitions Michele filed on behalf of 9,000 people arrested in New York City without warrants between January 13 and April 20, 1990. In each case filed, she asked just one question: "Why haven't you released these people yet?"

She began her career as an attorney with the Legal Aid Society and rose to become the Attorney-in-Charge of the Criminal Defense Division. Michele led the Society's Special Litigation Unit from 1988 to 1998, and returned to that position in 2002. There, she litigated a variety of civil rights issues on behalf of criminal defendants, including cases that guaranteed the privacy of attorney-client interviews for prisoners, and improved the conditions under which newly-arrested persons were held while awaiting arraignment. In 2004, she successfully challenged the City's prolonged detention of protestors arrested during the Republican National Convention.

Michele once described her love for criminal defense work, "the ultimate issue involved--whether someone is in jail or free--is the most important issue that any lawyer can handle." Her last client, for whom she won a prison disciplinary issue, wrote in a letter, "I am writing to say thank you, because you're the best lawyer I ever had and I wish you had my criminal case."

Michele was a woman of creativity, compassion, vision, and ceaseless determination to correct injustice. Her passion to fight for the freedom of her clients helped many. She is greatly missed by all of us who knew her and who had the good fortune to work with her.

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cabbage) as a punishment for misconduct by mentally ill inmates; eliminating isolated confinement of prisoners with serious mental illness in cells that have solid steel doors that severely isolate and restrict communication; and improving suicide prevention assessments to be required upon admission to the SHU.

The settlement also requires DOCS and OMH to provide increased mental health treatment, including:

- ✓ 405 new residential program beds for prisoners with serious mental illness (in addition to 310 residential mental health programs beds which the state instituted after the litigation commenced);
- ✓ 215 "Transitional Intermediate Care Program" beds for prisoners with mental illness in general population;
- ✓ 90 additional Intermediate Care Program beds for prisoners with mental illness who cannot tolerate the prison general population;
- ✓ A 100-bed RMHU, which will provide four hours per day of out-of-cell programming for prisoners with serious mental illness who would otherwise be in SHU;
- ✓ An additional 20 psychiatric hospital beds for prisoners in need of acute care; and
- ✓ Universal and improved mental health screening of all prisoners at admission to prison.

The settlement's provisions for the review and reduction of disciplinary sentences of inmates with serious mental illness include the following:

- ➳ A One-Time Review of Previously-Imposed SHU Time: In order to address the historical accumulation of large SHU sentences and meet the goal of reducing the time inmates with mental illness are housed in restrictive environments, the settlement requires that all inmates with serious mental illness have their SHU sentences reviewed by central office staff (OMH and DOCS personnel appointed by the Commissioners) for diversion from SHU and for SHU time cuts.

- ➳ Automatic Review of New SHU Sentences: All disciplinary determinations will automatically be reviewed by the Superintendent and OMH if mental health is at issue in a disciplinary hearing and an inmate receives a SHU sanction of greater than 60 days or an accumulation of 120 days or longer of SHU or keeplock confinement.

- ➳ Time Cuts: At least once every three months, inmates will have their SHU time reviewed for possible time cuts by a Case Management Committee ("CMC") composed of DOCS and OMH staff.

- ➳ Case Management Committees (CMC) Expansion: These committees currently exist in Level One OMH facilities for the purpose of monitoring and making recommendations for time cuts, privileges, and mental health treatment for inmates in SHU. Under the settlement agreement, all OMH Level Two facilities will now have CMCs. Inmates in keeplock housing units serving more than 60 days of confinement time will also be subject to CMC review.

- ➳ Reviews of SHU Confinement: SHU penalties will be reviewed at least every 90 days to see if the penalty is consistent with both mental health treatment and safety and security requirements. The settlement agreement states a goal of moving inmates with serious mental illness from more restrictive to less restrictive environments and creating significant reductions in housing this population in restrictive environments.

The reform of DOCS's disciplinary process required by the settlement includes:

- ❑ A presumption against bringing disciplinary charges for incidents of self-harm, threats of self-harm, and related issues: The settlement calls for a presumption against pursuing these charges and only in rare circumstances can an inmate receive SHU or keeplock time for self-harming behavior or verbally reporting intent to self-harm.

- ❑ Informational Reports: In place of some Misbehavior Reports, DOCS will use informational reports that will not result in a penalty of SHU or keeplock time in various residential programs. This system is currently in place in the Behavioral Health Units ("BHUs").

- ❑ Refusals of Treatment or Medication: Misbehavior Reports will not be issued for an inmate's refusal of medication or treatment, although an inmate-patient may be subject to discipline for refusing to go to a location where treatment is provided or medication is dispensed.

- ❑ Limits on Restricted Diet: The restricted diet cannot be used as punishment for inmates with serious mental illness except for specified safety and security reasons, and even in those cases, the restricted diet cannot be imposed for more than seven days.

- ❑ SHU Mental Health Assessment and Suicide Prevention Screening: These will take place within one day of admission into SHU.

The settlement also reforms DOCS's and OMH's use of observation cells. Under the settlement, inmates can be held no longer than four days in an observation cell. If an inmate is held more than seven days, OMH needs to consult with a clinical director or designee. Constant 24-hour supervision of such cells is mandated, amenities for inmates in observation are improved, and daily clinical contact is required.

The new state budget provides money to carry out the State's commitments in the settlement agreement. These funds approximate over $50 million for construction costs, $2 million for additional OMH staffing for the 2007-2008 year (to grow to $9 million when construction is complete), and nearly $2 million for additional DOCS staffing for the 2007-2008 fiscal year.

According to Betsy Sterling of Prisoners' Legal Services: "The settlement provisions require the commitment of high-level officials in both of the state agencies to involvement and to oversight of changes and reforms in the prison mental health system. We expect this commitment of the leadership to drive the entire system forward with long overdue and necessary change."

There are approximately 8,000 inmates in DOCS's custody with mental illness, or twelve to thirteen percent of the total inmate population. According to OMH, approximately 21% of those inmates suffer from schizophrenia and other psychotic disorders, 23% have mood disorders, and 10% have anxiety disorders. During the course of the litigation, the Plaintiff's expert estimated that 60% of all inmates in SHU in OMH Level One prisons were on the active OMH caseload.

Nina Loewenstein of Disability Advocates, Inc. stated: "This settlement will greatly enhance the care and treatment of every prisoner with serious mental illness in New York prisons and, once the treatment beds promised in the settlement are completed, significant numbers of prisoners with serious mental illness will be diverted from SHU into programs providing treatment and programming up to four hours a day."

Cliff Zucker, Executive Director of Disability Advocates, said: "This landmark settlement will ensure that prisoners with serious mental illness receive needed treatment and are not confined under inhumane conditions. Moreover, mental health staff, correctional officers, prisoners, and the public will

benefit from the increased safety and stability provided by making mental health treatment available to those in need."

At a court conference held on April 27, 2007, Judge Lynch stated: "[h]owever justified the conditions in SHUs might be as a matter of discipline and security, they almost were guaranteed to worsen the mental condition of just about anyone but certainly those with vulnerable psyches … greater attention should probably be paid to the problem of extremely lengthy SHU confinement even to those who are not mentally ill."

This case was litigated on behalf of inmates with mental illnesses case by Disability Advocates, Inc., the Prisoners' Rights Project of the Legal Aid Society, Prisoners' Legal Services of New York, and the law firm of Davis Polk & Wardwell.

On April 24, 2007, the Albany Times Union published an editorial about the upcoming settlement. We reprint it below:

Justice At Last: Editorial, Albany Times Union, April 24, 2007

Mark the date. This coming Friday is destined already to be long remembered for the cruelly overdue treatment that now will be extended to the 8,000 or so New Yorkers who must battle the horrors of severe mental illness in the most inappropriate place of all. That's when U.S. District Judge Gerard Lynch of New York City plans on signing an agreement expanding mental health services for inmates of New York's prisons. More staff will be available in the prisons, which will enable mental health professionals to be ever vigilant about inmates prone to try to hurt, or even kill, themselves.

Those same inmates, already enduring an all too often dehumanizing existence, will be spared at last from such sadistic indignities as being stripped naked and placed in Plexiglas-walled cubicles when they suffer psychotic episodes, or being forced to subsist on a grotesque diet of bread and cabbage as a form of punishment.

The inmates doing the hardest time of all, 23-hours-a-day solitary confinement in what's known as The Box, will receive between two and four hours a day of therapy outside their cells. In a more humane prison system, of course, mentally ill inmates would be spared the horrors of The Box altogether. That would be the law now, in fact, if Governor George Pataki hadn't vetoed such legislation in his final months in office.

A daily respite of therapy for these inmates comes only after five years of litigation and two weeks of a non-jury trial before Judge Lynch. Disability Advocates, a not-for-profit group in Albany, went to court in an effort to devote more resources to people so desperately in need of them. The resolution order by Judge Lynch, strikingly enough, was readily accepted by the state Office of Mental Health, which was a defendant in the lawsuit along with the state Department of Correctional Services. That, along with Governor Spitzer securing $60 million more to treat mentally ill inmates, represents an enormous change in state policy from the Pataki era.

