Pro Se

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"BOOT THE SHU" BILL BECOMES LAW IN NEW YORK

New York is the first state in the nation to pass a law requiring that prisoners with serious mental illness be housed in therapeutic treatment programs, and not in SHU and keeplock (segregated confinement), except where such placement would be inconsistent with the safety and security needs of the prison. In January 2008, Governor Spitzer signed this landmark piece of legislation.

This law, particularly in combination with the implementation of the settlement agreement reached in Disability Advocates, Inc. v. New York State Office of Mental Health and Department of Correctional Services, et al., 02 Civ. 4002 (S.D.N.Y.), (See Vol. 17, No. 2, Spring 2007 edition of *Pro Se* for detailed article on the settlement), vastly increases the resources committed to the care and treatment of the seriously mentally ill in prison. There are approximately 8,000 prisoners in DOCS' custody on the active mental health caseload, or 12-13% of the total prisoner population. The Department of Justice estimates that as many as 56% of state prison inmates suffer from some form of mental illness.

The struggle to pass legislation to protect prisoners with serious mental illness spanned five years, and encompassed a strong coalition of former and current prisoners, family members of prisoners, mental health advocates, civil rights supporters, and prisoners and disability rights attorneys. Notably, the union that represents the New York State Correctional Officers also supported the passage of this legislation. This year marked the fourth year that the Assembly passed legislation on this topic, and the second year that the Senate, demonstrating bipartisan support for this measure, passed identical legislation by

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Message From the Executive Director

PLS published the first issue of **Pro Se** in 1984. We created the newsletter so prisoners in New York State prisons would have a regular and reliable source of information regarding developments in prisoners' rights, and to educate and inform prisoners about how to use the state and federal courts. Since that time, you, our readers, have become more informed about legal issues. In response to these developments, the breadth and depth of our coverage of prisoners' rights issues has increased. Thus, for the past few years, our articles have reflected the growing knowledge of our readership. While this works well for readers who have been following developments in the law over the years, it leaves new readers without a publication that explains the basics of the law, such as, what rights prisoners have, where these rights come from, how to read a legal citation, which courts hear which types of cases, and what kinds of relief each court can grant. To balance the needs of new and old readers, we have decided to produce two issues a year that provide basic material on the law for our newer readers. Beginning with this issue, some of the articles we publish in the Winter and Summer issues will be geared toward teaching inmates new to the study of law the basics of prisoners' rights and the operation of the courts that decide issues affecting these rights. In addition, when we report case decisions in the Winter and Summer issues, we will explain the basic legal terms and concepts that we use. The Spring and Fall issues will continue to provide more in-depth coverage of cases and legal issues. This way we hope to respond to the needs and interests of all of our readers. We welcome your feed back on this development and are always interested in your comments.

"Boot the SHU Bill"

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unanimous vote, sending the bill to the Governor for his review. Former Governor Pataki vetoed similar legislation at the close of the 2007 legislative session, causing public outcry demonstrated by a multitude of newspaper editorials from one end of the state to the other. Governor Spitzer's office worked with Assembly and Senate leaders to modify the bill in accordance with information from DOCS and OMH leadership. These efforts resulted in the modified bill, agreed to by all sides, that the Governor has now signed.

The law (Assembly Bill Number A09342, Jeffrion Aubry, sponsor; Senate Bill Number S06422, Michael Nozzolio, sponsor) requires the building of residential mental health treatment programs to house prisoners with serious mental illness.

These programs will be jointly operated by the New York State Office of Mental Health and the Department of Correctional Services. The housing programs will provide clinically appropriate mental health treatment while maintaining the safety and security of the prisons. Screening and ongoing assessments of prisoners for mental illness are required. The law also provides important training elements, requiring that all newly hired correctional officers and all staff working in mental health programs receive annual mental health training, including training on the types and symptoms of mental illnesses, the goals of mental health treatment, the prevention of suicide, and effective and safe management of prisoners with mental illness.

