Pro Se

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HINTS OF CHANGE AT PAROLE

Eighteen months after the state was sued over its extremely low parole rates for violent offenders, and more than seven months of a new administration in Albany, the New York Law Journal reports indications that Parole Boards are easing back on what critics had contended was, in effect, an unwritten policy of denying parole to inmates based solely on the circumstances of their crime.

According to the Journal, whereas Parole Boards under former Governor George E. Pataki were releasing violent A-1 felons at a rate of between 3 percent and 5 percent from 2000 to 2005, more than 11 percent of such felons were granted release in 2006; more than 15 percent were released from January to July 2007, and June's release rate was 26.7--a release percentage not seen in New York since the early 1990s, when boards appointed by former Governor Mario Cuomo were making release decisions.

Additionally, there are ongoing settlement talks in the federal litigation against the state, Graziano v. Pataki, in which inmates charged that the Division of Parole was unlawfully making parole decisions based solely on the seriousness of an inmate's crime.

George B. Alexander, Parole Chairman appointed by Governor Eliot Spitzer, told the Law Journal that it is Mr. Spitzer's policy, as well as his own, that commissioners consider and weigh a range of factors about an inmate, not just the nature of the crime, when deciding on parole eligibility. Mr. Alexander said he believes the Governor has given the Board the "autonomy" to do its job, and higher release rates may be the result. "If there has been any hesitation [to grant parole] in the past, I think people feel more able to do the jobs that they were entrusted with in this administration," said

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A Message From Susan Johnson, Executive Director

The election of Governor Eliot Spitzer appears to have brought with it a welcome change in the way in which New York addresses prisoners' issues. As we reported in our Winter 2007 issue of ***Pro Se,*** just eight days after being elected, Governor Spitzer issued an Executive Order that sharply cut the cost of collect calls from prisons in New York State. More recently, on July 19, 2007, Governor Spitzer signed into law the Family Connections bill, which states that prison telephone service is a right and not a revenue generator. In addition, as this issue of ***Pro Se*** notes, Governor Spitzer has also recently signed legislation that suspends rather than terminates Medicaid benefits for prisoners while they are incarcerated. This law enables inmates to reenter society without having to wait two to three months for their benefits to restart. Governor Spitzer has also issued Executive Order #10, which created a New York State Commission on Sentencing Reform. The Order states that the goal of the Commission is to perform a comprehensive review of New York's current sentencing structure. As part of that review, the subcommittee on Incarceration and Reentry will be evaluating the extent to which education and reentry preparation programs can facilitate the readiness of inmates to transition into the community and reduce recidivism. Finally, as the cover story of this issue of ***Pro Se*** notes, there has apparently been a change in attitude regarding the way in which Parole decisions should be made, the result being a significant increase in the number of inmates being release to parole since Governor Spitzer has taken office.

Taken individually, any one of these events could be seen as progress in the fight for criminal justice reform. Taken together, the message is much stronger. New York State is committed to rehabilitation, reentry, and reducing recidivism. The present administration realizes that it is crucial to successful reintegration that reentry services begin *before* an inmate leaves prison. Individuals who have been neglected, unfairly treated, or mistreated while in prison are far more likely to be a public safety risk upon release than those who have had access to programs, education, and appropriate medical and mental health care. For more than thirty years, PLS has helped to reduce that safety risk by assisting individuals while in prison, ensuring that prisoners are treated fairly, that they receive the programs, medical and mental health treatment they need, and that they maintain contact with their families so as to facilitate their reintegration into society. Years ago, PLS also played a significant role in specific reentry programs, but due to drastic funding cuts, we were forced to cut back on the services we could provide. But, the winds have shifted and PLS is working hard to secure increased funding so we can provide such services again.

Although it is too early to tell what effect the recent changes in the law will have on reducing recidivism, it is extremely clear, at this juncture, that the Governor and those who he has placed in administrative positions share a common goal: to increase public safety by decreasing the likelihood that individuals will re-offend. Facilitating family contact, ensuring that individuals who are released from prison can obtain the medical and mental health services that they need, restructuring our sentencing laws with a focus toward education and reentry, and encouraging the Parole Board to consider all the factors that are relevant to release are all ways in which to achieve this goal.

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Mr. Alexander, a former Erie County Department of Probation commissioner.

Soon after taking over at the Board this winter, Mr. Alexander notified commissioners that they are bound to consider several factors when hearing parole cases under Executive Law § 259-i. They include not only the nature of the crimes, but also whether the inmates pose a risk to others if released, their prospects for re-entering society, and their efforts to improve personally while incarcerated.

Critics of the system as it had come to operate under Mr. Pataki argued that the commissioners--all of whom were eventually appointed by the former Governor--gave inordinate consideration to the circumstances of the crimes and little or none to the efforts inmates made, often over decades, to improve themselves.

Robert N. Isseks, the lawyer representing the Plaintiffs in the Graziano suit, said there has been something of an easing of Parole Board decisions toward violent inmates. He attributes that, in part, to his January 2006 litigation on behalf of inmates who contend they were denied parole unlawfully by Boards who failed to weigh all factors relevant to their release.

Amy James-Oliveras, who is active in several parole reform and inmate relatives groups, said she has been at meetings involving Mr. Alexander at which he has assured families that a new attitude is in place and that the families are an important factor in an inmate's successful reentry into society. It was the first time the chairman has met with the families of inmates, she said. “They expressed that there was a new atmosphere and that there was a new balanced approach…but that it would take time,” said Ms. James-Oliveras, of Wappingers Falls. Her husband, George Oliveras, served 27 years of a 25-years-to-life term for murder before being paroled. Ms. James-Oliveras said she is worried, however, that a more open-minded attitude by Parole Boards could vanish overnight if Mr. Spitzer is politically embarrassed by the actions of a parolee. “I think it would be his Willie Horton if any of these high-profile guys get out and commit a crime," she said. “I don't think it will be seen as an individual. It will be seen as, ‘No one should be paroled.’”

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News and Briefs

New Law Reinstates Inmates to Medicaid Immediately Upon Release

Under a new law signed by Governor Spitzer in July, inmates who were receiving Medicaid benefits prior to their incarceration will be immediately reinstated to the Medicaid rolls upon their release.

Medicaid is a joint federal/state health care program for low income persons and persons with disabilities.

Under prior law, Medicaid benefits were terminated during incarceration. Inmates had to reapply for benefits when they were released, a process which took two to three months and could result in delays in obtaining treatment and services at a time when they were greatly needed. Those delays caused many former prisoners to forgo needed medical care, even in cases of serious illnesses or addiction.

The New York Times, for example, recently reported the stories of Sheryl Sohn and Rufus Dantzler. Ms. Sohn learned while in prison that she had an advanced case of Hepatitis C that had ravaged her liver. Prison doctors prescribed medicine to ease her symptoms and put her on a liver transplant list. When she was released

last December, however, a pharmacist at a CVS told her that until her Medicaid benefits were reapproved, she would have to pay for her medication. She was told the same thing when she tried to have her prescription filled at Kings County Medical Center in Brooklyn. For a month, Ms. Sohn went without the drugs she needed, even as her body grew achy, itchy, and bloated. “I could have gone into liver failure at any time,” she said. She eventually checked herself into the SUNY Health Science Center at Brooklyn, and, in May, had a liver transplant at Mount Sinai Hospital.

Mr. Dantzler was ordered, upon his release, to get treatment for alcoholism and marijuana abuse. But when he arrived at the program, he was told that he would have to pay for treatment because his Medicaid coverage had not yet started. Mr. Dantzler had to put his treatment on hold while he waited for Medicaid, jeopardizing his parole.

Under the new law, Medicaid will be suspended, not terminated, during incarceration, and inmates will have their Medicaid coverage immediately reinstated once they are released.

Advocates for inmates praised the new law, but pointed out that it only helps those who were already on the Medicaid rolls prior to their incarceration. “The next step is to go beyond suspension to make sure that every person leaving prison has health care coverage, regardless of whether or not they had it before,” said Tamar Kraft-Stolar, Director of the Women in Prison Project at the Correctional Association of New York.

Sentence Reform Commission Reviews State’s Complex, Inconsistent Sentencing Scheme

This past March, Governor Spitzer established the New York State Commission on Sentencing Reform and ordered it to conduct “a comprehensive review of New York’s current sentencing structure, sentencing practices, community supervision, and the use of alternatives to incarceration” and make recommendations for future legislative changes. The Governor charged the Commission with exploring the following issues:

- ✓ the current complex and sometimes inconsistent structure of New York sentencing laws, which include indeterminate sentences, determinate sentences, definite sentences, sentences of parole supervision, merit time, supplemental merit time, shock incarceration, temporary release, presumptive release, and conditional release;
- ✓ the uniformity, consistency, certainty, and adequacy of the sentences produced by the current system;
- ✓ whether the lengths of imprisonment that the system produces are equitable and whether there exist either too many barriers to or insufficient incentives for alternatives to incarceration;
- ✓ the ability of education and job training to ease reentry and reduce recidivism;
- ✓ the impact of current sentencing practice on state resources;
- ✓ the relationship of sentencing to public safety and recidivism; and
- ✓ future trends in sentencing.