Words like these, from Sarah Kerr, a lawyer for the Prisoners' Rights Project of the Legal Aid Society in New York City, speak volumes: "We believe there's real commitment now in the leadership of the state agencies that will result in true reform for mentally ill prisoners."

How encouraging it is to think that times are changing for some of the most vulnerable people of all, for whom times bad and good passes at a torturously slow pace.

NEWS AND BRIEFS

Parole: Making An Effort To Obtain Sentencing Minutes

In the last issue of ***Pro Se***, we reported the case of Standley v. New York State Division of Parole, 825 N.Y.S.2d 568 (3d Dep't 2006). Standley was one of a number of decisions in recent years to hold that the Division of Parole was failing to meet its legal obligation to consider the recommendations of sentencing courts when deciding whether to grant or deny parole.

Such recommendations, if they exist, would be contained in your sentencing minutes, the transcript of what was said at your sentencing hearing. Criminal Procedure Law § 380.70 requires sentencing courts to deliver the sentencing minutes to DOCS so that they will be available for parole hearings. Courts, however, often fail to follow that rule. As a result, DOCS's files frequently do not contain the sentencing minutes and thus, Parole does not consider them.

In light of the recent court decisions, the Division of Parole has advised PLS that, beginning last Fall, Parole staff in correctional facilities have begun requesting the sentencing minutes of inmates scheduled to appear before the Parole Board so that the Board may consider the recommendations, if any, of the sentencing court.

Parole also advises PLS that when an inmate raises an argument in an administrative appeal or an Article 78 proceeding regarding his/her sentencing minutes, Parole staff check to see if the minutes were available and considered by the Board. If staff learns they were not available, they obtain copies from the sentencing court and check to see whether the court made any recommendation with respect to sentencing. If so, then the inmate is given a new Board appearance, at which the Board can properly consider the recommendation of the court.

Practice pointer: *If you believe your sentencing court made a recommendation with respect to the length of your sentence which should be considered by the Parole Board, you should check with your Inmate Records Coordinator and/or your Parole Officer at your correctional facility to ensure that your files contain a copy of your sentencing minutes. If not, you should ask the Division of Parole to obtain a copy from your sentencing court.*

New York's Persistent Felony Offender Statute: Unconstitutional?

Seven years ago, in Apprendi v. New Jersey, 530 U.S. 446 (2000), the Supreme Court held that a sentencing scheme which allows a judge, rather than a jury, to decide "any fact that increases the penalty for a crime" is unconstitutional, in violation of the Sixth Amendment's right to a trial by jury.

Ever since then, the question has been raised: Does New York's persistent felony offender statute, Penal Law § 70.10, violate the Apprendi rule?

The question arises because Penal Law § 70.10 allows a sentencing court to increase the penalty for any felony to up to 25 years to life if it finds that the offender is a "persistent felony offender" (*i.e.*, has been previously convicted of two or more felonies), and it is "of the opinion that the history and character of the [offender] and the nature and circumstances of his criminal conduct indicate that extended incarceration and life-time supervision will best serve the public interest." Further, New York's Criminal Procedure Law § 400.20 specifies that it is the court--not a jury--that must make these factual findings.

The first finding the court must make to enhance a sentence under the persistent felony offender rule--whether the offender has two or more prior felonies --is permissible under Apprendi. That is because the Apprendi Court explicitly created an exception for enhancements based solely on recidivism.

The second finding that the statute requires the court to make, however--whether the history and character of the offender and the nature and circumstances of his criminal conduct merit an

enhanced sentence--appears to be exactly the kind of "fact" which, under Apprendi, must be decided by a jury, not a judge.

Nevertheless, until recently, both state and federal courts had upheld the statute against Apprendi challenges.

For example, in People v. Rosen, 96 N.Y.2d 329, (2001), cert. denied, 534 U.S. 899, the New York Court of Appeals flatly rejected an Apprendi challenge to the persistent felony offender statute; and in Brown v. Greiner, 409 F.3d 523 (2d Cir. 2005), the Second Circuit Court of Appeals reversed a judgment granting a writ of habeas corpus to a petitioner sentenced pursuant to the persistent felony offender statute.

In both of those cases, the courts reasoned that the type of factual finding that § 70.10 requires judges to make was different from the type of fact finding that was at issue in the Apprendi case.

The Brown and Rosen cases, however, were premised solely on the Supreme Court's decision in Apprendi. In the years following Apprendi, the Supreme Court issued additional decisions strengthening and clarifying the Apprendi rule.

In Blakely v. Washington, 542 U.S. 296 (2004), the Supreme Court repeated that a judge may not enhance a criminal defendant's sentence based on any facts that were not included in either the findings of the jury verdict, or the admissions contained in a defendant's guilty plea. Blakely also made it clear that this rule must be followed even if the facts at issue do not relate to the charged crime, but instead, as with the findings required by New York's statute, relate solely to generalized information about the history and character of the defendant.

Nevertheless, in 2005, New York's Court of Appeals rejected renewed challenges to the persistent felony offender statute in People v. Rivera, 5 N.Y.3d 61 (2005). In Rivera, the Court held that the findings required under PL § 70.10 regarding the defendant's history and character "fall squarely within the most traditional discretionary sentencing role of the judge" and were therefore not subject to the Apprendi rule. Rivera, 5 N.Y.3d at 69.

Although Rivera seemed at odds with Blakely, many thought that it sounded the death knell for further challenges to PL § 70.10.

One more Supreme Court decision, however, is providing renewed support for continued challenges to PL § 70.10. In Cunningham v. California, --- U.S. ----, 127 S.Ct. 856 (2007), the Court invalidated California's determinate sentencing law, which authorized an enhanced "upper term" if the sentencing judge found "circumstances in aggravation." 127 S.Ct. at 860. In doing so, the Court rejected reasoning which was identical to that used by the New York Court of Appeals in Rivera.

The Cunningham decision, in turn, has moved at least one New York federal district court to reject Rivera and conclude that PL § 70.10 can no longer stand.

In that case, Portalatin v. Graham, 478 F. Supp 2d 385 (E.D.N.Y. 2007), the Defendant, Carlos Portalatin, was convicted of a July 2002 car jacking in Williamsburg, Brooklyn. He had previous convictions for attempted burglary and attempted criminal sale of a controlled substance. At Mr. Portalatin's sentencing in April 2003, the state judge made several factual findings, including: Mr. Portalatin had failed to take advantage of drug treatment opportunities; he was inclined to "prey upon others"; and he could not control his problems. Mr. Portalatin received a sentence of 18 years to life in prison.

Upon Mr. Portalatin's challenge to his sentence in federal court, Eastern District Court Judge John Gleeson held that the statute could not comply with the Sixth Amendment as long as it required judges to make findings of fact before issuing an enhanced sentence. "It does not matter what type of fact finding a judge makes," Judge Gleeson wrote. "If a finding is 'legally essential' to the enhanced sentence, the Sixth Amendment is violated unless that fact is either admitted by the defendant or found by a jury beyond a reasonable doubt." In reaching this decision, Judge Gleeson took pains to emphasize "the deference federal courts must

always accord to state courts' interpretations of state statutes." Id at 17. Nevertheless, Judge Gleeson was compelled to reject the Court of Appeals' decision in Rivera. The court granted Mr. Portalatin's writ of habeas corpus and ordered the state Supreme Court to vacate the sentence and re-sentence the Defendant.

Practice pointer: *Question: Does any of this apply to me? Answer: Maybe. If you are serving an enhanced sentence as a persistent felony offender, and your case is still on direct appeal, you can argue, as Mr. Portalatin did, that the rationale of Cunningham fatally undermines the Court of Appeals' decision in Rivera and that your enhanced sentence violates your Sixth Amendment rights.*

If your direct appeal became final after Blakely was decided (on June 29, 2004) you may be able to argue in a federal habeas corpus petition that your state court decision constituted an unreasonable application of the Apprendi rule, as interpreted by Blakely.

If your direct appeal became final before Blakely was decided, however, it is unlikely that you will be able to get the same relief as Mr. Portalatin did in federal court. This is because, under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), a petitioner cannot get federal relief unless he shows that the state court's decision was an unreasonable application of Apprendi. Given the Court of Appeals' decision in Rosen, New York courts that rejected Apprendi challenges to PL 70.10 prior to Blakely, were probably not acting unreasonably. Further, the Second Circuit has held that neither Apprendi nor Blakely's modification of Apprendi apply retroactively (i.e., to cases decided before they were decided). See Coleman v. United States, 329 F.3d 77 (2d Cir. 2003); Carmona v. United States, 390 F.3d 200 (2d Cir. 2004).

That said, these questions are complicated and have not yet been fully resolved by the courts. If you have been convicted as a persistent felony offender, you should explore your options with your defense attorney, regardless of when you were convicted.