The New York State Commission on Quality of Care and Advocacy for Persons with Disabilities will monitor the quality of mental health care provided pursuant to the new law. The State Commission will work with an advisory committee that includes

independent mental health experts and advocates, and may include family members of former inmates with serious mental illness. The Commission will report annually to the Governor and the Legislature on the state's progress in meeting the requirements of the new law.

Provisions of the new law take effect on differing dates. For example, the oversight responsibilities of the Commission take effect on July 1, 2008. The law's requirement to divert inmates with mental illness from segregated confinement, however, takes effect in relation to when the residential treatment programs are built. The law states that diversion of inmates will be required within two years of the completion of the first program, and no later than 2011.

The law, paired with the settlement in DAI, Inc., et al. v. New York State OMH and DOCS, et al., ensures the continued existence of the mental health programs that have already come on-line and provides for additional programs to be added for years into the future. In tandem, the law and the settlement establish major improvements in psychiatric treatment for New York State prisoners with mental illness from the time they first arrive in state prison and will do much to minimize the placement of prisoners with mental illness in segregated housing.

The Governor's Executive Budget, released in January 2008, includes a sizeable allocation of funding to the Office of Mental Health and DOCS to implement both the new law and the Disability Advocates Inc. settlement. The combination of these funds will allow for the addition of inpatient and outpatient bed space and also add approximately 150 full time OMH staff to provide services.

News and Briefs

Post Release Supervision

Once again, there have been several significant developments resulting from challenges to DOCS's policy of including a period of post release supervision (PRS) in all determinate sentences, without regard to whether the sentencing court actually imposed PRS. In People v. Hill, 849 N.Y.S.2d 13 (2007), the Court of Appeals disagreed with the lower courts' application of the Court's decision in People v. Catu, 792 N.Y.S.2d 887 (2005). In Catu, the Court held that where a defendant is not informed about PRS at the time that he pleads guilty, his constitutional right to due process of law is violated. In Hill, the Court of Appeals, reversing the Appellate Division's affirmation of a trial court decision, instructed that where a defendant moves to vacate his sentence because at the time that he pled guilty, he was not informed that his sentence included a period of PRS, the sentencing court cannot simply adjust the sentence to give him the sentence that he bargained for. Rather, the Court held, it must vacate the plea and restore the defendant to the position that he was in before he accepted the plea.

In Hill, the defendant went to trial, and after the complainant testified, notified the court that he wanted to change his plea to guilty. The court sentenced him to 15 years. The defendant later found out that he also had to serve 5 years PRS. Defendant Hill sought to vacate his plea, saying that he would not have pled guilty if he had known that he had to serve a period of PRS. Instead of vacating his sentence, the trial court re-sentenced Defendant Hill to 12½ years in prison, and 2½ years of PRS. The Appellate Division

affirmed this result, noting that the defendant had gotten the sentence that he had bargained for. See, 830 N.Y.S.2d 33 (3rd Dep't 2007). The Court of Appeals did not agree, noting that, pursuant to Penal Law §70.45[5], if the defendant violated PRS after serving 2 years and 5 months, he would be returned to prison for 6 months, even though he only owed 1 month of PRS when he violated.

The Court held that where, *at the time of the plea*, the defendant is not informed that his sentence includes a period of PRS, the defendant's waiver of his right to a jury trial is not knowing and voluntary, and is therefore unconstitutional. If the defendant moves to vacate the conviction, he or she must be allowed to do so. Further, the Court held, because the constitutional violation occurred when the defendant entered his plea, and not when he was sentenced, the sentencing court cannot simply re-figure the sentence to give the defendant the sentence that he believed he was receiving. Rather, the court must allow him to withdraw his plea, and put him in the position that he was in before he accepted the plea.

In another development, the Court of Appeals accepted six more cases challenging sentences to which periods of PRS had been added even though there had been no mention of PRS at sentencing. Five of the cases – People v. Sparber, People v. Lingle, People v. Thomas, People v. Frazier, and People v. Ware – involve defendants who are raising claims in the context of their direct appeals.

The sixth case, Matter of Garner v. DOCS, is an Article 78 challenge to the imposition of PRS by the Department of Correctional Services. We expect that the decisions in these cases will resolve some of the issues surrounding the imposition of periods of PRS where the court did not mention PRS at sentencing.