The Commission held its first two public sessions in June and July. At its initial session, members criticized the current sentencing structure. Michael C. Green, the District Attorney of Monroe County, said the sentencing system is a “mess.”According to him, it fails to provide flexibility to help offenders with such programs as drug treatment. Although he advocated for strict punishment for violent offenders, he said the State also has an obligation “to deal with those people who can and want to be helped.” He said he would argue for the greater use of alternatives to incarceration, especially the diversion of

nonviolent drug offenders to treatment instead of prison. State Senator Eric Schneiderman noted that the State's mandatory minimum sentences for drug offenders are far stricter than in many states in the South and the West. He said, "We have to deal with the fact that our sentencing structure is out of line with the rest of the country for nonviolent drug offenders." State Assemblyman Joseph Lentol said that the State's criminal statutes are "disjointed, confusing and inconsistent," producing unpredictability for defendants, attorneys, judges, and crime victims. "No one, even those who practice in this area of law on a daily basis, are sure how the law will be applied in a particular case," Mr. Lentol said.

At its second meeting, in July, the Commission heard from witnesses representing the judiciary, prosecutors, and defendants.

A state judge emphasized the need for more consistency in sentences. He noted that, in some circumstances, a defendant could face a determinate sentence between 5 and 25 years, meaning that two persons convicted of the same offense could end up serving sentences that diverge by as much as 20 years.

Witnesses for defendants testified in favor of doing away with mandatory minimum sentences and for increased focus on treatment for drug offenses. Jonathan Gradess, Executive Director of the New York State Defender Association, called for reducing the influence of the prosecution when it comes to sentencing and plea bargains, and a philosophy that views treatment as optimal and jail as a last resort. Gabriel Sayegh of the Drug Policy Alliance, urged the Commission to offer first- and second-time nonviolent drug offenders a choice of treatment rather than incarceration. He suggested viewing drugs as a disease, not a crime. "If I have cancer I'm not going to talk to a lawyer," he said. "Why do we do that with drug abuse?"

The parents of Ashley O'Donoghue, who is serving a 7-to-21-year sentence for a first-time, nonviolent drug offense under the Rockefeller Drug Laws, testified about the need for further reform of those laws, and handed out articles about their son.

Members of the prosecution bar took a different view. Bridget G. Brennan, New York City's special narcotics prosecutor, and Michael E. Bongiorno, the Rockland County District Attorney, said reforms to the Rockefeller Drug Laws had given benefits to some offenders who did not deserve them. "Nonviolent drug offenders: There's no such thing," said Mr. Bongiorno, adding that drug crimes, by their very nature, did violence to users, and calling for enhanced penalties for repeat marijuana offenders and for drug offenders caught with weapons. Bronx District Attorney Robert Johnson argued that members of his community favored a strict approach to sentencing in order to improve safety in their neighborhoods and asked the Commission not to reduce the role that prosecutors play in sentencing, in favor of increasing the discretion given to judges. "We have a greater link to the community than the judge," Mr. Johnson said and added, in apparent reference to O'Donoghue's testimony, that only a "small minority" advocated further changes in the drug laws, that they don't speak for the "silent majority" in New York who are happy with the status quo, and that some family members had let their personal experience cloud their judgment.

The Commission is directed to issue an initial report of its findings and recommendations by October 1, 2007, with a final report to follow by March 1, 2008.

Practice pointer*: The Sentence Reform Commission is chaired by Denise O'Donnell, a former U.S. Attorney in Buffalo and Current*

Chairwoman of the Division of Criminal Justice Services. Other members include: Juanita Bing Newton, Administrative Judge of the Criminal Court of the City of New York; Brian Fischer, Commissioner of the Department of Correctional Services; George Alexander, Chairman of the State Parole Board; Michael McDermott, a former Albany County District Attorney; Michael C. Green, the District Attorney of Monroe County; Anthony Bergamo, Chief Executive Officer of Niagara Falls Redevelopment; State Senator Eric Schneiderman (Democrat, Manhattan); and State Assemblyman Joseph Lentol (Democrat, Brooklyn).

To contribute your views about New York's current sentencing structure to the Sentence Reform Commission, write to Denise O'Donnell, Chairwoman, NYS Commission on Sentencing Reform, 4 Tower Place,10th Floor, Albany, New York 12203-3764

Court Expresses Concern Over Sex Offender Management and Treatment Act

State v. Junco, (Sup. Ct., Washington Co.)(May 3, 2007) (Krogmann, J.) (Unreported Decision)

New York's new Sex Offender Management and Treatment Act ("SOMTA") permits the State to hold allegedly dangerous sex offenders in a psychiatric treatment facility after the terms of their incarceration have expired.

Under the law, codified as Article 10 of the Mental Hygiene Law ("MHL"), convicted sex offenders who are nearing the ends of their sentences have their cases reviewed by a "Case Review Team" established by the State Office of Mental Health ("OMH"). If the Care Review Team determines that they meet the definition in the law of a "sex offender requiring civil management," they are referred to a legal proceeding for possible civil confinement.

The new law defines a "sex offender requiring civil management" as one who is suffering from a "mental abnormality" which "predisposes him or her to the commission of conduct constituting a sex offense and that results in that person having serious difficulty in controlling such conduct."

The legal proceeding to which such persons may be referred has three parts. In the first part, a judge decides whether there is "probable cause" to conclude that the offender is a "sex offender needing civil management." If there is probable cause, the case is referred to a jury, which must decide the same question. If the jury unanimously agrees that there is "clear and convincing evidence" that the offender is a "sex offender needing civil management," the judge must hold yet another hearing to determine whether the offender should be civilly committed or subjected to intensive parole supervision.

In the first court decision since the enactment of the new law, a State Supreme Court Judge rejected the State's position that the probable cause portion of the legal proceeding was intended to be nothing more than a brief, summary proceeding, to be dispensed with in a matter of hours, and expressed concerns about the adequacy of the work of the Case Review Team.

In a four-day probable cause hearing, the court permitted the Respondent, a convicted sex offender who had been referred for civil management by a Case Review Team, to conduct an extensive cross-examination of the State's expert, an OMH psychiatrist who had participated in the decision.

The psychiatrist had evaluated the Respondent shortly before his maximum expiration date and concluded that he suffered from an "Impulse Control Disorder," which made him a "danger to others" and required his "strict and intensive supervision in an OMH Psychiatric Facility with a Sexual Offender

Program and an Aggression Replacement Therapy Program." The decision of the Case Review Team was based largely this psychiatric diagnosis.

Under the cross-examination permitted by the court, however, the Respondent showed the psychiatric evaluation suffered from several shortcomings.

For instance: Although the State psychiatrist believed that the Respondent suffered from an "Impulse Control Disorder," he could not conclude that he had "serious" difficulty in controlling his conduct"--one of the elements required by the statute for a finding that a sex offender requires civil management.

Further, although the Respondent had been subjected to numerous psychiatric evaluations in DOCS' custody over a prolonged period of time (since 1992), he had never previously been diagnosed with Impulse Control Disorder--until the State psychiatrist's evaluation on the eve of the Respondent's release date.

In addition, the psychiatrist relied on the number of Misbehavior Reports that the Respondent had received in custody without being aware of the circumstances surrounding them. Furthermore, he considered a criminal charge against the Respondent in 1991 which had been dismissed; he did not know that a determination had been made that there was no sexual contact with the victim in the Respondent's current offense; he had not been provided with any of the many favorable reports submitted regarding the Respondent's behavior in custody; and had conducted only a one-hour interview with the Respondent prior to making his diagnosis--about which, the court noted, he "incredibly" took no notes.

The court held that the flaws in the State psychiatrist's presentation were not so great as to prevent it from finding probable cause that the Respondent was a "sex offender requiring civil management." It nevertheless expressed its "concern" about the quality of his testimony and cautioned the State that at the trial stage of the SOMTA proceeding, it "will be held to a more strict burden of establishing by clear and convincing evidence that the respondent is a detained sex offender who suffers from a mental abnormality."

Practice pointer: *Inmates who may be subject to SOMTA are entitled to free representation in the three stages of the legal proceeding required by SOMTA. Representation is provided by Mental Hygiene Legal Services. If you believe you may be subject to SOMTA, you should contact MHLS at any of the following addresses: 40 Steuben Street, Suite 501, Albany, New York 12207 (Central and Northern New York); 50 East Avenue, Suite 402, Rochester, New York 14604 (Western New York); 26 Center Circle, Wassaic, New York 12592 (Southern New York, including Dutchess and Sullivan Counties); or 60 Madison Avenue, 2d floor, New York, New York 10010.*

Inmates are not, however, entitled to counsel at the critical stage--when the Case Review Team is conducting its review and deciding whether the inmate should be placed in the SOMTA proceedings in the first place.