FEDERAL CASES

Court Finds No Excessive Force In Cell Extraction

Allaway v. McGinnis, 473 F.Supp.2d 378 (W.D.N.Y. 2007)

Plaintiff Allaway sued a number of correction officers ("COs") over an incident that occurred at Southport on May 28, 1999.

According to the court, there was a videotape of the incident. The videotape showed that Allaway was ordered to come out of his outdoor exercise pen. He refused. An officer asked him several times to come out "the easy way," and assured him that nothing would happen to him if he came out voluntarily. He did not respond. A six-man extraction team wearing helmets and body armor then approached the pen. Allaway was given a last chance to come out voluntarily, but he again refused. As an officer began to unlock the door, Allaway turned to the door and, according to the court, "appear[d] to tense his body as if preparing either to defend himself or to charge." As soon as the door opened, Allaway lunged toward the doorway. He was met by the lead officer wearing a transparent Plexiglas shield on his arm. The officers then entered the pen, wrestling Allaway to the ground.

From that point on, the court wrote, Allaway was surrounded by the officers. He "appear[ed] to continue to struggle even after he [was] on the ground." The officers, meanwhile, tried, "with some difficulty," to get his hands behind his back and handcuff him.

During this struggle, one officer could be seen cocking his right arm back a short distance and punching Allaway four times.

Eventually Allaway was subdued, placed on a gurney, and removed from the pen.

The court held that the force used was not excessive.

According to the court: "Plaintiff's own refusal to come out of his exercise pen necessitated the use of some force, and that force was used only after plaintiff ignored repeated pleas to come out 'the easy way.' When the door to his pen was opened, plaintiff not only resisted the officers, but charged toward them in an apparent attempt either to get past them or simply to attack them, thus adding to the need to use force to subdue plaintiff."

Nor did the four punches delivered by the correction officer amount to excessive force. According to the court, the officer described them as "softening blows" administered "for the sole purpose of getting plaintiff to comply with the officers' orders." These "were not wild, thrashing, unrestrained blows," continued the court, " but were delivered in a deliberate, methodical manner from a relatively short distance, while plaintiff was still struggling and resisting the officers' attempts to place mechanical restraints on him." Therefore, the court concluded, "no rational fact finder could conclude that these four punches [constituted] an Eighth Amendment violation."

The court dismissed the Plaintiff's case.

***Practice pointer**: This case was decided on "summary judgement." Summary judgment is a procedural mechanism which allows a judge to decide a case if the facts are not in dispute and "the record taken as a whole could not lead a rational [juror] to find" in favor of the party against whom summary judgment is sought. See Federal Rule of Civil Procedure 56(c).*

Here, the Defendants moved for summary judgment. When a motion for summary judgment is made, the adverse party--in this case, the Plaintiff--"must set forth specific facts showing that there is a genuine issue for trial." If the adverse party does not so respond, the court has to accept the pleadings and affidavits of the moving party--here, the Defendants--as true.

The Defendants in this case submitted a sworn affidavit from the CO who delivered the four punches, stating that they were merely "softening blows." The Plaintiff never responded to the Defendants' motion and, thus, never contested that assertion. The court, therefore, had to accept the CO's characterization as a fact.

STATE CASES

Disciplinary Cases

Substantial Evidence: Inmate Not Guilty of Forging Grievance Forms/Harassing Staff

Matter of Constantino v. Goord, 831 N.Y.S.2d 719 (2d Dep't 2007)

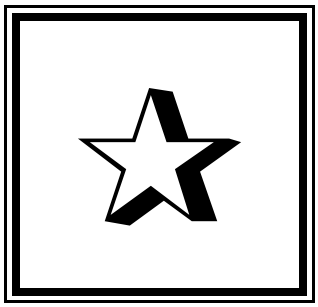
The Petitioner was charged in separate Misbehavior Reports with forging, counterfeiting or altering official documents, and harassing and obstructing staff. The first charge was brought against him after he created a personalized grievance form which he then sought to have copied in the facility library because, he said, there was a shortage of official forms. The second charge came about after an officer told the Petitioner to move his dinner tray, and the Petitioner complied. The officer then asked the Petitioner what the problem was with the tray. The Petitioner did not immediately answer, but instead gave the correction officer what he later described as an "inquisitive look." The correction officer then walked away.

The court dismissed both charges. With respect to the first charge, the court noted that the terms "forge" and "counterfeit" carry with them an element of "intent to defraud or deceive" and that the administrative record contained no evidence that the Petitioner customized his grievance form with that intent. Indeed, the court noted, the Hearing Officer showed that he understood that the Petitioner did not intend to deceive anyone: he wrote in his findings that the Petitioner had altered the form "solely for [his] use in submitting grievances." Although the court noted that the word "alter" could conceivably embrace what the

Petitioner did--indeed, the court noted by filling out any form a person is, in a sense, altering it--the word as it appears in the disciplinary rule the Petitioner was charged with violating (Rule 116.12) "has rational meaning only by reference to the words with which it is associated." Thus, the word "alter" in Rule 116.12 carries the same intent to defraud or deceive as do its companion words "forge" and "counterfeit." Since the record lacked any evidence of any intent on the Petitioner's part to defraud or deceive anyone, the charge was not supported by substantial evidence.

With respect to the second charge, the court found that the evidence was simply insufficient to establish that the Petitioner either harassed the correction officer or obstructed or interfered with him. At the hearing, the Petitioner testified that he was merely listening for his cellmate to tell him what the problem was with the tray. The correction officer then walked away to resume his duties. Under the circumstances, the court held, "the findings that the petitioner's facial expression and his momentary non-response harassed, or obstructed or interfered with the officer were not supported by substantial evidence."

***Practice pointer**: Although the court did not mention it, DOCS's grievance regulations specifically provide that if an official grievance form is not available, a grievance "may be submitted on plain paper." 7 N.Y.C.R.R. 701.5. Thus, not only was the Petitioner's behavior in this case not in violation of any disciplinary rule, it appears to have been specifically authorized by DOCS's grievance rules.*



DOCS's Regulations Adequately State Range of Sanctions for Disciplinary Misconduct, Says Court

Matter of Allah v. Selsky, 829 N.Y.S.2d 744 (3d Dep't 2007)

Correction Law § 138(3) states that "[f]acility [disciplinary] rules shall state the range of disciplinary sanctions which can be imposed for violation of each rule."

In this case, an inmate was charged with violating facility correspondence procedures, and smuggling and possessing contraband, after it was discovered that he sent a letter to an inmate with whom he did not have correspondence permission, by using the inmate's furlough address. He was found guilty of two of the three charges in a Tier III hearing and sentenced to 52 days of keeplock with a corresponding loss of packages, telephone privileges, and commissary privileges. He then commenced an Article 78 proceeding in which he argued, among other things, that DOCS's Directive No. 4422, which outlines the policies and procedures of the Inmate Correspondence Program, violated Correction Law § 138(3) by failing to state a range of disciplinary sanctions that can be imposed for violating the rule.

The court disagreed. It noted that the Petitioner was charged with violating Disciplinary Rule 180.11 (7 N.Y.C.R.R. 270.2[B][26][ii]). That rule requires that inmates follow instructions from staff regarding correspondence procedures. He was not charged with violating the rules of the correspondence program itself. Moreover, the court noted, the sanctions for violating the disciplinary rules are set forth in 7 NYCRR 254.7, and the penalty imposed on the Petitioner was authorized by that regulation.

With respect to the hearing itself, the court noted that the Petitioner admitted that he wrote the letter and sent it to the other inmate at an outside address without having obtained permission to correspond with him. This, together with the Misbehavior Report, and the letter and testimony of

the inmate who received the letter, it found, provided substantial evidence to support the determination of guilt.

***Practice pointer**: Seven N.Y.C.R.R. 254.7 provides the following range of potential penalties in a Tier III hearing:*

- *(i) counsel and/or reprimand;*
- *(ii) loss of one or more specified privileges for a specified period, including correspondence and/or visiting privileges with a particular person, where the inmate has been involved in improper visiting or correspondence-related conduct in connection with that person;*
- *(iii) confinement to a cell or room continuously or to a Special Housing Unit continuously or on certain days during certain hours for a specified period;*
- *(iv) a restricted diet;*
- *(v) restitution for loss or intentional damage to property;*
- *(vi) forfeiture of money confiscated as contraband;*
- *(vii) loss of a specified period of good time subject to restoration by a Time Allowance Committee;*
- *(viii) the imposition of one work task per day other than a regular work assignment for a maximum of seven days, excluding Sundays and public holidays, to be performed on the inmate's housing unit or other designated area; and*
- *(ix) where applicable, removal from the elected Inmate Grievance Resolution Committee ("IGRC"), and/or loss of the privilege of participating as a voting member of the IGRC for a specified period of time.*

The rule also requires that a mandatory five-dollar surcharge be assessed against any inmate found guilty in a Tier III hearing.