And, in the Appellate Division, the First and Third Departments, in People v. Figueroa, 846 N.Y.S.2d 87 (1st Dep't 2007), and People v. Quinones, 848 N.Y.S.2d 757 (3rd Dep't 2007), respectively, joined the Second Department in holding that where neither the sentencing minutes nor the sentence and commitment papers mention a period of PRS, the sentence actually imposed by the court does not include any period of PRS.

Finally, the Third Department, in Matter of Dreher v. Goord, 858 N.Y.S.2d 758 (3rd Dep't 2007), joined the First Department in holding that where the sentencing court has not expressly imposed a period of PRS, DOCS does not have the authority to impose a period of PRS. Quoting Early v. Murray, 451 F.3d 71 (2d Cir. 2006), the Court held that, "[t]he only cognizable sentence is the one imposed by the judge. Any alteration to that sentence, unless made by a judge in a subsequent proceeding, is of no effect." In reaching this result, the court advised that its prior decisions to the contrary should no longer be followed.

New York's Highest Court Finds Correction Law §24 Constitutional

In September 2005, Keith Haywood filed two *pro se* §1983 actions in state Supreme Court alleging that various Department of Correctional Services (DOCS) employees had engaged in conduct that violated his federal and state constitutional rights. The first case was a complaint against defendant Curtis Drown, a DOCS hearing officer, who found Mr. Haywood guilty of improper mail solicitation. Mr. Haywood claimed that defendant Drown was not an impartial hearing officer, had found Mr. Haywood guilty on less than substantial evidence and had imposed a penalty that was intended to censor Mr. Haywood in violation of his First Amendment rights. Mr. Haywood asked the court to expunge the charges and award him monetary damages.

In his second lawsuit, Mr. Haywood named a DOCS hearing officer, two correction officers and two of their superior officers as

defendants. Mr. Haywood alleged that the various defendants conspired in writing a false misbehavior report, used excessive force, tampered with his urinalysis test and denied him a fair and impartial hearing. Again Mr. Haywood asked for monetary damages.

In most states, when an inmate complains about violations of his federal constitutional rights and seeks money damages, he has the choice of filing a §1983 action in either State or Federal court. However, in New York State we have a specific State statute, Correction Law §24, that prohibits all actions, state and federal, against employees of DOCS in their personal capacities for money damages arising out of their employment.

Thus, although New York supreme courts have the jurisdiction to hear §1983 damage claims against state employees, Correction Law §24 has been interpreted as carving out an exception for DOCS employees.

After Mr. Haywood filed his case in the state Supreme Court, the defendants made a motion to dismiss based on Correction Law §24. Mr. Haywood responded by arguing that Correction Law §24 was unconstitutional because it violated the Supremacy Clause. Article VI, clause 2 of the U.S. Constitution, known as the Supremacy Clause, states: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Mr. Haywood argued that since the right to file a §1983 action is a federal right, Correction Law §24 impermissibly discriminates against that right because it prohibits a person from filing a §1983 action in state court for money damages against a DOCS employee.

The court disagreed and granted the motion to dismiss. Mr. Haywood appealed. In the Fourth Department, Mr. Haywood again presented his argument that Correction Law §24 was unconstitutional but, again, the court agreed with the defendants and dismissed the case. Although the court did not specifically characterize Correction Law §24 as a subject matter jurisdiction statute, it did rely on Woodward v. State, 805 N.Y.S.2d 670 (3d Dep't 2005). In Woodward, the court held that the Supreme Court did not have subject matter jurisdiction to decide a §1983 retaliation claim filed by a DOCS employee, when the allegations in the complaint indicated that the defendant, also a DOCS employee, was acting "within the scope of his employment." Therefore, arguably, the court in Haywood viewed Correction Law §24 as a subject matter jurisdiction statute and found that the state was authorized to limit the jurisdiction of its courts.