The Rumor Mill

Prisoners' Legal Services often receives letters from inmates citing rumors of new laws or prison policies which may be of benefit to them. Often, such rumors are exaggerated, or simply incorrect.

We recently received a number of letters about a supposed new law which would provide additional merit time for both determinate and indeterminate sentences. One such letter stated as follows: "Dear ***Pro Se***: I would like to know what's going on with the new law (8 months to a year for flats/violents) that Spitzer approved. Also it would be retroactive. Thank you."

Regrettably, there is no such law. A new law was recently *proposed* by State Senator Velmanette Montgomery (Democrat of Brooklyn), which would have allowed DOCS to award up to one third of the sentence as merit time against both the minimum and maximum terms of indeterminate sentences, and the terms of determinate sentences. However, like many such proposals, Senator Montgomery's has not made it out of the Committee process.

Pro Se will continue to write about important new laws affecting inmates' lives when they become law.

Practice pointer*: To request a copy of Senator Montgomery's sentencing proposal (Senate Bill # 3578,) contact her office at 306 Legislative Office Building, Albany, New York 12247.*

Federal Cases

Supreme Court: Prisoner's Section 1983 Complaint That Termination of Hepatitis C Treatment Threatened His Life, States a Claim Under the Eighth Amendment

Erickson v Pardus, __US__, 127 S. Ct 2197 (2007)

William Erickson, an inmate in Colorado, sued Colorado prison officials, alleging that they had wrongfully terminated his Hepatitis C treatment, thereby putting his life in jeopardy.

Erickson alleged that after being diagnosed with Hepatitis C, he completed classes and otherwise complied with protocols of the Colorado Department of Corrections to be enrolled in the State's Hepatitis C treatment program. The treatment program, which takes a year to complete, involves weekly self-injections of medication by use of a syringe. Shortly after he began the treatment, prison officials were unable to account for one of the syringes given him and, upon searching, they found it in a trash can, modified in a manner which suggested the use of illegal drugs.

The officials concluded that the altered syringe led to the "reasonable inference" that Erickson had either used or intended to use drugs. They charged him with various disciplinary violations and also removed him from the Hepatitis C treatment program. They argued that his removal from Hepatitis C treatment was necessary because, for "the successful treatment of Hepatitis C, [it] is incumbent upon the individual remaining drug and alcohol free to give the liver a better chance of recovery." Under Colorado's treatment protocol, a person removed from the treatment regime for having used illegal drugs must wait up to 18 months before commencing treatment again.

In his lawsuit, Erickson alleged that his life was threatened by his removal from the Hepatitis C treatment program, and that his removal therefrom constituted deliberate indifference to his serious medical needs, in violation of his Eighth Amendment Rights.

The Court of Appeals dismissed his claim. It found that his complaint did not state a violation of the Eighth Amendment because it failed to "allege that as a result of the discontinuance of [his] treatment…he suffered any harm, let alone substantial harm, [other] than what he already faced from the Hepatitis C itself."

The Supreme Court reversed. The Court noted that a violation of the Eighth Amendment can be found when delays in medical treatment involve "life-threatening situations and instances in which it is apparent that delay would exacerbate the prisoner's medical problems." The Court also noted that the Eighth Amendment "protects against future harm to an

inmate." Here, the Court continued, Erickson had specifically stated in his complaint that the decision to remove him from the Hepatitis C medication was "endangering [his] life," and that he was "still in need of treatment for this disease." "This alone," the Court held, would, if true, be a sufficiently serious harm to state a claim under the Eighth Amendment.

The Court reversed the Court of Appeals and remanded the case for further proceedings.

Practice pointer: *The Eighth Amendment prohibits "cruel and unusual punishment." The Supreme Court held, more than thirty years ago, that this language means, among other things, that prison officials may not be "deliberately indifferent" to an inmate's "serious" medical needs. Estelle v. Gamble, 429 U.S. 97 (1976).*

The issue in this case was whether the Plaintiff's complaint had stated a sufficiently "serious" medical need. The lower court concluded that because it did not--because it failed to specifically allege that it was the Defendant's removal of the Plaintiff from the treatment program that threatened his life, rather than the underlying fact that he had Hepatitis C (for which the Defendant was not responsible). In reversing, the Supreme Court noted that Federal Rule of Civil Procedure 8(a)(2) requires that a complaint contain only "a short and plain statement of the claim showing that the pleader is entitled to relief" which " 'gives the defendant fair notice of what the...claim is and the grounds upon which it rests.' " Moreover, the Court continued, it is well settled that a document filed pro se is "to be liberally construed." "A pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers."

State Cases

Disciplinary Cases

Hearing Officer Erred in Relying on Confidential Information, but Error Was Harmless Where Other Evidence Supported the Decision

Matter Britt v. Goord, 838 N.Y.S.2d 793 (3d Dep't 2007)

The Petitioner was charged in two Misbehavior Reports with fighting, disobeying a direct order, violent conduct, creating a disturbance, assault on an inmate, and use of a weapon. At his Tier III hearing, he pleaded guilty to fighting, disobeying a direct order, and creating a disturbance, but not guilty to violent conduct, assault on an inmate, and use of a weapon. The Hearing Officer, after a hearing which included confidential information, concluded that the Petitioner was guilty of all charges. The Petitioner challenged that conclusion in an Article 78 proceeding.

A Hearing Officer in a prison disciplinary hearing may rely on confidential information. In order to do so, however, there must be some evidence in the record that the information is reliable and credible.

In this case, the Hearing Officer did not personally interview the confidential informant. The Correction Officer ("CO") who did had only been at the facility for about one month and was unable to vouch for his credibility. Under the circumstances, the court held, there was insufficient evidence of the informant's reliability and credibility.

Nevertheless, the court held that the Hearing Officer's reliance on the informant's testimony was a "harmless" error: The informant provided

no information that was not already in the record. He merely confirmed what was already known from other sources, *i.e.*, the Misbehavior Reports, the investigative memorandum, the testimony of the Correction Officers, and the admissions made by the Petitioner. Consequently, the court affirmed the hearing result.

"In Absentia" Hearing Reversed Where Inmate Was Not Advised of Consequences of Failure to Attend

Tafari v. Selsky, 836 N.Y.S.2d 306 (3d Dep't 2007)

The Petitioner was charged with interfering with an employee and refusing a direct order after he allegedly refused to leave his cell to attend a Tier III hearing and refused to sign the refusal form. As a result, the hearing was held in his absence and he was found guilty of both charges. He then filed an Article 78 proceeding.

The court held that the hearing record failed to establish that the Petitioner was advised of the consequences of his failure to attend the hearing and that, therefore, the determination had to be reversed. The COs who attempted to bring the Petitioner to the hearing testified that he refused to leave his cell for the hearing and would not sign the refusal form. However, they did not testify that they advised him of his right to attend the hearing and the consequences associated with failing to appear--namely, that the hearing would be held in his absence. "Without evidence that petitioner was so advised, the record does not establish that [he] knowingly and voluntarily waived his right to attend, and the Hearing Officer should not have held the hearing in [his] absence."

Disciplinary Hearing Was Timely Commenced

Matter of Agosto v. Selsky, 834 N.Y.S.2d 402 (3d Dep't 2007)

An inmate was charged with having forged a certificate that he had completed aggression replacement training. After being found guilty in a Tier III hearing, he filed an Article 78 proceeding.

His principal argument in his Article 78 proceeding was that the hearing was not timely commenced. The Misbehavior Report was written on January 6, 2006, but the hearing did not commence until January 13, 2006. Under 7 N.Y.C.R.R. 251-5.1(a), when an inmate is confined to keeplock or SHU pending a disciplinary hearing, the hearing must be commenced within seven days of the confinement. The inmate argued that the period from January 6th to January 13th constituted eight days and, therefore, his hearing should be reversed. The court, however, held that, "in calculating that period the day the misbehavior report is written is excluded." Thus, since the period to be counted started on January 7th, not January 6th, the hearing was timely commenced.

The court also rejected the Petitioner's claim that he could not be found guilty absent a comparison between his handwriting and that of the allegedly forged document by a handwriting expert. "Although the documents were not compared by a handwriting expert," the court held, "the Hearing Officer's own analysis and his finding of sufficient similarities between the forged documents and petitioner's handwriting samples are enough to sustain the determination."

Practice pointer*: The court's decision relied on General Construction Law § 20, which provides: "A number of days specified as a period from a certain day within which or after or before which an act is authorized or required to be done means such number of calendar days*

exclusive of the calendar day from which the reckoning is made."

Note that 7 N.Y.C.R.R. 251-5.1(a) provides that a hearing must commence within seven days of an inmate's initial confinement in SHU or keeplock--not, as the court in this case perhaps inadvertently suggested, within seven days of the writing of the Misbeh avior Report.