Inmate Loses Challenge to a Disciplinary Hearing Based on Denial of Witnesses

Matter of Williams v. Goord, 826 N.Y.S.2d 522 (3d Dep't 2007)

The Petitioner was charged in a Misbehavior Report with assault on staff, violent conduct, and refusing a direct order. Following a Tier III disciplinary hearing, he was found guilty of the charges. After the finding was affirmed on administrative appeal, he brought an Article 78 proceeding.

The court affirmed the charges. The Misbehavior Report, the testimony of its author and another correction officer, the Unusual Incident Report, and the Use of Force Report, the court found, provided substantial evidence.

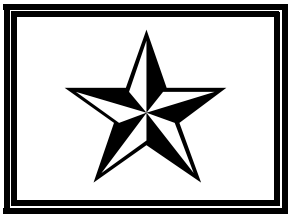
The court also rejected the Petitioner's contention that he was denied the right to call relevant witnesses. Although several inmates refused to testify, the record reflected that each inmate gave a reason why he did not wish to testify and wrote his reason on a refusal form. The court found that that constituted "an adequate explanation for the witnesses' refusal" and that, since they had not previously agreed to testify, the Hearing Officer was not required to personally interview them. The court also found no error in the Hearing Officer's denial of the Petitioner's request to call ten correction officers as witnesses, as the record indicates that their testimony would have been irrelevant or redundant to the testimony of the officers who did testify.

***Practice pointer:** Inmates have a conditional right to call witnesses to testify at a Superintendent's Hearing. The right is conditioned on a finding that calling the witness would not threaten institutional safety or correctional goals and that the testimony is neither irrelevant nor redundant. See 7 N.Y.C.R.R. 254.5 (a). What happens, however, when the witness would neither threaten institutional security or be irrelevant or redundant--but simply refuses to testify?*

Inmates have neither the right (nor the ability) to force a reluctant witness to testify at a disciplinary hearing.

New York courts have held, however, that due process requires that when a requested witness refuses to testify, the Hearing Officer must at least try to determine: 1) why the witness is refusing to testify; and 2) that the reasons are genuine.

If the witness previously agreed to testify and then changes his mind, courts have held that the Hearing Officer must personally interview the witness to determine why. Matter of Barnes v LeFevre, 69 NY2d 649 (1986). If the witness did not previously agree to testify (as in this case), courts have held that it is sufficient for the Hearing Officer to conduct an inquiry regarding the refusal through a correction officer. Matter of Rossi v Portuondo, 716 N.Y.S.2d 116 (3d Dep't 2000), lv. denied 96 N.Y.2d 706 (2001). See Matter of Hill v. Selsky, 795 N.Y.S.2d 794 (3d Dep't 2005) for a thorough review of the law of these so-called "witness refusal" cases.



Re-Hearing, Not Expungement, Was Proper Remedy for Failing to Allow Inmate to Comment on Evidence Against Him

Matter of Cahill v. Goord, 827 N.Y.S.2d 336 (3d Dep't 2007)

The Petitioner was charged with conspiring to escape and with issuing threats. The charges stemmed from certain letters that he allegedly wrote outlining a planned escape. At his disciplinary hearing, he requested permission to review the letters. The Hearing Officer refused, and later found the Petitioner guilty of the charges. Following an unsuccessful administrative appeal, the Petitioner commenced an Article 78 proceeding, arguing that the Hearing Officer erred in denying him access to the letters.

The lower court found in the Petitioner's favor and ordered a re-hearing. The Petitioner appealed, arguing that the court should have annulled the hearing and expunged the charges, rather than order a re-hearing.

The Appellate Division affirmed the lower court. The court held that although the Hearing Officer had erred in failing to allow the Petitioner to review his letters, that error constituted only a violation of state regulations, not of the Petitioner's constitutional rights. Therefore, the court held, annulment of the charges was not required, and an order for a re-hearing was not inappropriate.

Practice pointer: *New York courts have held that annulment of a disciplinary hearing and expungement of the charges--instead of a re-hearing--is only required when: (1) the disciplinary determination is not supported by substantial evidence; or (2) there has been a violation of one of the inmate's "fundamental due process rights" to which inmates are entitled at a disciplinary hearing, as spelled out by the Supreme Court in Wolff v. McDonnell, 418 U.S. 539 (1974). See Hillard v. Coughlin, 593 N.Y.S.2d 573 (3d Dep't 1993) lv. denied 82 N.Y.2d 651.*

The "fundamental due process rights" to which inmates are entitled at a Superintendent's Hearing under Wolff include: advance written notice of the charges; a statement from the Hearing Officer regarding the evidence relied upon and the reasons for the disciplinary action; and the right of the inmate to call witnesses and present documentary evidence in his defense "when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals."

In this case, the court reasoned that allowing the Petitioner to review the letters that he was alleged to have written did not violate his right to present evidence in his defense, because the Hearing Officer had already seen the letters. Instead, the court held, the Hearing Officer's

actions merely violated the Petitioner's right to reply to the evidence against him. That right is granted to inmates by DOCS's Regulations--See 7 N.Y.C.R.R. 254(a)(3)--but it is not explicitly required by Wolff. Since only the Petitioner's regulatory rights were violated, not his constitutional rights, the court reasoned, a re-hearing was not inappropriate.

There are some additional circumstances in which a court should generally annul a hearing instead of ordering a re-hearing. In Hilliard, for instance, the court noted that in some cases, basic fairness may require expungement even when the error committed was not of constitutional dimension. As examples, the court cited cases in which the inmate had already served a substantial period of his penalty, or in which there had been a significant lapse of time since the incident and important witnesses or other evidence were no longer available.

The inmate in this case was represented by Prisoners' Legal Services.

Twenty-One-Month Delay in Issuance of Misbehavior Report Voids Charges

Matter of Loret v. Goord, 832 N.Y.S.2d 717 (4th Dep't 2007)

The Petitioner was charged with and found guilty of conspiring to possess alcohol or intoxicants, conspiring to possess drugs, and engaging in inmate telephone abuse. He filed an Article 78 proceeding, alleging that the hearing in which he was found guilty was in violation of his due process rights due to the fact that the Misbehavior Report was issued 21 months after the commission of the acts underlying the charges.

The court agreed.

Seven N.Y.C.R.R. 251-3.1(a) provides that "[e]very incident of inmate misbehavior involving danger to life, health, security or property must be reported, in writing, as soon as practicable."

In this case, a number of significant events occurred during the 21-month period between the time of the acts underlying the disciplinary charges and the date on which the Misbehavior Report was issued--including the Petitioner's trial and conviction for an unrelated crime. Still, the court noted, there was nevertheless an unexplained seven-month delay between the date of the conviction and the issuance of the Misbehavior Report. The court concluded that annulment, rather than a re-hearing, was required, "based on the lengthy and unexplained delay in the issuance of the Misbehavior Report, in violation of petitioner's due process rights."

Practice pointer: *An unjustified delay in filing a Misbehavior Report will not generally be grounds for reversal of a disciplinary hearing--unless you can show that you were "prejudiced" by the delay. For example, in this case, the court cited the case of Di Rose v. New York State Dept. of Correctional Servs., 714 N.Y.S.2d 161 (3d Dep't 2000) appeal dismissed 96 N.Y.2d 850. In Di Rose, there was more than a year's unexplained delay between DOCS's completion of the investigation that led to the disciplinary charges and the filing of the Misbehavior Report. The court noted that "due process is not violated by delay in the absence of prejudice." It found, however, that the inmate had been prejudiced as the result of the unavailability of various witnesses through death and release on parole.*

"Prejudice," in this context, means that the delay has injured the inmate's ability to defend himself--by, for example, making important witnesses or evidence unavailable.

Here, the court does not explicitly state how the Petitioner was prejudiced by the 21-month delay in the filing of the report. It may have concluded that with such a lengthy delay, prejudice could be assumed.

Inmate Waived Claim That He Was Not Given Urinalysis Test Result Form; Failed to Show Prejudice

Matter of Gray v. Selsky, 829 N.Y.S.2d 271 (3d Dep't 2007)

The Petitioner was charged with violating the urinalysis testing rule. According to the Misbehavior Report, he was ordered to provide a urine sample but was unable to do so within three hours. After being informed that his inability to provide a sample would be considered a refusal subject to discipline, the Petitioner still did not produce a sample. A Hearing Officer found him guilty and that determination was upheld on administrative appeal.

In a subsequent Article 78 proceeding, he argued that he was denied documentary evidence because he asked for the request for the urinalysis test form but was never given a copy. Although the Petitioner did request that document and the Hearing Officer stated that he would provide it to him, he never did so. However, the court held, by his failure to "remind the Hearing Officer before the close of the evidence, even after being twice asked if he had any further evidence or documents to be considered, petitioner waived this objection." In any event, the court concluded, the Petitioner has not established that he was prejudiced as a result of not receiving a copy of this document.