Because the case involved the issue of the constitutionality of a state statute, Mr. Haywood was able to appeal to the Court of Appeals as of right. At that point, the private law firm of Dechert, Price and Rhodes, Jason E. Murtagh, of counsel, agreed to take on Mr. Haywood's case, *pro bono*. There were two questions before the Court of Appeals: Whether Correction Law §24 applies to federal civil rights actions and if so, whether Correction Law §24 violates the Supremacy Clause or is preempted by 42 U.S.C. §1983.

On appeal, Mr. Haywood's counsel argued that if Correction Law §24 is construed as either an immunity statute or a statute limiting the subject matter jurisdiction of state courts, it is unconstitutional because it is preempted by federal law, burdens the litigation of a federal claim, discriminates against a federal right and conflicts with principles of federalism.

In a 4 to 3 decision, the Court held that Correction Law §24 does not violate the Supremacy Clause. Haywood v. Drown, 2007 WL 4164492 (Ct. Apps. 2007). The Court arrived at this conclusion noting the following: In general, §1983 claims for money damages against government officials can be filed in New York State Supreme Courts. However,

Correction Law §24 creates an exception to this rule because it prevents New York state courts from exercising jurisdiction over damage claims against DOCS employees. The

Supreme Court has clearly held that "[c]onduct by persons acting under color of state law which is wrongful under 42 U.S.C. §1983 . . . cannot be immunized by state law." So, at first glance Correction Law §24 appears to violate the Supremacy Clause. But, the Court cautioned, the Supremacy Clause also gives the states the power to deny the enforcement of a federal right if the state can demonstrate that it has a "valid excuse" for doing so.

In this case, held the Court, the state has enacted a statute that limits the subject matter jurisdiction of its state supreme courts over a certain type of claim – damage claims against DOCS employees. Since the statute does not discriminate against one claim in favor of another but rather prohibits all damage claims, both state and federal, there is no Supremacy Clause violation.

In a fifteen page dissent, Justice Jones, joined by Justices Smith and Pigott, wrote that Correction Law §24 should be found to be unconstitutional because it violates the Supremacy Clause. The dissent agreed that the Supremacy Clause gives the states the power to deny the enforcement of a federal right but to do so the state must demonstrate one of two things: either that the rule involved is a neutral jurisdictional rule or that the state has a valid excuse for refusing jurisdiction.

The dissent asserted that the statute involved in this case was clearly not a neutral one since it "functions as an immunity statute that allows state courts to selectively exclude prisoner suits for damages against DOCS personnel." As to whether New York state has a "valid excuse" for refusing to hear §1983 damage claims against DOCS personnel in state court, the dissent pointed to the three Supreme Court cases that have defined "valid excuse" and noted that all of them involved state concerns of power over the parties (whether the parties were residents of the state) and competence over the subject matter involved (whether the claim arose within the state's jurisdiction). The dissent noted that none of these concerns were present in this case. The claims arose within the State's jurisdiction,"the State supreme court has jurisdiction over the parties and, based on the State's willingness to allow the adjudication of all section 1983 claims against other state employees, competence over the type of claim at bar."

PLS, together with the Prisoners' Rights Project of The Legal Aid Society and the New York State Defenders Association (NYSDA) appeared as amicus curiae in support of Mr. Haywood's appeal to the Court of Appeals.

State Cases

Sex Offenders and Civil Management

Courts Agree On Standard for Probable Cause Hearings

Several courts recently addressed the issue of the evidentiary standard that courts should apply at hearings held to determine whether, according to Article 10 of the Mental Hygiene Law, there is probable cause to believe that an inmate is a sex offender requiring civil management. In Matter of State of New York v. J.T., 2007 WL 3284327 (Sup. Ct. N.Y. Co. Nov. 5, 2007), the court's decision both set forth the procedures required by Article 10, and decided the issue of the petitioner's burden of proof at a probable cause hearing.

Three Step Procedure

Step 1

A civil management proceeding begins

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when DOCS or OMH asks the case review panel (CRP or "the Panel") to review the case of an inmate – who may be detained as a sex offender – who is approaching his or her release date. The Panel reviews the inmate's records, and conducts a psychiatric exam. If the Panel decides that the inmate is a sex offender requiring civil management, the Panel will notify the inmate and the Attorney General of its finding.