Inmate Found Guilty of Possession of Escape Materials, Not Guilty of Correspondence Violations

Matter of Davis v. Goord, 833 N.Y.S.2d 802 (4th Dep't 2007)

The Petitioner was charged with violating inmate Rules 108.13 [possession of any article or paraphernalia providing reasonable grounds to believe that escape is planned] and 180.11 [compliance with correspondence procedures pursuant to 7 NYCRR parts 720, 721]. The court determined that there was substantial evidence to support a finding that he possessed escape materials, including a magazine article concerning prison escape. It also found that there was substantial evidence that he had ordered equipment used to pick locks and bypass security systems to be delivered to his lawyer's office.

The court found that the determination that the Petitioner had violated DOCS' correspondence rules was not supported by the evidence. Those charges were based on the Petitioner's receipt of a letter from someone named "Sparky," whom DOCS' officials believed to be a former inmate. DOCS' rules prohibit writing to an inmate or someone on parole or probation without authorization from the facility superintendent. *See* 7 N.Y.C.R.R. 720.3(b)(2).

The mere fact that the Petitioner had received a letter from "Sparky," however, did not constitute evidence that the Petitioner had violated the correspondence rule, the court held. In fact, the hearing record contained no evidence that the Petitioner either wrote to "Sparky" or even that "Sparky" had been an inmate.

Similarly, the court found, there was no evidence that the Petitioner had violated DOCS' rules against "kiting" mail, *i.e.*, sent "written material in outgoing mail not specifically intended for the addressee identified on the exterior of the envelope." *See* 7 N.Y.C.R.R. 720.3(p). The Misbehavior Report indicated only that he received mail, not sent it.

In light of its findings, the court ordered DOCS to expunge the references to the alleged correspondence rule violations from the Petitioner's records. Since, by the time of the ruling, the Petitioner had already served his SHU sentence, there was nothing further the court could do for him.

Inmate Found Guilty of Making Threats, Even Though Threats Not Made to Victim

Griswold v. Goord, 835 N.Y.S.2d 460 (3d Dep't 2007)

The Petitioner was scheduled for conditional release after serving 16 years of a 25-year sentence for attempted murder and assault when, in a recorded telephone conversation with his sister, he became angry and, referring to a third person, said, "I'll punch his lights out." As a result, he was charged with making threats and failing to comply with telephone guidelines. Following a Tier III hearing, he was found guilty as charged and received a penalty that included 18 months loss of good time, which had the effect of postponing his release date. After an unsuccessful administrative appeal, he commenced an Article 78 proceeding challenging the disciplinary determination.

In his Article 78, he argued that his statement was an offhand remark communicated only to his sister, rather than a serious threat of violence, and was insufficient to support the finding that he had made a threat because it was never communicated to the person against whom it was directed.

The court rejected this argument. It noted that the relevant disciplinary rule--7 N.Y.C.R.R. 270.2(B)(3)(i)--prohibits "any threat" made "under any circumstances." It was therefore of "no consequence," according to the court, that the threat was never communicated to its intended target. The Petitioner's claim that the threat was not real, the court held, presented a credibility issue for the Hearing Officer to resolve. Accordingly, the court found, the Misbehavior Report, together with the Petitioner's admission that he made the statement, provided substantial evidence for the determination of guilt.

Inmate Forfeits Right to Challenge Administrative Segregation Hearing

Abdur-Raheem v. Burgee, 835 N.Y.S.2d 457 (3d Dep't 2007)

The Petitioner, a Muslim, was placed in Administrative Segregation ("Ad. Seg.") based on an Ad. Seg. recommendation which stated that he was suspected of influencing other Muslim inmates to stay in their cells during Ramadan and of being the catalyst behind an inmate strike earlier in the year. Following a hearing, it was determined that the Petitioner's continued presence in the general population would pose a threat to the safety and security of the prison facility, a decision which was upheld on administrative appeal. As a result, the Petitioner filed an Article 78 proceeding.

In his proceeding, he contended that the recommendation was made in retaliation for grievances he had filed, that the Hearing Officer was biased, and that he could not prepare a defense because the recommendation was deficient in its details.

The court found, however, that by refusing to attend his hearing, he had forfeited the right to raise these issues. According to the court, he was given the opportunity to present his views and respond to the segregation recommendation, "yet chose to forgo that opportunity." Moreover, the court found, the recommendation, together with the testimony and evidence at the hearing, provided sufficient evidence to support the conclusion that he had negatively influenced other Muslim inmates such that his removal from the general population was in the best interest of the facility's safety and security.

Hearing Officer's Refusal to Provide Inmate With Correction Officer's Injury Report Results in Reversal of Disciplinary Hearing

Matter of Davis v. LeClaire, Sup Ct. Albany Co, March 28, 2007 (McNamara, J.)

The Petitioner was found guilty in a Tier III disciplinary proceeding of violent conduct, creating a disturbance, assault on staff, weapons possession ,and refusing a direct order.

According to the Misbehavior Report, a Correction Officer ("CO") observed the Petitioner creating a disturbance in the mess hall at Elmira and placed him on the wall for a pat frisk. When the CO attempted to retrieve an

object that he said he felt in the Petitioner's pocket, he allegedly came off the wall and struck the CO in the face with his elbow. The CO then grabbed the Petitioner from behind and forced him face first into the wall. When the Petitioner attempted to break free, he was driven face first to the floor. According to the Report, the Petitioner continued to struggle while on the ground, and attempted to strike the CO again. The CO then struck the Petitioner with a closed fist in his forehead.

The Petitioner denied the charges. He stated that he and the CO had exchanged words in the mess hall. Shortly thereafter, a CO told the Petitioner to follow him into the hallway. According to the Petitioner, he was told to put his hands on the wall and was then punched in the head, thrown to the ground and punched and kicked.

It was undisputed that as a result of the incident, the Petitioner suffered a fracture of the orbital bone around his eye, a broken nose, a fractured thumb, and facial lacerations which required more than thirty stitches to close.

At his hearing, the Petitioner requested that the Hearing Officer produce the Injury Report of the Correction Officer who wrote the Misbehavior Report as well as photographs of the Officer's injuries, both of which are generally generated as part of the Use of Force Report. The Hearing Officer denied this request, stating that revealing the CO's injury reports would constitute an unauthorized invasion of the Officer's privacy.

After being found guilty, and having his administrative appeal affirmed, the inmate filed an Article 78 proceeding.

The court noted that appellate courts have held that medical records and photographs of the Correction Officer involved in an altercation with inmates are relevant to disciplinary charges that arise from the incident. *See*, *e.g.*, Matter of Cody v. Goord, 794 N.Y.S.2d 149 (3d Dep't 2005). It was therefore an error for the Hearing Officer to deny the Petitioner's request to review them.

Moreover, the court found, the error required reversal of the hearing. The Petitioner's defense to the charges was that he was the victim of an unprovoked attack by the Correction Officers. His request for the CO's Injury Report was intended to show that the CO's injuries did not support the description of the incident contained in the Misbehavior Report. In addition, the court pointed out, in fact, that the CO's Injury Report made no reference of any injury to his face--which was arguably contrary to the CO's assertion that the Petitioner initiated the incident by striking him in the face with his elbow.

"Considering the importance of this evidence," the court wrote, "the Hearing Officer's refusal to allow the Petitioner to review it cannot be characterized as harmless."

The Petitioner in this case was represented by Prisoners' Legal Services of New York.

Parole Cases

Court Declines to Reverse Parole Denial of Model Inmate

Cruz v. New York State Division of Parole, 833 N.Y.S.2d 311 (3d Dep't 2007)

The Petitioner, denied parole, appealed the denial in an Article 78 proceeding.

The Petitioner had been convicted of manslaughter and weapon's possession arising out of an altercation between two groups of men in 1991. The Petitioner, who had been drinking and smoking marijuana, had retrieved his gun from the trunk of a car and fired a shot but was unaware that he had hit anyone. When he found out the next day that an individual had been shot, he turned himself in to the police. He was 17 years old at the time and had no prior criminal record.

The record before the Parole Board revealed that Petitioner has always admitted his guilt and expressed remorse for his conduct. In his 15 years of incarceration, he had only one disciplinary offense. He has participated in numerous available programs, including alcohol and substance abuse treatment and the alternatives to violence project, and he had earned 45 college credits. The record also showed that he had offers of employment from a New York City police officer and several relatives. Finally, at his hearing, the Petitioner detailed the support that he receives from his wife who visits him weekly, and he continued to express his sorrow for the taking of another person's life and the suffering that he caused.

Although the Board noted his positive institutional achievements and his exemplary conduct in prison, it concluded that "[his] actions that led to the death of a male victim leads this panel to determine that if released at this time, there is a reasonable probability that your (sic) would not live and remain at liberty without violating the law." Accordingly, the Board denied parole and ordered the Petitioner held for an additional 24 months.