Practice pointer*: Often, as both this case and the two above suggest, the key to getting a court to care about a procedural error in a disciplinary hearing is to show that the error "prejudiced" you--i.e., affected your ability to defend yourself. Generally, courts are not inclined to reverse disciplinary cases--even where there was a clear procedural error--if they conclude that the error was "harmless," or did not affect the outcome of the case.*

Parole

Court Reverses Parole Denial Based Solely on Seriousness of Crime

Matter of Rios v. New York State Division of Parole, 15 Misc.3d 1107(A) (Unreported Disposition) (N.Y. Sup Ct., March 12, 2007)

The Petitioner, a 39-year-old inmate serving a term of 18 years to life for a murder committed when he was 19 years old, appeared before the Parole Board for the second time in 2006.

He had made good use of his twenty years in prison. He obtained Bachelor's and Associate's degrees in business administration. He had been heavily involved in volunteer activities in his facility's American Legion post--so much so, that a retired DOCS's lieutenant submitted a letter on his behalf, expressing his belief that the Petitioner had obtained "a new meaning in his life" and would "be able to carry this with him while leading a productive life." Two correctional sergeants submitted letters attesting to his positive adjustment and his volunteer work in prison. He had also worked in a program jointly run by the Department of Motor Vehicles ("DMV") and DOCS. His supervisor in that program wrote that he was "extremely helpful and knowledgeable" about the procedures at DMV. According to her, the Petitioner was a team leader whose responsibilities included teaching new procedures to his fellow workers, and he "does so efficiently and thoroughly" and is "extremely cooperative and respectful." Another supervisor had stated that the Petitioner's "ability to interact respectively with a wide range of people and personalities has often turned difficult situations into positive ones." She concluded that the Petitioner's "excellent customer service skills and work efforts…will surely [be an

asset] in whatever position he might hold."

At his hearing, he admitted his guilt in the murder and expressed his remorse, stating:

> What I did was a cowardly act. At this point I don't try to take that away. I can't express to you exactly what emotion I was feeling on that day except for fear, but I know now it was a cowardly act. It takes [more] bravery not to use violence than to use violence.

When asked how he had changed since he had committed the crime, he stated:

> I have thought about that over the years also, and basically I'd like to think of myself as more mature. I'm also sadder inside because I have done something I can't take back. I have to live with that, and some day I'm going to face my Creator, and I'm going to have to make accounts for what I did, and that's a day I fear.

The Board nevertheless denied parole. Although it noted the Petitioner's accomplishments, it held: "[W]hen we weigh the fact that you took two lives against your achievements, we believe release at this time is not in the public interest."

The Petitioner appealed. The court reversed.

The court began its analysis by reviewing the law that applies to Parole Board hearings. It noted the oft-repeated language that release on parole is a discretionary function and the Board's determination should not be disturbed by a court unless it is shown that it was irrational "bordering on impropriety" and thus, arbitrary and capricious. It also reviewed Executive Law § 259-i with which decisions of the Parole Board must comply. Section (2)(c) of that statute states:

> 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 law.

It then states that the Board must consider the following factors in determining whether the above criteria has been met:

> (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…; and
> (v) the written statement of the crime victim or the victim's representative, where the crime victim is deceased or is mentally or physically incapacitated.

Additionally, the court noted, Section (1)(a) of Executive Law § 259-i states that where the sentencing court has set the minimum period of incarceration, the Parole Board must also take into account:

> (i) the seriousness of the offense with due consideration to the type of sentence, length of sentence, and recommendations of the sentencing court, the district attorney, the

> attorney for the inmate, and the pre-sentence probation report, as well as consideration of any mitigating and aggravating factors, and activities following arrest and prior to confinement; and (ii) prior criminal record, including the nature and pattern of offenses, adjustment to any previous probation or parole supervision and institutional confinement.

The court then noted that "almost all of the statutory factors to be considered by the Parole Board in determining whether parole should be granted weigh in [his] favor." In light of that, the court found, "we would expect a rational explanation by the Parole Board for its decision as to why parole was nonetheless denied." Instead, the court found, "the Parole Board focused almost exclusively on the serious nature of petitioner's crime as a reason for its denial [of] parole" and that "there is a strong indication that the denial of petitioner's application was a foregone conclusion."

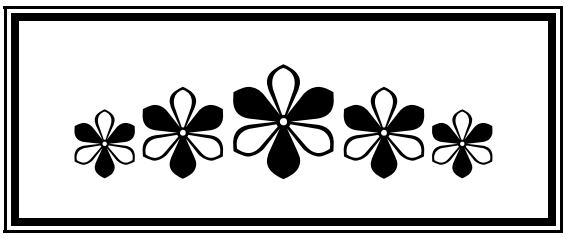
Although the Board made "passing reference" to the Petitioner's clean disciplinary record and positive programmatic efforts, it made clear that those factors, no matter how impressive, could not justify his release from prison when weighed against the seriousness of his crime. "[The] passing mention in the…decision of petitioner's rehabilitative achievements [do not] demonstrate that the Parole Board weighed or fairly considered the statutory factors where, as here, it appears that such achievements were mentioned only to dismiss them 'in light of the seriousness of petitioner's crime.'"

The court recognized that appellate courts have held that: "it is not necessary for the Parole Board…to specifically refer to each and every one of the statutory factors it considered in its decision granting or denying parole release." However, the court held, "it is unquestionably the duty of the Parole Board to give fair consideration to each of the applicable statutory factors as to every person who comes before it, and where the record convincingly demonstrates that the Parole Board did in fact fail to consider the proper standards, the courts must intervene."

The court continued:

> Here, the Parole Board, in essence, revealed in its decision its belief that the sentence which petitioner received, which provided him with the possibility of parole, was inappropriate. In so doing the Parole Board exceeded its powers; it is the role of the legislature to determine the appropriate sentences for particular crimes, and of the judiciary to determine the appropriate sentence for the particular defendant before the court. Indeed, in focusing exclusively on the petitioner's crime as a reason for denying parole the Parole Board was, in effect, re-sentencing petitioner to a sentence that excluded any possibility of parole since petitioner is powerless to change his past conduct. And, as the Appellate Division has admonished, under similar circumstances, such "re-sentencing" by the Parole Board "reveal [s] a fundamental misunderstanding of the limitations of administrative power." Citing Matter of King, 190 A.D.2d…. In short, the court concludes that the Parole Board…abdicated its responsibility to fairly consider all the relevant statutory factors in determining whether parole should be granted to petitioner and its resulting decision was arbitrary and capricious.

The court ordered the Board to hold a new hearing before a different panel.



Parole Revocation: Failure to Promptly Transfer Parole Violator to Willard Results in Release

People ex rel. James Woelfle v. Poole, 15 Misc.3d 1101(A) (Unreported case) (Sup. Ct. N.Y.Co., March 8, 2007)

The Petitioner plead guilty to various parole violation charges and was restored to parole on the condition that he complete 90 days of treatment at the Willard Drug Treatment Campus. The final revocation hearing was held on October 17, 2006, but the Petitioner was not transferred to DOCS until December 19, 2006, and did not arrive at Willard until January 10, 2007. On arrival, he refused to participate in the program, arguing that the three-month delay in transferring him had violated the terms of his plea agreement.

The court agreed. Since a parole violator does not receive credit for time served in local custody against the 90-day requirement of the Willard program, he must be transferred to the program promptly. Otherwise, he can spend far more time in custody than he bargained for. "Retention for inordinate amounts of time without exigent circumstances raises due process concerns," held the court in this case. Moreover, the court continued, it is irrelevant whether the fault lies with the local facility or with DOCS or--as here--with both. "The restraint of the parolee's liberty is the same."

Here, there was an 85-day delay between the final revocation hearing and the Petitioner's arrival at Willard. The court held that a delay of more than 40 days between the imposition of the parole requirement and transfer to Willard was unacceptable. It ordered the Petitioner be immediately released to parole supervision.

Programs

Court Affirms Revocation of Wife's Visitation Privileges

Matter of Sylvester v. Goord, 828 N.Y.S.2d 729 (3d Dep't 2007)

In 2004, an inmate's wife allegedly concealed three cell phones inside of a typewriter and mailed them to Great Meadow Correctional Facility to be used by her husband and two other prison inmates. After an investigation, her visitation privileges were revoked. She requested a hearing and Commissioner Goord affirmed the penalty. She then brought an Article 78 proceeding to challenge the result.

The court upheld the Commissioner. It noted that the Petitioner admitted that she mailed the cell phones to the facility and that the record contained confidential information indicating that the cell phones were intended to be used in connection with an escape. This, plus an investigator's testimony regarding the threats that cell phones pose to the safety and security of correctional facilities, provided sufficient evidence to support the Commissioner's determination. Her contrary testimony that she did not intend to facilitate an escape attempt but,instead, simply sought to reduce the cost of her husband's facility phone bill, the court held, "is irrelevant."

The court also rejected her assertion that, because the incident in question did not occur during a personal visit, her visitation privileges could not be revoked. The court noted that DOCS's regulations state that visitation privileges may be revoked when there is "reasonable cause to believe that such action is necessary to maintain the safety, security and good order of the facility." *See* 7 N.Y.C.R.R. 200.2(b)(2). Moreover, the court found, the regulations contain no requirement that the actions which lead to a revocation of visiting privileges take place during an actual visit.