Step 2

If the Attorney General (AG) agrees with the Panel's decision, the statute requires that he start a legal proceeding by filing a sex offender civil management petition. In this proceeding, the State of New York is the petitioner, and the inmate is the respondent.

The court must hold a probable cause hearing within thirty days of the filing of the petition. The judge is the fact finder at the hearing; it is not a hearing before a jury. The issue at the hearing is whether there is probable cause to believe that the respondent is a sex offender requiring civil management. At this hearing, the **burden of proof** (which party has the responsibility of submitting evidence) is on the State.

Step 3

If the court finds that the evidence submitted by the State of New York establishes probable cause, the inmate will be committed to a secure treatment facility. Within sixty days of the probable cause decision, a jury trial must begin, to decide whether the inmate is a sex offender who suffers from a mental abnormality – defined as a condition, disease or disorder that affects the emotional, cognitive or volitional capacity of a person in a manner that 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. At the trial, the State must prove its case "by clear and convincing evidence."

Court Defines Probable Cause

In J.T's case, the court was required to decide the State's burden of proof at the second stage of the proceedings: the probable cause hearing. The respondent-inmate argued that because he would completely lose his liberty for at least two months, the petitioner should have to show that it was "more probable than not" that the respondent is a sex offender requiring civil management. The State argued that it should only have to produce evidence showing that there is "reasonable cause to believe" that the inmate is a sex offender requiring civil management. The court adopted the "reasonable cause to believe" standard, rather than the "more probable than not" standard. Two other cases reaching the same result with respect to the State's burden of proof at the probable cause hearing are Matter of New York v. Pedraza, 18 Misc.3d 261 (Sup. Ct. Suffolk Co. 2007) and Matter of New York v. Junco, 836 N.Y.S.2d 856 (Sup. Ct. Wash. Co. 2007).

Inmate Not Entitled to Counsel at Psychiatric Examination

In Matter of State v. Davis, 842 N.Y.S.2d 703 (Sup. Ct. Bronx Co. 2007), the court held that an inmate is not entitled to be represented by counsel during the first step of the civil management proceedings. During Step 1, the case management committee reviews the inmate's file and conducts a psychiatric

examination. The inmate argued that because he did not have a lawyer during Step 1, any statements that he made to the psychologist during the psychiatric exam were inadmissible at the probable cause hearing (Step 2 of the civil management proceedings). Conducting the psychiatric exam prior to the

appointment of a lawyer, the inmate argued, violated his statutory and constitutional rights to counsel. The court rejected the argument.

The court noted that the purpose of the examination procedure is to determine *whether* the inmate is a sex offender requiring civil management; it is not an examination that *necessarily* leads to a civil management proceeding. In addition, the court noted that Article 10 does not provide for assignment until the probable cause hearing. Based on these two facts, the court concluded that the right to counsel provided by Article 10 is not **constitutionally infirm** (does not violate the constitution).

Subject of Article 10 Proceeding Moved Closer to His Attorney

A month after the first decision in Matter of State v. Davis, the court issued a second decision, Matter of State v. Davis, 2007 WL 2949130 (Sup. Ct. Bronx Co. Oct. 18, 2007), requiring that the State move the respondent from a psychiatric facility in Northern New York – 400 miles from his attorney's office – to a psychiatric center closer to where his attorney had his office. The court found that while Article 10 gave the Commissioner of Mental Health the discretion to choose the facility where the respondent will be housed pending trial, it was not the intent of the legislature to have the respondent housed 400 miles from his lawyer while the two are preparing for trial.

Psychologist Cannot Rely on Unreliable Hearsay in Pre-Sentence Report

In Matter of State v. Dove, 846 N.Y.S.2d 863 (Sup. Ct. Bronx Co. 2007), the court held that during Step 1 of the civil management proceedings, the examining psychiatrist cannot rely on unreliable hearsay found in the inmate's institutional and criminal records. In Dove, the psychologist who determined that the respondent was a sex offender in need of civil management relied in part on statements from the victims of crimes that were in the inmate's pre-sentence report. The court held that those statements were hearsay and unreliable, because the victims of the crimes were under no business duty to speak with the investigators nor were their statements made under oath. (Records that are made in the ordinary course of business are often found to be admissible even though they are hearsay, and in some circumstances, sworn statements may be admissible). The court ordered references to the victim statements **redacted** (removed) from the psychologist's report. The court found that even with the

redaction, there was more than enough information in the report to support a finding of probable cause to believe that the respondent is a sex offender requiring civil management.