The court--with apparent reluctance--upheld the Board's decision, writing as follows:

> We find petitioner's academic and institutional achievements exemplary. It would seem that he is a prime candidate for parole release. Yet, given the standard of review available to us, we cannot find that the Board's decision exhibits "'irrationality bordering on impropriety'" Clearly, the Board considered the appropriate statutory factors set forth in Executive Law § 259-i, spanning from the seriousness of petitioner's crime to his lack of criminal history, nearly spotless prison disciplinary record, positive program accomplishments and post-release plans. Yet, with the Board not required to give equal weight to those factors, and instead placing more emphasis on the serious nature of petitioner's crime, we are constrained to affirm.

Court Reverses Parole Denial Where Denial Based Solely on Seriousness of the Crime

Matter of Almonor v. New York State Board of Parole, (Sup. Ct., NY Co.) (March 29, 2007) (York, J.)

On December 1, 1991, the Petitioner, then 20 years old, was at a nightclub with some friends when a fight broke out. He and other friends were drawn into the fight, the details of which are unclear. According to the Petitioner, he was slashed in the face with a knife and one of his friends gave him a gun with which to defend himself. Ultimately, the Petitioner fired the gun three times, injuring one woman and killing one man. He was sentenced to 12½ to 25 years for criminal use of a firearm in the first degree, and to 8⅓ to 25 years for manslaughter in the first degree.

During the Petitioner's years in prison, he successfully completed various programs to deal with his aggression, received his GED, and completed training programs that enable him to work as an electrician's assistant and a custodial maintenance worker. In addition, he trained in legal research, received an associate's degree in paralegal studies, and worked as a paralegal in the prison library. The Law Library Supervisor gave him consistently superior evaluations for his conduct. His record also detailed other vocational and rehabilitative achievements,

including work with the hearing impaired and work as an HIV/AIDS Peer Educator.

In 2004, he married his high school sweetheart, a former teacher who now works as a Guidance Counselor with the New York City Department of Education. She wrote a letter to the Parole Board on behalf of her husband in connection with his 2006 application for parole. In addition, numerous relatives and friends, as well as the Petitioner's local assemblyman, wrote letters. The Petitioner also submitted evidence to the Board showing that he was actively seeking both employment and entrance into a four-year college in the event of his release on parole.

At his 2006 parole hearing, the Petitioner expressed his remorse for the crime and stated that he was older and wiser and he would not repeat his earlier mistakes. One of the Commissioners commented that he found it "rather interesting" that his manslaughter charge received a smaller sentence than his weapons charge.

The Commissioners then denied parole, writing:

> Parole is again denied due to the serious nature and violent circumstances of the instant offenses, criminal use of a firearm first and manslaughter one, wherein you shot and killed one man and shot and injured a female victim.

The Petitioner challenged the denial of parole in an Article 78 proceeding as arbitrary and capricious. The court reversed, noting that although the Parole Board has great discretion, its discretion is not "unfettered."

> The Board cannot base its determination solely on the serious nature of the crime. Instead, although it need not discuss every statutory factor, it must consider these factors "as to every person who comes before it." This includes consideration of the inmate's institutional record including, as is relevant here, the inmate's vocational education, his training and work assignments, therapy, and his release plans. Where the record convincingly demonstrates that the Parole Board did in fact fail to consider the proper standards, the courts must intervene.

In this case, the court found, the Board relied exclusively on the severity of the offense in its decision to deny parole. Its decision did not mention any factor other than the seriousness of the crime as its basis. Thus, its action "not only contravene[d] the discretionary scheme mandated by statute, but also effectively constitute[d] an unauthorized re-sentencing of the defendant." In reaching this conclusion, the court also noted the short length of the parole hearing, the Commissioners' unwillingness to discuss the Petitioner's letters in support of his application, and Commissioner Rodriguez's comment suggesting that he thought the Petitioner's sentence for manslaughter was too short.

The Court ordered that a de novo parole hearing be held.

Practice pointer: *The similarities between this case and the* <u>*Cruz*</u> *case above--and their opposite results--beg further explanation. Both cases involve inmates convicted of manslaughter at a young age in similar circumstances. Both inmates apparently have model prison records, and in both, the Board denied parole based entirely on the "seriousness of the underlying offense." Yet, in this case, the court felt it appropriate to reverse the Board, while in* <u>*Cruz*</u>*, it declined. Why?*

The only rationale that the editors of ***Pro Se*** *can suggest is that, in this case, the court found that the Board failed to consider any factor* <u>*other than*</u> *the seriousness of the crime, while in*

the Cruz case, the court found that the Board did consider factors other than the seriousness of the crime--notably the inmate's "nearly spotless prison disciplinary record, positive program accomplishments and post-release plans." Apparently, this distinction was sufficient to merit upholding the Board in the Cruz case, while reversing it in the instant case.

One can only wonder, however, if this is a distinction without a difference. In Cruz, all the factors other than the seriousness of the offense weighed in favor of granting parole. If the Board considered those factors, it must have rejected them out of hand. A cynic could argue, based on the results of these decisions (and others like them), that it makes little difference whether or not the Board considers additional factors, since it will not be persuaded by them.

Pro Se litigants should also note that, even in this case, it is not clear that the inmate won much. A court's authority upon reversing a parole hearing is limited to ordering that a new parole hearing be held. The court does not have the authority to order the inmate released. See Quartararo v. New York State Div. of Parole, 637 N.Y.S.2d 721 (1st Dep't 1996). DOCS' inmate locator reveals that the Petitioner in this case remains incarcerated and that his next parole board is not scheduled until April 2008. That suggests that the Board has either appealed this case, and obtained a stay of the decision, or that it held the re-hearing required by the court and denied the Petitioner parole once again. In either event, it is evidence that even a successful challenge to a parole denial may, in the end, be only a "pyrrhic" victory.

Court of Claims Cases

Inmate, Burned During Physical Therapy, Wins Summary Judgement on DOCS' Negligence

Banks v. State of New York, (Court of Claims, April 11, 2007) (Mognano, J.) (Unreported Decision)

The Claimant, an inmate, suffered burns on his shoulder during a physical therapy session at Shawangunk Correctional Facility. He sued the State in the Court of Claims and, after his claim was filed, he moved for "summary judgment."

A motion for summary judgment is one in which one party argues that there is enough evidence available for the court to decide the matter without a trial. To prevail, the party making the motion "must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact."

Making a *prima facie* means submitting evidence that, unless rebutted, would be sufficient to prove the case.

If the party making the summary judgment motion establishes a *prima facie* case, "the burden shifts to the opposing party to produce evidence that some of the facts on which the *prima facie* case depends are in dispute, thus requiring a trial."

Here, the Claimant submitted an affidavit in support of his summary judgment motion. In his affidavit, he stated that part of his physical therapy treatment involved application of a hot plate wrapped in a towel to his left shoulder. He complained that the device was too hot but his complaints were ignored, causing burns and permanent scarring. He also submitted, with his motion, an "Inmate Injury Report," which indicated that he had presented himself at the Wallkill Correctional Facility health facility on September 2, 2005, stating that while receiving physical therapy the day before, a heating pad caused burns on his shoulder. In the Inmate Injury Report, the nurse wrote, "[b]urns noted

on Lt shoulder (3) blisters intact," applied Bacitracin and a dressing, and admitted the Claimant to the infirmary to be seen by a doctor. In an Inter-Departmental Memorandum addressed to "Dep. Hansen," she noted that the Claimant told her he had "complained to PT staff that the moist heat was too hot and another towel was placed between the heat source and his skin."

The court found that the evidence submitted by the Plaintiff established the Plaintiff's *prima facie* case of negligence under the doctrine of *res ipsa loquitur.*

Res ipsa loquitur is a Latin term meaning "the things speaks for itself." It is a principle of evidence which allows a court to conclude that the mere fact that an event happened is proof of the defendant's negligence, because it could not have happened absent the defendant's negligence. To establish negligence by virtue of *res ipsa loquitur*, a claimant must show that: (1) the event was of a kind that does not ordinarily occur in the absence of negligence; (2) the event was caused by an "agency or instrumentality" within the defendant's exclusive control; and, (3) the event was not due to any voluntary action or contribution on the part of the claimant.

Here, the court found, the fact that the Claimant was burned during his physical therapy session satisfied the standard for a showing of negligence by virtue of *res ipsa loquitur*. The facts established by the Claimant's evidence, if true, made "the inference of negligence…inescapable." The burden, therefore, shifted to the State to demonstrate that there were disputed factual issues which warranted a trial.