Inmate Lacks Standing to Challenge Denial of Mother's/Sister's Visiting Privileges

Matter of Cortoreal v. Goord, 825 N.Y.S.2d 846 (3d Dep't 2007)

The visitation privileges of the Petitioner's mother and sister were revoked as a result of their involvement in supplying the Petitioner, as in the case above, with a cell phone. Here, however, unlike the case above, in which the visitor (the inmate's wife) challenged the visitation denial, here the inmate himself commenced an Article 78 proceeding challenging the revocation.

The court dismissed the case.

It noted that it has repeatedly held that an inmate does not have standing to challenge a visitor's loss of visitation privileges with him because it is their ability to visit, rather than his ability to receive visitors, that is restricted.

Practice pointer: *"Standing" is the ability of a party to demonstrate to the court sufficient connection to and harm from the law or action challenged to support that party's participation in the case. It is a prerequisite to your right to bring a case.*

Appellate Court Finds Revocation of Temporary Release Appropriate; Reverses Trial Court

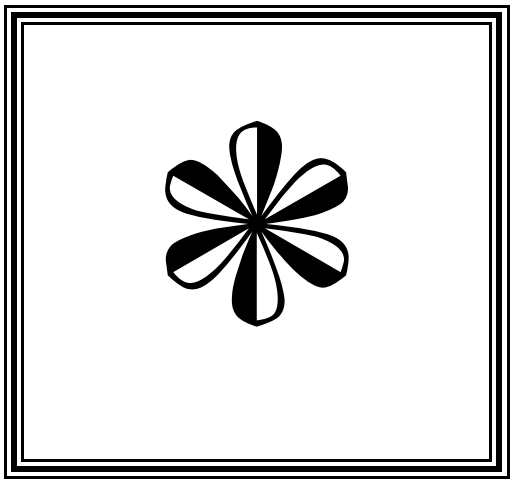
In re Marciano v. Goord, 830 N.Y.S.2d 552 (1st Dep't 2007)

The Petitioner's participation in the Temporary Release Program was cancelled and his earned eligibility and merit release date were revoked after his wife filed a report with the police that he had threatened to kill her and he admitted in a Temporary Release Committee ("TRC") hearing that he had argued with her. In a decision that we reported in the Summer 2006 edition of ***Pro Se***, a lower court reversed the TRC decision, finding that it was not supported by substantial evidence and that its conduct had violated the Petitioner's right to due process of law. The court ordered that he be reinstated to Temporary Release and that he be granted a parole hearing within ten days.

On appeal, the appeals court reversed the lower court's finding that the TRC's action was not supported by substantial evidence. It found that the wife's police complaint, coupled with the Petitioner's admissions, constituted sufficient evidence upon which temporary release could be revoked.

However, it sustained the lower court's decision to annul the TRC on procedural grounds. It noted that while an inmate does not have a right to be admitted into a Temporary Release Program, once admitted, he has a liberty interest in continued participation, which requires that he be provided with some due process before being discontinued. The required due process is afforded in DOCS's regulations, which require that an inmate be provided with at least a 24-hour notice of a hearing to review his participation in Temporary Release and an opportunity to reply to the charges, call witnesses, and produce evidence. *See* 7 N.Y.C.R.R. 1904.2(h). Here, the court found, the Petitioner was not given any notice of his TRC hearing. Although he had previously signed a waiver of notice, that waiver expressly related to a prior TRC meeting at which his participation in the Temporary Release Program was suspended, pending an investigation. The court also found that the Petitioner was neither permitted to present witnesses nor was he informed of his right to do so.

That did not mean, however, that the Petitioner was entitled to full restoration of his merit time and parole release dates, which had been automatically rescinded by the determination to discontinue his Temporary Release Program participation. Instead, the court held that the appropriate remedy for the procedural violations--particularly in light of its earlier finding that DOCS had produced sufficient evidence to terminate Temporary Release--was simply to order that a new hearing be conducted, "in which petitioner is afforded the procedural rights in accordance with DOCS's own regulations."



Pro Se Practice

WHEN MENTAL ILLNESS IS A FACTOR IN A SUPERINTENDENT'S HEARING

In this issue of ***Pro Se,*** we celebrate the settlement of DAI v. OMH and DOCS. This settlement will bring a long-overdue reform to DOCS's over-reliance on punitive disciplinary measures, rather than treatment, to control such inmates. However, in many cases, inmates with mental illness will continue to have disproportionate contact with DOCS's disciplinary system because they are simply unable to conform their conduct with the strict rules and regulations of a prison setting.

Long before DAI, Prisoners' Legal Services has been in the forefront of the fight to ensure that DOCS take account of mental illness before punishing inmates with lengthy disciplinary sentences. That fight resulted in a string of decisions in the late 1980s in which New York State courts recognized that mental illness could be a defense to a disciplinary charge. *See, e.g.*: People ex rel. Reed v. Scully, 140 Misc.2d 379 (Sup. Ct., Oneida County, 1988); Rosado v. Kuhlmann, 563 N.Y.S.2d 295 (3d Dep't 1990); and Huggins v. Coughlin, 76 N.Y.2d 904 (1990).

It was not until the settlement of the PLS class action lawsuit, Anderson v. Coughlin, however, that DOCS conceded the need for a new set of regulations detailing when and how mental illness and low intellectual capacity would be taken into account in a Superintendent's Hearing. The Anderson regulations, embodied in 7 N.Y.C.R.R. §§ 254.6, 254.7, establish a much-needed framework to ensure that, during disciplinary hearings, hearing officers meaningfully consider the mentally ill inmates' mental status.

This article is intended to explain when and how, under the Anderson regulations, mental illness or low intellectual capacity may be used as a defense in a Superintendent's Hearing.

The Anderson Regulations

Broadly, the regulations provide that when an inmate's mental condition or intellectual capacity at the time of an incident is "at issue," a hearing officer must consider the inmate's mental state before rendering a decision.

An inmate's mental condition is at issue if one of seven trigger factors are met. For example, if the inmate is deemed a "Level One" by OMH, or if the inmate has been discharged from the Central New York Psychiatric Center ("CNYPC") within the past nine months, then the inmate's mental condition is "at issue." [For a list of the seven trigger factors, *See* 7 NYCRR 254.6[b][1]]. In addition, the hearing officer may deem mental condition to be at issue in the absence of a specific trigger factor if "it appears to the hearing officer, based on the inmate's testimony, demeanor, the circumstances of the alleged offense, or any other reason, that the inmate may have been mentally impaired at the time of the incident or may be mentally impaired at the time of the hearing." 7 N.Y.C.R.R. § 254.6 (b)(1)(viii).

When the hearing officer finds that mental condition is at issue, then he must ensure that the inmate understands the charges and the purpose of the Hearing, ask other witnesses about their

observations of the inmate's mental state at the time of the incident, take confidential testimony from an OMH clinician, and provide the inmate with a written disposition stating how the inmate's mental state was considered. 7 NYCRR §§ 254.6(c); 254.7(a). According to a June 6, 2006 memo that DOCS's counsel's office circulated to Superintendents (to give to hearing officers), the written disposition must reflect how the hearing officer considered the inmate's mental health in determining guilt/innocence, and if found guilty, how the hearing officer considered the inmate's mental condition in assessing the penalty.

In addition to considering evidence about the inmate's mental condition, the hearing officer may be called upon to consider the inmate's lack of intellectual capacity. There are only two specific trigger factors for intellectual capacity set forth in 7 N.Y.C.R.R. 254.6(b)(2), and they are:

- the incident occurred while the inmate was housed at the Special Needs Unit at Wende, Arthur Kill, or Sullivan; or
- the inmate did not score above 69 on an intelligence test or did not score above the third-grade level in a reading test conducted by prison officials.

As in the case with mental impairment, a hearing officer may deem intellectual capacity to be at issue even in the absence of the two specific trigger factors where the circumstances indicate "that the inmate may have been intellectually impaired at the time of the incident or may be intellectually impaired at the time of the hearing." *See* 7 N.Y.C.R.R. 254.6(b)(2)(iii).

When the hearing officer finds that intellectual capacity is an issue, he must follow the same steps required when mental state is at issue. However, instead of taking testimony from an OMH clinician, he takes testimony from a correction counselor or teacher, who will present confidential evidence about the inmate's intellectual functioning. 7 N.Y.C.R.R. 254.6(c)(4).

Failure to Follow Anderson Regulations Can Result in Reversal of Your Hearing

Failure to follow the Anderson procedures can result in a reversal of a disciplinary hearing. That was the result, for instance, in Pinckney v. LeClaire, Index. No. 2006-012394 (Erie Co. Sup. Ct., 2007), one of the first judicial decisions concerning the Anderson regulations.