More On Article 10 of the MHL

To learn about a recent federal court decision holding two sections of Article 10 of the Mental Hygiene Law unconstitutional, see the article on Mental Hygiene Legal Services v. Spitzer, 2007 WL 4115936 (S.D.N.Y. Nov. 16, 2007) under Federal Cases in this issue of Pro Se.

Disciplinary Cases

Incomplete Expungement Leads to Award of Costs

In 2004, Michael Mathie, IV filed an Article 78 petition asking that the court order the respondents to expunge all references to a Tier III hearing that had been reversed on administrative appeal. The respondents moved to dismiss the petition, claiming that expungement had been made, and the petition was therefore **moot** (the issue no longer exists; here, because the petitioner got what he wanted). The court granted the respondents' motion.

Following the dismissal of the lawsuit, petitioner Mathie made a FOIL request for documents that referred to material that the court had ordered expunged. Petitioner Mathie then submitted these documents as exhibits to a motion to reargue and/or renew. The court denied that motion, as well as a motion to vacate the prior judgment and order on the **grounds** (basis) of fraud, misrepresentation or misconduct.

Mathie appealed, and in a decision entitled Matter of Mathie IV v. Selsky, et al., 845 N.Y.S.2d 867 (3rd Dep't 2007), the Third Department noted that while the respondents conceded that the documents attached to the petitioner's motion papers referred to the reversed disciplinary hearing, and that such references should have been expunged, it appeared that the respondents had, by the time the case got to the Appellate Division, expunged the improper references from Mr. Mathie's records. For this reason, the court did not reverse the lower court's ruling that the issues raised in the petition were moot.

The petitioner also requested that the court order the respondents to reimburse him for the **costs that he incurred** (money he spent) in connection with the Article 78. The court found that the disbursement forms that the petitioner had submitted with his motions showed that he had incurred expenses of $20.32. The court held that "under the circumstances presented," the petitioner should be permitted to **recoup** (recover) those expenses.

Doctrine of Res Judicata Does Not Bar Second Tier III Proceeding Following Criminal Conviction

The Court of Appeals affirmed two lower court decisions holding that the doctrine of *res judicata* does not bar a second Tier III proceeding where, between the time of the

first Tier III and the second, the inmate was criminally convicted of the conduct that was the subject of the first Tier III hearing. Matter of Josey v. Goord, 9 N.Y.3d 386 (2007). The facts giving rise to this Article 78 proceeding were as follows. Petitioner Josey was charged with assaulting another inmate. At the time of his Tier III hearing, security staff were aware that the victim of the assault had died. Nonetheless, this fact was not included in the misbehavior report. The petitioner was found guilty of assault, and sentenced to 24 months SHU.

A year later, the petitioner pled guilty to manslaughter in connection with the same underlying facts. DOCS then charged him with violating Inmate Rule 1.00, Penal Law offense and sentenced him to an additional 72 months in SHU and 156 months of lost good

time. Petitioner Josey challenged the hearing, arguing that because both Tier III proceedings arose from the same facts, the doctrine of *res judicata* barred the second proceeding.

The doctrine of *res judicata* prevents a party from bringing a claim where a judgment on the merits exists from a prior action between the same parties involving the same subject matter. The doctrine applies both to court decisions and quasi-judicial administrative determinations, such as Tier III hearings. However, prior to applying the doctrine to an administrative proceeding, the court must decide whether doing so would be consistent with the role of the agency, the necessities of the particular case, and the nature of the precise power being exercised. The doctrine should give conclusive effect to agency determinations only if its application is consistent with the nature of the particular administrative decision.