In reply, the State argued that: the therapist had acted properly in placing the hot plate on the Claimant's shoulder; there was no evidence that the therapist had acted negligently or in "disregard of community standards"; there was no evidence that the hot plate was malfunctioning or the Defendant had notice that it would cause the Claimant's skin to burn; and there was no proof that the Claimant was in need of special precaution due to age or sensitivity. The court noted, however, that the State presented no *evidence* in support of its arguments. The State's arguments were "[m]ere conclusions, expressions of hope or unsubstantiated allegations." As such, they were insufficient to meet the State's burden of proof on a summary judgment motion. "Had [the State's] allegations been supported by evidence of improper physical therapy practice, a malfunction or lack thereof of the heat source or claimant's alleged particular sensitivity to heat, or any indication that burns to the skin such as claimant received are a normal and accepted risk of physical therapy involving heat, [the State] may well have been able to demonstrate issues of fact" sufficient to warrant a trial. However, "[s]ince no such evidence was presented, and counsel's statements to the contrary are not an adequate substitute and the fact that a physical therapy treatment uncontrovertedly resulted in second degree burns implicates negligence within the comprehension of a layperson."

Thus, the court granted summary judgment to the Plaintiff and scheduled a trial for damages.

Inmate Awarded $8,000 for DOCS' Negligence in Allowing Other Inmates to Assault Him in SHU

Martin v. State of New York, 833 N.Y.S.2d 706 (3d Dep't 2007)

In April 1999, while serving a SHU sentence, the Claimant was attacked and assaulted by two inmates wielding shanks as he exercised in the "cage." The assault lasted approximately three minutes, during which the Claimant defended himself, rendering one of his

assailants semiconscious. As a result of the incident, the Claimant required a total of nine stitches, one to his scalp, three to his left thumb, four to his chest, and one on the right side of his neck. Approximately six weeks later, in June 1999, he sought mental health treatment, contending that he could not sleep due to nightmares and that he was suffering from extreme headaches, and subsequently was diagnosed with Posttraumatic Stress Disorder ("PTSD") and treated with various medications.

In the interim, the Claimant commenced an action against the State in the Court of Claims, alleging that on the day he was assaulted, Correction Officers negligently failed to screen inmates before allowing them to enter the exercise cage. After a trial, the court found for the inmate and awarded him $15,000 in compensation for his physical injuries, but rejected his claim that he suffers from PTSD and, hence, denied him any compensation for his alleged psychological injuries.

Both the Claimant and the State appealed. The Claimant argued that the award should include damages for PTSD, while the State argued that the $15,000.00 awarded for the Claimant's physical injuries was too high.

The appeals court found that the lower court had acted appropriately in rejecting the Claimant's PTSD claim. At trial, the court had been confronted with competing expert opinions as to whether the Claimant suffered from PTSD and it elected to credit the testimony of the State's expert over that of the Claimant. In addition, the court noted that the Claimant had sustained a seven-inch laceration to his chest in a bar fight in 1970, was incarcerated in 1979 for armed robbery, and was found guilty of fighting while incarcerated at least three times, including an incident during which the Claimant apparently threw hot oil at a fellow inmate. Thus, the court wrote, the incident was "not claimant's first exposure to violence." The court also considered the testimony of the Correction Officer who escorted the Claimant to the infirmary following the attack, who stated that the Claimant expressed "exuberance that he had successfully defended himself from two attackers, and that he had, in fact, rendered one semiconscious during this incident." Finally, the court took into consideration testimony to the effect that some of the symptoms the Claimant associated with PTSD, including his allegedly persistent headaches, could be the product of other medical conditions from which the Claimant suffers, including hypertension and Grave's disease. Under these circumstances, the appeals court held, "the Court of Claims quite properly rejected claimant's assertion of PTSD."

The court also agreed with the State's contention that the $15,000 awarded by the Court of Claims for the Claimant's physical injuries was excessive under the circumstances. On reviewing the record as a whole, the court reduced the Claimant's award to $8,000.00--although one judge dissented from that portion of holding, concluding that there was nothing in the record to justify reducing the award from $15,000.00.

Other Cases

Inmate Denied Visitation With Children

Matter of Conklin v. Hernandez, 837 N.Y.S.2d 419 (3d Dep't 2007)

The Petitioner, an inmate, petitioned for visitation with his two children, ages three and five, whom he has not seen since he was incarcerated in 2004. After a hearing, the Family Court denied his petition, granting him only the right to communicate with his children by mail and receive updates on their condition six times per year. The Petitioner appealed.

The Appellate Division noted that "visitation [with] a noncustodial parent is

presumed to be in the child's best interest and should be denied only in exceptional situations, such as where substantial [proof] reveals that visitation would be detrimental to the welfare of the child." Further, the court noted, "the incarceration of a noncustodial parent shall not, by itself, preclude visitation with his or her child." On the other hand, the court noted, "denial of an application for visitation is proper where evidence demonstrates that visitation would not be in the child's best interest" and "the propriety of visitation is generally left to the sound discretion of Family Court whose findings are accorded deference by [the appeals court] and will remain undisturbed unless lacking a sound basis in the record."

In this case, the court found that the Family Court's determination that, under the circumstances, it would not be in the children's best interests to have visitation with their incarcerated father was supported by the record, notwithstanding what the court characterized as the Petitioner's "earnest efforts to secure in-person visitation with his children."

The court pointed out that the Petitioner had minimal financial resources and no family or friends to assist in providing transportation or supervision of the children. The children's mother was a single mother with four children who worked full time earning minimal wages. She did not have either a car or the financial resources or family or friends to help with the five- to eight-hour round trip from the City of Binghamton, where she lived, to Wyoming County, where the Petitioner was incarcerated. Although the Petitioner offered to use his inmate salary to pay for their bus transportation, the court stated, he offered no proposal for how the children's mother would care for her other two children or pay other travel-related expenses, and he was unable to suggest anyone suitable, other than the mother, who could accompany and supervise his children.

At Family Court, the children's mother had testified that she did not oppose visitation with the father, but that she did not want to have any contact with him herself because of their volatile relationship. She conceded that the Petitioner had bonded with their son, who was 2½ years old when the Petitioner had last lived with them, prior to his incarceration, but she stated that their daughter, who was only a four-month-old infant at that time, did not know him and she was uncomfortable having her visit with someone who was, essentially, a stranger.

Under all of the circumstances, the court held, including the young ages of the children, the difficult logistics and the expense of travel, the mother's opposition to having contact with the Petitioner, the lack of a pre-existing relationship between the father and the daughter, and the parties' lack of resources or appropriate third-party assistance, the Family Court's denial of visitation "had a substantial basis in the record" and should, therefore, be affirmed. The appeals court noted that if the Petitioner were to be transferred to a facility closer to his children or if the financial situation of the parties substantially improved or a suitable adult were to be identified by the parties who could provide the necessary supervision and transportation, the Petitioner could renew his petition for a modification of visitation at a later date.

Inmate Denied Re-Sentencing Under Drug Law Reform Act

People v. Vega, 836 N.Y.S.2d 685 (2d Dep't 2007)

The Drug Law Reform Act of 2004 established a new sentencing structure for drug

offenses in an effort to alleviate the strict laws enacted in 1973, commonly known as the Rockefeller Drug Laws. Although the new sentences apply only to persons convicted after the Reform Act was passed, the Act also allowed inmates convicted of A-I and A-II drug offenses prior to the Act's passage to apply to be re-sentenced. The Act, however, does not require a sentencing court to grant re-sentencing. Instead, under the statute, the court should:

> consider any facts or circumstances relevant to the imposition of a new sentence which are submitted by such person or the people and may, in addition, consider the institutional record of confinement of such person… Upon its review of the submissions and the findings of fact made in connection with the application, the court shall, unless substantial justice dictates that the application should be denied, in which event the court shall issue an order denying the application, specify and inform such person of the term of a determinate sentence of imprisonment it would impose upon such conviction.

In this case, the Defendant was a second felony offender with a prior criminal history dating back to 1988, including convictions of other controlled substance offenses, and he was subsequently convicted of murder in the second degree. Moreover, his prison disciplinary record was poor. Under the circumstances, the court held, justice dictated that his application for a new sentence be denied.

Inmate in IPC Denied Permission to Participate in Family Reunion Program

Matter of Cabassa v. Goord, 836 N.Y.S.2d 351 (3d Dep't 2007)

The Petitioner was placed in Involuntary Protective Custody ("IPC") at Shawangunk Correctional Facility after it was revealed that his safety was in jeopardy. Because of his IPC status, his application for participation in the Family Reunion program was subject to "special review." *See* 7 N.Y.C.R.R. 220.2(c). When the special review was completed, his Family Reunion application was denied and the determination was upheld on administrative appeal. The Petitioner then commenced an Article 78 proceeding challenging the denial.

The court noted that "it is well settled that [a] decision to deny an inmate participation in the family reunion program is 'heavily discretionary' and will not be disturbed if supported by a rational basis." Here, the court found, DOCS properly considered the various factors outlined in 7 N.Y.C.R.R. 220.2 during the special review process, but denied the Petitioner's application primarily on the basis of his IPC status and the security concern presented thereby. Because this constituted a rational reason for the denial of the Petitioner's application, the court dismissed the Petitioner's Article 78 proceeding.