Mr. Pinckney's hearing concerned charges of assault on staff, violent conduct, failure to follow a direct order, and possession of a weapon, all stemming from a May 3, 2006 altercation with guards at Wende Correctional Facility. Halfway through the Hearing, the Hearing Officer removed Mr. Pinckney from the Hearing because he was disruptive.

After removing Mr. Pinckney, the Hearing Officer decided, based on statements Mr. Pinckney made during the Hearing, to take confidential testimony from an OMH clinician about Mr. Pinckney's mental health. However, he failed to otherwise comply with the Anderson regulations. He did not ask witnesses about their observations of Mr. Pinckney's mental health, he did not ensure that Mr. Pinckney understood the charges and Hearing process, and perhaps most importantly, he failed to provide Mr. Pinckney with a written disposition stating how he considered Mr. Pinckney's mental health in rendering a disposition. He found Mr. Pinckney guilty of the charged conduct and imposed a penalty of 18 months SHU time and recommended loss of good time.

In a subsequent Article 78 proceeding, Mr. Pinckney argued that these errors required that the Hearing be reversed and expunged from his record. The court, in an oral decision, agreed.

Some Practical Considerations Regarding Mental Status Testimony

In the ordinary case, an inmate will not need to persuade the hearing officer to request confidential mental status or intellectual capacity testimony because DOCS's paperwork usually correctly identifies those Hearings in which such testimony is needed. The hearing officer will ordinarily indicate to the inmate that confidential mental health or intellectual capacity testimony will be presented even though the inmate will not be allowed to be present during that testimony.

But if the hearing officer indicates that confidential testimony will not be presented, and you believe that it should be presented, you should specifically request it. As noted above, caselaw establishes that you have a right to present evidence of your mental status in your defense at a disciplinary hearing when your mental status is at issue. If, however, none of the trigger factors identified in the regulation above are present, the burden may be on you to convince the hearing officer that your mental status is "at issue" in the hearing and should be considered.

Another consideration: The regulation only requires hearing officers to consider *OMH* testimony about your mental health. There is no reason, however, that you cannot present additional testimony on this issue--and, often, it might be advisable to do so. For example, you may benefit from presenting your own account of your mental status at the time of the alleged misbehavior. You have a unique insight into the mental status issues that may be relevant to the proceedings and your own testimony may be more important, in the final analysis, than that of an OMH clinician.

Likewise, you might want to consider calling other inmates or staff who can testify about your mental status at the time of the incident. While such witnesses cannot give testimony about your diagnosis or treatment, their account of the incident may provide the hearing officer with facts relevant to your mental status at or near the time of the events that gave rise to the disciplinary charges. *See* 7 N.Y.C.R.R. 254.5[a] ("The inmate may call witnesses on his behalf provided their testimony is material, is not redundant, and doing so does not jeopardize institutional safety or correctional goals.").

Evidence of mental illness does not address the issue of guilt or innocence of the underlying misconduct. However, Rule 254.6 makes it clear that evidence of mental illness may be considered as a "mitigating factor." A "mitigating factor" is a fact or circumstance that can justify reduced punishment or no punishment at all. Under Rule 254.6(f), a hearing officer is required to consider mental condition or intellectual capacity in determining the "appropriate penalty to be imposed" and if, in light of the inmate's mental health status, the hearing officer believes that a penalty "would serve no useful purpose," he may dismiss the charge or charges altogether.

If you offer testimony about your mental status, it should be truthful and consistent with the official testimony about mental status. For example, it would not be useful to testify about a long history of serious mental illness in prison if OMH testimony indicates that you have never asked for or received treatment for mental illness.

Your testimony is most helpful when seen as a supplement to the official testimony about mental status. For example, if an OMH witness is called, he/she might testify about a hospitalization at CNYPC, but may omit details about the duration of the hospitalization or the basis for the admission. Thus, you can present facts to fill in the gaps in the official testimony. If you were admitted to CNYPC, you should be sure to inform the hearing officer about the length of your confinement at CNYPC and the reasons for that confinement.

Similarly, if OMH prescribed psychiatric medication, you should testify about the actual effects of that medication. OMH witnesses will sometimes testify about medication without testifying about whether the medication actually achieved its desired results. This is another example where you could fill in gaps left by the OMH witness. If you refused to continue with a prescribed

medication, you could provide an explanation for non-compliance to the hearing officer.

If you feel that the charged misconduct was the product of mental illness, you should give testimony about the symptoms that led to the misconduct. As noted above, it would probably be unhelpful for you to present testimony about symptoms at the time of the incident if these or similar symptoms were not mentioned in the OMH testimony.

In sum, the purpose of an inmate's testimony about his own mental status is to provide his unique personal view of the psychiatric or intellectual impairment that may be relevant to the charged misconduct. That personal view should supplement the key events (*i.e.*, diagnosis, OMH classification, hospitalization, and medication) that are documented in the official record and presented in OMH's or in DOCS's testimony.

The inmate in Pinckney v. LeClaire was represented by Prisoners' Legal Services of New York.

Pro Se Practice II

RECENT DEVELOPMENTS REGARDING POST-RELEASE SUPERVISION ("PRS")

Last summer's federal appeals court decision in Earley v. Murray, 451 F.3d 74, *r'hg denied* 462 F.3d 14 (2d Cir. 2006), in which the court held that a term of PRS can only be imposed by a sentencing court, not by DOCS, has thrown the PRS portion of many determinate sentences in New York into question.

This article is intended to review the state of the law on this rapidly-developing subject, at least, as it stands at the end of April 2007--and to provide some advice on how to proceed to inmates who have had PRS administratively added to their sentence by DOCS.

I. Background

Pursuant to Penal Law § 70.45, every determinate sentence must include a period of PRS.

In some cases, however, sentencing courts have failed to mention PRS either at the sentencing or in the commitment order. In those cases, DOCS has added the period of PRS to the sentence administratively, after the inmate arrives in state custody--frequently to the inmate's surprise and consternation. Moreover, in those cases in which the sentencing court had discretion over the amount of PRS time to impose, and did nothing, DOCS added the maximum period of PRS permitted by statute.

Prior to Earley, many inmates had challenged DOCS's administrative imposition of PRS. The argument was that by adding PRS to a sentence, DOCS was improperly taking on the role of the sentencing court. State courts, however, had uniformly upheld DOCS's authority to add PRS when the sentencing court failed to mention it. They found that when DOCS added PRS, it was merely enforcing a statutorily-required part of a sentence, and not engaging in a judicial function. *See, e.g.*, Deal v. Goord, 778 N.Y.S.2d 319 (3d Dep't 2004); People v. Hollenbach, 762 N.Y.S.2d 860 (4th Dep't 2003), lv. denied, 100 N.Y.2d 642 (2003).

In Earley, however, the court held that since PRS is part of a sentence, it can only be imposed by the sentencing court, and thus, DOCS's administrative imposition of PRS is a "nullity." The court relied on Hill v. United States ex. rel Wampler, 298 U.S. 460, a 1936 Supreme Court case in which the Court held that only a judge can impose a sentence, and, once a sentence has been imposed, it cannot be administratively modified.

Since Earley is a decision of a federal appeals court, lower federal courts in New York are bound by its holding, but state courts are not.

Most litigation over DOCS's administrative application of PRS has and will, of necessity, take

place in state court. Even those inmates who may have grounds for challenging the validity of their PRS sentence in federal court will have to exhaust their state court remedies first. Thus, how the state courts--which previously found no problem with DOCS's practice--will respond to Earley has been the critical question.

II. State Court Developments

As of the date this article is being finalized, in mid-May, 2007--some 10 months after Earley was decided--it is still too soon to give a definitive answer to the question of how the state courts will respond to Earley.

Following Earley, there were numerous contradictory decisions at the trial court level. Some courts agreed with Earley and declared DOCS's addition of PRS to a sentence to be null and void. Other courts, however, have rejected Earley, or concluded that notwithstanding Earley, they are bound by the pre-Earley state appellate decisions, such as Deal, 778 N.Y.S.2d 319.

It is only in the last several months that New York's four mid-level appeals courts have begun to address the issues raised by Earley. Those courts' decisions have not been uniform, however. One Appellate Department appears to have accepted Earley with respect to some categories of sentences and rejected it with respect to others. Another appears to have accepted Earley whole-heartedly, while yet a third appears to have rejected it. What follows is a department-by-department review of the current status of these "un-imposed PRS" cases.

The First Department has accepted Earley, but only insofar as it applies to the sentences of drug offenders who are not convicted of a Class A felony and first violent felony offenders.

Under Penal Law § 70.45(2), the period of post-release supervision imposed on a determinate sentence is generally five years. However, exceptions apply to persons being sentenced for a drug offense that was not a Class A felony or for a first-time violent offense. In those cases, the statute gives the sentencing court discretion over the period of post-release supervision to impose.