In Matter of Josey v. Goord, the Court examined DOCS Disciplinary Rule 1.00, which permits departmental sanctions based on a criminal conviction and, by its own terms, does not preclude an inmate from being disciplined at any time for any violation of the other rules of conduct based on the same incident (see 7 N.Y.C.R.R. §270.2(A)). Concluding that this rule allows DOCS to punish an inmate twice for the same underlying conduct, the Court held that in the context of prison disciplinary hearings, where the second proceeding is based on a criminal conviction, the doctrine of *res judicata* does not bar the second Tier III for violating the rule prohibiting the commission of a Penal Law offense.

In reaching this result, the Court recognized that DOCS has valid a **penological** (relating to the management of prisons) interest in seeing that disciplinary determinations are made quickly, which often precludes a thorough investigation. In contrast, where a criminal investigation results in a conviction, issues such as **mens rea** (the defendant's state of mind, e.g., whether the assault was motivated by racial animus) and self defense are resolved beyond a reasonable doubt. Thus, the Court noted, DOCS has both a strong penological interest in having the ability not only to conduct a disciplinary hearing and quickly impose a penalty for the violation of disciplinary rules, but also to modify that penalty in light of a subsequent criminal conviction premised on the same act.

The court held that *res judicata* does not preclude DOCS from disciplining an inmate for being convicted of a Penal Law offense even though DOCS previously assessed a penalty for the inmate's violation of disciplinary rules stemming from the same conduct. To conclude otherwise, the Court said, would impede DOCS's ability to promote prison safety and have the perverse effect of encouraging hearing officers to impose more stringent disciplinary penalties initially, before any criminal investigation and proceedings are concluded.

Employee Assistant Claim Dismissed; Substantial Evidence

Claim Not Preserved

In Matter of Woodward v. Selsky, 841 N.Y.S.2d 411 (3rd Dep't 2007), the court considered the petitioner's claims that his right to employee assistance had been violated and that the hearing officer's determination that he had possessed a weapon was not supported by substantial evidence. The court held that because the petitioner did not raise the substantial evidence claim before he got to the Appellate Division, he had not **preserved the issue** (to preserve an issue requires raising the issue in a timely manner, and objecting to the hearing officer's or the court's resolution of the issue), the court would not consider it.

The court further held that the record showed that between the hearing officer and the employee assistant, the petitioner received all of the documents that he had requested, and that the petitioner had not shown that he was **prejudiced** (that his defense was hurt) by the manner in which the assistant helped him.

Practice Pointer**: **In order to maximize the chances that a court will reach the issues that you raise in an Article 78 proceeding, you need to raise them in a timely manner. You should raise all the issues that you want the court to reach at your hearing and again on appeal to the Director of Inmate Disciplinary Programs. The issue of whether a determination of guilt is supported by substantial evidence is one of the few issues that can be raised for the first time in an Article 78 petition. It must be raised in the petition, and if it is not raised there, cannot be raised in the appellate division.

Court Rules Meaning of Letters Is a Question of Credibility

In Matter of Reid v. Selsky, 842 N.Y.S.3d 113 (3rd Dep't 2007), the petitioner was charged with threats and harassment based on a letter that he had sent to the Commissioner of DOCS. The misbehavior report stated that the letter was offensive and obscene. The petitioner offered an innocent interpretation of the letter and put on a retaliation defense.

The court ruled that whether the letter should be given an innocent, as opposed to an **inculpatory** (tending to prove guilt), interpretation, and whether the report was filed in retaliation for the petitioner's legally protected conduct, were credibility issues that the law gives the hearing officer the authority to decide.

Practice Pointer**: **This is not the first time that the Appellate Division has held that determining whose interpretation of a letter, photograph or videotape is correct is a question of credibility. For example, in Matter of Robinson v. Selsky, 840 N.Y.S.2d 230 (3d Dep't 2007), the court had to determine whether the hearing officer's determination that a letter was threatening was supported by substantial evidence. Rather than reviewing the letter itself, the court held that whether the inmate's innocent interpretation of the letter should be credited was a credibility determination to be made by the hearing officer. We at PLS disagree with the court's ruling that the question of whether a written communication is offensive or obscene – or whether a videotape shows the petitioner engaging in an act of misconduct – is a credibility issue. Rather, we think that this is a fact issue to be resolved by the hearing officer, and that at least where the item which is the subject of interpretation is the primary evidence against the petitioner, the hearing officer's decision is subject to substantial evidence review by the courts.