Practice pointer*: 7 N.Y.C.R.R. 220.2(c) provides for "special review" of an inmate who is otherwise eligible to participate in the Family Reunion program if he or she: (i) has been designated a central monitoring case; (ii) has any outstanding warrants or show cause order (e.g., U.S. Immigration Service); (iii) has been convicted of heinous or unusual crimes or if it appears that the inmate is a sex offender; (iv) is a returned parole violator; (v) is in protective custody or administrative segregation; (vi) is in a special program such as Merle Cooper or APPU or IPC or assigned to a closed mental hygiene unit. The regulation does not specify what factors should be considered in the "special review" process, so it is unclear as to what factors--other than the mere fact that the*

inmate was in IPC--were considered in this case.

Inmate Denied Access to Pre-Sentence Report

People v. Muniz, (Sup Ct., Kings Co.) (May 7, 2007) (Rivera, J.) (Unreported Decision)

Inmates often want to see a copy of their Pre-sentence Report. Often, they wish to correct what they believe to be incorrect information in the Pre-sentence Report. On other occasions, they may wish to use the Pre-sentence Report to argue in favor of admission to certain prison programs or to present to the Parole Board for consideration for release on parole.

Under Criminal Procedure Law § 390.50, a sentencing court must provide the parties in a criminal case with access to the Pre-sentence Report at least one day prior to sentencing. They must also provide copies to various public agencies, including DOCS. Beyond that, however, the law states that Pre-sentence Reports are "confidential and may not be made available to any person except…upon specific authorization of the [sentencing] court." C.P.L. § 390.50(1).

State courts are divided over whether a sentencing court may grant an inmate access to his Pre-sentence Report for any purposes other than presenting arguments about his sentence. In Salamone v. Monroe County Dept. of Probation, 524 N.Y.S.2d 943 (4th Dep't 1988), the Fourth Department of the Appellate Division held that a Pre-sentence Report can never be released for any purpose other than that for which it was prepared (*i.e.*, to help the judge establish sentence).

However, in Blanche v. People, 598 N.Y.S.2d 102 (3d Dep't 1993), the Third Department held that the sentencing court may disclose the Pre-sentence Report--if the party requesting the Report can show some "important need [for it] that cannot be filled by other means."

Thus, if you were convicted in one of the Counties located in the Third Department, you can obtain a copy of your Pre-sentence Report if you can show an "important need [for it] that cannot be filled by other means."

What constitutes such a need?

Several courts have addressed that question.

In Shader v. People, 650 N.Y.S.2d 350 (3d Dep't 1996), the Petitioner made a motion for disclosure of his Pre-sentence Report in connection with his pending parole appeal. There, the appellate court held that the Petitioner had made an adequate showing of the need for the report "inasmuch as it is one of the factors required to be considered by the Board of Parole upon application for release."

However, in Kilgore v. People, 710 N.Y.S.2d 690 (3d Dep't 2000), the court held that the Petitioner's assertion that he needed his Pre-sentence Report in order to help him prepare for his parole board was not a sufficient ground for release of the Report. "Petitioner's bare assertion," wrote the court, without more, that he required the report in order to properly prepare for an appearance before the Board of Parole "is insufficient to constitute a showing [of need for the report]." At the very least, the "petitioner must demonstrate that he has been given notice of an impending hearing before the Board of Parole."

Also, in Campney v. People, 718 N.Y.S.2d 898 (3d Dep't 2001), where the inmate claimed he needed his Pre-sentence Report in order to "apply for certain prison programs and future parole release consideration," the court found his claim too "speculative and insufficient" to support his application.

Here, the court held, the Petitioner made "only a bare assertion that he requires his Pre-sentence Report for an upcoming parole hearing." He did not inform the court of the date

of the hearing or why he needed the Report to prepare. Under these circumstances, the court found, it did not have enough information to determine whether the Petitioner was entitled to his Report. “Petitioner’s bare assertion that he needs it for an upcoming parole hearing is insufficient,” held the court.

Inmate’s Article 78 Proceeding Dismissed as Untimely

Matter of Watson v. Goord, 832 N.Y.S.2d 464 (3d Dep’t 2007)

The Petitioner filed a grievance in the winter of 2003-2004, alleging that he was not provided with adequate winter clothing. He filed another in December 2003 challenging the institutional procedure for reviewing his complaint about medical care. His grievances were administratively denied in September 2003 and January 2004, respectively. In January 2005, he commenced an Article 78 proceeding.

Pursuant to Civil Practice Law and Rules § 217 (1), Article 78 proceedings are governed by a four-month statute of limitations. Section 217(1) states: “a proceeding against a body or officer [an Article 78 proceeding] must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner or the person whom he represents in law or in fact, or after the respondent’s refusal, upon the demand of the petitioner or the person whom he represents, to perform its duty…”

An administrative determination becomes “final and binding” when it is received by the person who wants to bring the Article 78 proceeding.

Here, because the Petitioner did not start his Article 78 proceeding until a year or more after his grievances were decided, the court dismissed his claim.

Pro Se Practice

Bringing an Excessive Force Lawsuit in the Court of Claims

New York State can be held liable in the Court of Claims when state employees, including Correction Officers, cause injury by using excessive force. However, succeeding in an excessive force claim is very difficult. The law allows officers to use reasonable force to maintain order and protect themselves, and there are significant obstacles to proving that the amount of force used was excessive. In excessive force cases, the Court of Claims judge is often forced to choose between the inmate’s story of what happened, or the Correction Officer’s, with little additional evidence. In the vast majority of cases, the court credits the testimony of the officer. Moreover, even in the rare instances in which inmates have successfully proved excessive force, the damage awards are usually modest.

Nevertheless, filing an excessive force claim in the Court of Claims may, for many, be an attractive alternative to filing in federal court. The process is generally simpler and more straightforward, many of the procedural hurdles that prevent federal courts from addressing the merits of inmate cases do not exist in the Court of Claims, and the threshold of what you must prove to establish excessive force is slightly lower in the Court of Claims than it is in federal court.

This article is intended to be a brief guide to filing an excessive force case in the Court of Claims.

Deadline for Filing an Excessive Force Claim:

★ Under the Court of Claims statute, if you believe a Correction Officer used excessive force against you, you must either file your claim in the court or serve the Attorney General with a notice that you intend to file a claim, within 90 days of the incident. If you give notice within this 90-day period, you have one year from the date of the incident to file the claim in court. If you fail to either give notice of your claim within 90 days, or fail to file your claim within one year, the Court of Claims cannot hear your case. *See* Court of Claims Act § 10(3-b).

★ There is one exception: If you miss the 90-day deadline for filing a claim or giving notice of your claim, you can file a motion for permission to file a late claim. (For more information on filing a late claim, request PLS's "Late Claims" memo.)

★ However, if more than one year has passed, all claims, including late claims, are barred by New York's statute of limitations. Excessive force claims are considered to be "intentional tort" claims, which are barred after one year has passed from the date of the incident.

What Constitutes Excessive Force Under New York law?

New York corrections law allows officers to use some force against inmates for certain purposes. Correction Law § 137(5) states:

> [N]o officer…shall inflict any blows whatever upon any inmate, unless in self defense, or to suppress a revolt or insurrection. When any inmate, or group of inmates, shall offer violence to any person, or do or attempt to do any injury to property, or attempt to escape, or resist or disobey any lawful direction, the officers and employees shall use all suitable means to defend themselves, to maintain order, to enforce observation of discipline, to secure the persons of the offenders and to prevent any such attempt or escape.

New York regulations require that Correction Officers use only "such degree of force as is reasonably required" and that they not "lay hands on or strike an inmate": unless they "reasonably believe that the physical force to be used is reasonably necessary for self-defense; to prevent injury to person or property; to enforce compliance with a lawful direction; to quell a disturbance; or to prevent an escape." 7 N.Y.C.R.R. § 251-1.2(b).

These rules do not specify precisely what kinds of force or level of force is excessive--it depends on the particular circumstances of the incident. When an inmate brings an excessive force claim, the Court of Claims must determine whether the degree of force was "reasonably required" or "reasonably necessary," focusing on "the circumstances confronting the officers or guards."

In past cases, the Court has been very willing to defer to the judgment and credibility of Correction Officers. The judges often note in their opinions that Correction Officers "are charged with the unenviable task of maintaining order and discipline in correctional facilities under stressful circumstances." Therefore,

judges are very reluctant to conclude that a given amount of force was unreasonable.

Proving Excessive Force:

In order to determine whether Correction Officers used excessive force, the Court of Claims examines the specific circumstances of the incident and evaluates the credibility of witnesses. In excessive force cases, the credibility of the witnesses is crucially important. It is very often the decisive factor.

In nearly all excessive force cases where an inmate can show an injury, the court must decide between the inmate's account of how the injury occurred and the account provided by the officer who testifies/officers who testify. The inmate bringing an excessive force claim bears the burden of proving that the officer(s) used excessive force. In other words, if the judge finds the inmate's testimony and the officer's/officers' testimony equally believable, the inmate loses and the claim is dismissed.