In People v. Hill, 830 N,Y.S.2d 33 (1st Dep't 2007), the First Department--citing Earley--held that when one of those exceptions apply, and the sentencing court had *discretion* over the period of post-release supervision, there is nothing in the Penal Law that authorizes DOCS to impose the maximum period of PRS permitted by statute, or any other specific period. In short, according to the First Department, in such a case, if the sentencing judge fails to impose a period of PRS, there is none. In a later case, however, People ex rel. Garner v. Warden, Rikers Island Correctional Facility, 833 N.Y.S.2d 384 (1st Dep't 2007), the same court rejected the claim of a second violent offender that DOCS had no authority to enforce PRS where his sentencing court had failed to impose it.

The Second Department appears to have embraced Earley wholeheartedly. In February 2007, it issued three decisions which, although brief, appear to unequivocally adopt the Earley holding. Those decisions are: People v. Smith, 829 N.Y.S.2d 226 (2d Dep't 2007); People v. Wilson, 829 N.Y.S.2d 917 (2d Dep't 2007); and People v. Noble, 831 N.Y.S.2d 198 (2d Dep't 2007). Each of these short decisions cite Earley and Wampler and hold, simply, that if PRS is not mentioned in either the sentencing minutes or the commitment order, it is not part of a sentence. Although the decisions do not explicitly say as much, the citations to Earley and Wampler strongly suggest that the court has concluded that if the sentencing court does not impose PRS as part of the sentence, DOCS does not have the authority to add it to the sentence, regardless of whether the offender is a first felony or second felony offender.

The Third Department recently decided Garner v. New York State Dept. of Correctional Services, 831 N.Y.S.2d 923 (3rd Dep't 2007). In that case,

the court adhered to its own pre-Earley precedent, in Deal v. Goord, 778 N.Y.S.2d 319 (3rd Dep't 2004), holding that PRS is automatically part of a determinate sentence, regardless of whether the sentencing judge mentions it, because it is required by statute. Because both Garner and Deal dealt with the cases of second felony offenders, however, it remains unclear how that court will address the issue of a first felony offender or drug offender (other than an A offender), for whom the length of the PRS period is discretionary, not mandatory.

The Fourth Department has not yet addressed the Earley question. Lower courts in that Department are, therefore, arguably still bound by pre-Earley caselaw, holding that DOCS may impose PRS where the sentencing court fails to do so. *See* People v. Hollenbach, 762 N.Y.S.2d 860 (4th Dep't 2003).

In sum, the Appellate Departments are presently divided over the applicability of Earley. One Department, the Second, has adopted it. Another, the First, has adopted it with respect to some offenders and rejected it with respect to others. Yet another, the Third, has rejected it with respect to second felony offenders, while the Fourth has not yet addressed the issue in a post-Earley case.

Thus, at present, your ability to get PRS removed from your sentence, if it was not imposed by your sentencing court, may depend both on in which Appellate Department you are able to file a lawsuit and what kind of sentence you are serving. As discussed below, it may also depend on the *kind* of lawsuit you file.

III. What can you do?

What should you do if DOCS has added a period of PRS that was not mentioned at your sentencing or in your commitment?

One option is to do nothing. As the above discussion suggests, the issues of whether DOCS has authority to add PRS to a sentence in general, and the narrower issue of whether DOCS has authority to add PRS to a sentence where the length of the period of PRS is not specifically set by statute, are currently being litigated in cases across the state. Because the Appellate Division is currently divided on the question, the question will, eventually, have to be resolved by the New York Court of Appeals. It is likely that within one or two years, most of the issues discussed above will be resolved by the courts. Unless you are presently confined *solely as a PRS violator*, or you are scheduled to be released in the near future, there is no need to take any immediate action.

If you are in prison *solely as a PRS violator*, and PRS was not imposed as part of the sentence by the sentencing court, then you could challenge the validity of your PRS in a state or federal habeas corpus proceeding.

A *federal* habeas corpus proceeding to challenge PRS should be successful, since Earley v. Murray is binding on all federal courts in New York State. The problem is, in order to file a federal habeas corpus proceeding, you must first exhaust your state court remedies. A *state* habeas corpus proceeding is likely to be successful in any county in the Second Department, since the Supreme Court would be bound by the recent Second Department decisions holding that PRS is not part of a sentence if it was not imposed by the sentencing court. It would also be likely to be successful in any county in the First Department, if the sentencing court had discretion over the period of post-release supervision to be imposed, since those courts would be bound by the First Department's decision in Hill. In any county in the Third or Fourth Department, it is likely to be unsuccessful, unless you are a first felony offender or a drug offender (other than a Class A offender)--in which case, it is difficult to predict what will happen.

If you are scheduled to be released shortly, and wish to try to have your PRS term removed from your sentence, your best option is to file an Article 78 proceeding to challenge DOCS's decision to add PRS to a sentence. Again, however,

your likelihood of success probably depends on where you file it. An Article 78 challenging DOCS's authority to impose PRS should be a strong case in any county in the Second Department, or in a case where a sentence was imposed pursuant to Penal Law §§ 70.02 or 70.70, and the exact period of PRS was not mandated by the statute. In counties in the Third or Fourth Department, it will likely be unsuccessful if a 5-year PRS term was mandatory, and if not, it is still too early to predict what the court will do.

If you are successful in your Article 78, the court will order DOCS to remove PRS from your sentence. The result would be a determinate sentence with no period of PRS, which would be an illegal sentence. As noted at the beginning of this article, Penal Law § 70.45 requires that every determinate sentence also have a period of post-release supervision. Thus, a successful Article 78 would result in an illegal sentence. Although the issues go beyond the scope of this article, it is likely that, if a sentencing court becomes aware that it has imposed an illegal sentence, *i.e.*, a determinate sentence with no PRS, the sentencing court would have the authority to correct the illegal sentence on its own by imposing a new sentence with a period of PRS.

Many inmates have opted to challenge PRS through 440 motions, rather than Article 78 proceedings. If your goal is to have PRS *removed* from your sentence, we advise you not to use a 440 motion to challenge the administrative imposition of PRS. To understand why, it is important to understand the difference between an Article 78 or habeas corpus proceeding and a 440 motion.

An Article 78 or a habeas corpus proceeding is a challenge to DOCS's administrative action--in this case, adding PRS to your sentence. It argues that DOCS had no authority to do so and asks the court to reverse DOCS's action.

A 440 motion, by contrast, is a challenge to your sentence. It argues that your sentence is illegal and asks the court to either change the sentence to a legal sentence or allow you to revoke your plea. As noted, there is no dispute that a determinate sentence without PRS is an illegal sentence. The only dispute is whether DOCS has the authority to correct the error.

The problem with a 440 motion is that it must be made in the same court that initially imposed the sentence. Sentencing courts have the inherent authority to correct an illegal sentence. Therefore, while results have been inconsistent, a 440 motion creates a risk that the sentencing court will respond to the motion by simply re-sentencing you to a determinate sentence with PRS, in order to correct the illegal sentence.

IV. Towards a Final Resolution?

Over the past few months, we have seen a number of decisions that have significantly changed the legal landscape of PRS. As this article notes, we believe that, eventually, the New York Court of Appeals will have to address these issues. Until then, it remains hard to predict how the law regarding PRS may change over the next few months or year(s), and so we will try to provide periodic updates on this rapidly developing area of law.

One additional recent development, however, may point to a possible resolution of this issue.

In Earley, the Court of Appeals directed the District Court to grant Mr. Earley a writ of habeas corpus, if it found that his petition had been timely filed. In a decision issued on May 1, 2007, the District Court, following the Court of Appeals's direction, granted Mr. Earley a writ. But the court then noted that the result was an illegal sentence under New York law--*i.e.*, a determinate sentence without post-release supervision. It therefore stayed the write for 28 days to allow the sentencing court an opportunity to correct the sentence--*i.e.*, to impose a new sentence, with PRS.

Could the District Court's solution point to the ultimate resolution of this issue? If so, it would

imply that you could obtain an order prohibiting DOCS from imposing PRS if the sentencing court failed to do so, but that order would be stayed pending a referral to the sentencing court so that a legal sentence could be imposed.

At this point, only time we will tell.

Practice pointer: *The jurisdiction of the four Appellate Departments is as follows:*

- *The First Department (seated in Manhattan [New York County]) covers only The Bronx (Bronx County) and Manhattan [New York County] (known formally in the court system as Bronx and New York Counties, respectively).*

- *The Second Department (seated in Brooklyn) oversees the supreme courts of the remaining boroughs of New York City--that is, Queens (Queens County), Brooklyn (Kings County), and Staten Island (Richmond County), as well as the remainder of Long Island (Nassau County and Suffolk County) and the New York City suburbs in Dutchess, Orange, Putnam, Rockland, and Westchester Counties.*

- *The Third Department (seated in Albany) includes an area extending from the territory of the Second Department north to New York's borders with Vermont and Quebec, and includes the cities of Albany and Binghamton. This territory extends nearly as far west as Syracuse.*

- *The Fourth Department (seated in Rochester) covers the remainder of the state (west of the Third Department's territory), and includes the cities of Buffalo, Rochester, and Syracuse.*

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