In deciding whose testimony to believe, the Court typically considers the following:

- The demeanor of the witnesses.

- The internal consistency of the claimant's testimony, and whether it squares with the physical evidence, including evidence of the claimant's injuries.
  - The Court will be suspicious of an inmate's testimony about excessive force if medical reports do not show the kinds of injuries that would be expected. For example: In Dougal v. State, Claim No. 102893 (Court of Claims, April 13, 2003), the court dismissed an inmate's claim partly because medical reports did not corroborate the inmate's testimony. The Claimant testified that Correction Officers punched him in the kidney/rib area 20 to 25 times, and that an officer hit his head repeatedly against a steel doorway 5 to 11 times. He also testified that his glasses fell on the ground and that an officer stepped on them. But a nurse who examined the Claimant observed no evidence of injury, and testified that "based upon Claimant's description of the nature and duration of the assault, one would expect to find very obvious injuries." The court also noted that photographs of the inmate after the alleged assault showed that his glasses had not been broken. The State also called a doctor as a medical expert who testified that with an assault as described by Claimant, she would expect to see serious head injuries. The judge agreed that had the events unfolded the way the Claimant alleged, "one would expect very visible and perhaps life threatening injuries." Because there was no such objective medical evidence consistent with the inmate's claims, the judge dismissed the case.

- The internal consistency of the Correction Officers' testimony, and whether it squares with the physical evidence.
  - Where several officers corroborate each other's testimony, the court will likely believe their account.
  - Even when the Correction Officers' testimony about an incident shows minor inconsistencies, the court will still credit their account as long as it is consistent about the critical details of the incident.

- Photographs or videotapes: In excessive force cases, "photographs of the condition of claimant's body immediately after that alleged force was applied [are] inescapably relevant, whatever they may or may not

show." The law requires "full disclosure of any films, photographs, video tapes or audio tapes" involving a party to the case.

- Medical records: Courts will always examine the claimant's medical records for proof of injuries. When no medical evidence substantiates the claimant's allegations of injuries, the court will dismiss the claim.

- Results of disciplinary actions or other court proceedings: When an inmate has been disciplined or convicted for assaulting the officer during the same incident during which the inmate was injured, the court will be more likely to dismiss the inmate's excessive force claim.

- Information from officers' personnel records about past conduct not allowed: The court will not allow the claimant to obtain information from a Correction Officer's personnel records for the purpose of showing that the officer probably assaulted the claimant because he had assaulted other inmates in the past.

Examples of "Reasonable" Use of Force:

There are several situations where the Court of Claims typically finds that the officers' use of force was reasonable and not excessive, even when the inmate can prove that the use of force caused an injury.

Inmate-instigated violence:

Where Correction Officers give a credible account that an inmate instigated violence against the Correction Officers, the Court will very likely find that the officers' use of force in response was reasonable.

✰ For example, in Blacks v. State, a Claimant suffered an injury above his eye during an altercation with Correction Officers. The inmate claimed that the officers had slammed his face into some cell bars without provocation. But an officer testified that the inmate suddenly kicked another officer in the knee while being escorted in handcuffs to the Special Housing Unit, and that the injury occurred when the officer then tried to subdue him. Although the inmate produced a videotape documenting that he did indeed have an injury above his eye, the videotape did not show how the injury happened. Because the injury was consistent with the officer's account of the altercation, the court credited the officer's testimony and dismissed the inmate's claim.

✰ In Quiles v. State, the Claimant admitted that he had been fighting with another inmate, but testified that the fight had broken up by the time Correction Officers arrived. The Correction Officers testified that the fight was ongoing when they were called in to break it up, and that the Claimant resisted their efforts to subdue him. The Court found that any injuries the Claimant suffered were a result of either his initial fight with the other inmate or his resisting the officers.

Inmates disobeying orders:

Similarly, if officers give a credible account that an inmate has resisted an order, the Court will allow the officers to use some force (including "takedowns") to subdue the inmate.

▶ In Curkendall v. State, a Claimant was able to produce a videotape of an incident in which a Correction Officer grabbed his arm and took him to the floor during a strip frisk.

The Claimant also produced a medical report that showed pain and significant bruising from a sprained knee, a laceration above his eye, as well as abrasions to his hip and back. Nevertheless, the judge found that because the inmate had resisted the officer's attempt to remove contraband hidden in his hand, the officer was justified in wrestling the inmate to the ground. The amount of force was "reasonable and appropriate" because the inmate "disobeyed a direct order and came off the wall during the frisk."

- In Odom v. State, the testimony and written reports of Correction Officers stated that an inmate refused to dress himself following a strip frisk. The court found that this "continued defiance and aggressive behavior" justified the officers in "taking him to the floor to put on his pants."

- In Williams v. State, a Claimant suffered a fractured arm in a struggle with Correction Officers. The Claimant testified that he did not resist the officers' orders to raise his hands for a frisk, and that an officer pushed his hands up toward his neck while handcuffed, resulting in the fracture. However, two officers testified that the Claimant resisted being placed in handcuffs and the fracture occurred as one officer struggled to place him in cuffs. After observing the witnesses' demeanor in giving these differing accounts, the court concluded that the amount of force was not excessive under the circumstances.

- In Thorpe v. State, the court believed the Claimant's testimony that he was "slammed" to the ground when an officer body tackled him to break up a fight between the Claimant and his cellmate. But, the court held, had the Claimant obeyed an order to lie prone on the floor, "he would not have experienced the use of force…. His injuries were the direct result of his own violent and assaultive behavior that day in his cell." Therefore, the officer's use of force was reasonable and necessary.

Possession of weapons:

- In Rosell v. State, the Claimant's ankle was broken during a struggle with Correction Officers who had spotted a concealed razor. The court found that the officers' use of force in tackling and restraining the inmate was reasonable because the inmate "was armed, attempted to flee, and resisted the officers."

Lack of objective evidence as to the cause of an injury:

- In McKee v. State, the Claimant produced an x-ray report showing that he had a dislocated shoulder that he claimed was the result of an unprovoked assault by Correction Officers. Despite the x-ray report, the court dismissed the case on the ground that the inmate had failed to present any other evidence indicating how the shoulder was dislocated. "No use of force report…or report of inmate injury, or other independent corroboration of the event was presented in evidence. Without more, Claimant's testimony alone does not persuade the court that the [State] should be liable for the alleged acts of its employees."

Proving Injuries:

Need for an expert:

Expert medical evidence is not necessary when the injuries documented in a claimant's medical records are of such a nature as to be

within the range of common knowledge and experience. An example of a situation where no medical expert is needed was a case where medical records showed that an inmate's wrists showed swelling and abrasions after he was placed in excessively tight handcuffs--no medical expert was needed to prove that the handcuffs caused the abrasions.

But in more complex cases, medical experts are needed. For example, in one case, an inmate was struck twice on the jaw by a Correction Officer and later underwent surgery to remove a salivary gland from his jaw. The Court of Claims declined to compensate the inmate for the surgery because he had not presented medical evidence proving that the blows to the jaw caused him to need surgery.

<u>Damages Available in Excessive Force Cases</u>:

When an inmate succeeds in proving that excessive force was used, the Court of Claims can only award compensatory damages. In other words, the Court can only award compensation for the actual harm that the inmate is able to prove. The Court of Claims cannot award punitive damages (damages intended to punish the State or the officer).

In excessive force cases, the Court of Claims has awarded damages for physical injuries, pain and suffering, and damaged/lost property. However, even in the handful of cases where inmates have succeeded in proving excessive force, damages awarded are usually modest. For example:

- An inmate who testified that a Correction Officer banged his head against a metal door frame and succeeded in proving that his eye was bruised from the incident was awarded $100.

- An inmate who testified that he was struck twice on the back of the head with a baton during a pat-frisk was awarded $200.

- An inmate whose medical records showed “minimal swelling and small abrasions” on his wrists after he complained that his handcuffs were too tight was awarded $200.

- An inmate who suffered knee pain after a Correction Officer knocked his knee into a concrete wall received $300.

- An inmate who claimed that he was slapped and punched by Correction Officers, and succeeded in proving to the court that “some excess force was used,” was awarded $500.

- An inmate assaulted by Correction Officers using unnecessary force was awarded approximately $148.95 for his broken sports eye glasses, $2.43 for lost shower slippers, and $3,000 for his injuries.

Cases in which the Court of Claims has awarded substantial damages are extremely rare. In one case more than ten years ago, an inmate who suffered persistent pain from being struck on the jaw by a Correction Officer was awarded $25,000 for his pain and suffering. In another, an inmate who needed surgery to remove his spleen after a Correction Officer beat him “unmercifully” and “without any provocation” was awarded $200,000 for pain and suffering and loss of quality of life. But, according to ***Pro Se****’s* research, these are the only cases in more than a decade where inmates have secured damage awards in the thousands.

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