Failure to Call Witnesses Leads to Expungement

In Matter of Ramsey v. Artus, 2007 WL 2988581 (Sup. Ct. Clinton Co. Oct. 1, 2007), the misbehavior report alleged that during the morning feed-up, the petitioner was yelling and caused other inmates to start yelling. The petitioner asked for five inmate witness whom he was able to identify only by their cell numbers. The hearing officer called the three inmates who were still in the prison where the incident occurred. Inmate 1 testified that he knew nothing about the incident. Inmate 2 said that he heard profanities and someone yelling in petitioner's cell. Inmate 3 testified that he was not aware of any incident and did not hear any argument between staff and petitioner. The hearing officer stated that having gotten testimony from three inmates, he

was not going to make efforts to locate the other two – one of whom was in the prison where the hearing was taking place – because their testimony would be **redundant** (the same as the other inmate's testimony, and therefore unnecessary).

There was no written explanation for the hearing officer's refusal to call these two witnesses. The hearing officer found the petitioner guilty of the charges.

Seven N.Y.C.R.R. §253.5(a) provides that inmates may call witnesses at their hearings providing that their testimony is **material** (logically connected to the issues before the trier of fact) and not redundant, and that calling them does not **jeopardize** (threaten) **institutional** (prison) safety or correctional goals. In this case, the court did not accept the hearing officer's reason for not calling the witnesses. The court noted that the petitioner had provided sufficient information to allow prison staff to identify the two witnesses. Further, the court found, because the testimony of the three witnesses who did testify was not consistent, the testimony of the proposed witnesses could not be considered redundant. Based on the hearing officer's failure to call witnesses, the court granted the petition and ordered that the hearing be reversed.

Lack of Foundation for Drug Test Results Leads to Expungement

Where an inmate at a Tier III hearing is charged with possession of drugs based on chemical testing of a substance found in the inmate's possession, the officer who tested the drugs must present evidence of the nature of the test and the test procedures. This evidence is the **foundation** (legally required factual basis) for the admission of the officer's testimony that testing showed the substance to be an illegal drug. In Matter of Mingo v.

Ercole, 843 N.Y.S.2d 644 (2nd Dep't 2007), the petitioner was charged with possession of heroin. At the hearing, an officer who had not done the testing, testified that the substance had tested positive for heroin. There was no testimony from the officer who had actually tested the substance, nor was there any testimony about the testing procedures or the nature of the test. The Second Department held that without such testimony, the hearing officer's finding that the petitioner had possessed heroin was not supported by substantial evidence. The court went on to hold that in light of this error and the passage of time, the proper remedy is reversal and expungement.

Regulations Do Not Require That Witnesses Testify In Inmate's Presence

In Matter of Chavis v. Goord, 865 N.Y.S.2d 866 (3rd Dep't 2007), the court considered whether the hearing officer's refusal to allow a witness to testify in the inmate's presence violated the inmate's right to call witnesses. Seven N.Y.C.R.R. §254.5 provides that a witness will testify in front of the inmate, unless doing so **jeopardizes** (threatens) **institutional** (prison) safety or correctional goals. If the hearing officer finds that a witness should not testify in the inmate's presence, the regulation requires that the witness's testimony be taped and that the tape be played for the inmate.

The Chavis court cited to Almonor v. Selsky, 678 N.Y.S.2d 402 (3rd Dep't 1998), where the Third Department held that it would jeopardize institutional safety to require a security witness to be physically present at the hearing where the officer was covering a housing unit at the time of the hearing and could not be relieved. The Almonor court found that the regulation's mandate was met when the witness testified over a speaker phone while the inmate listened and posed questions. Likewise, in petitioner Chavis's case, the court held that allowing the witness to testify via speaker phone satisfied the regulatory mandate.

Practice Pointer: Safety and security trump an inmate's right to have witnesses testify in his or her presence. At your hearing, if a witness testifies by speaker phone, or if you are allowed to hear a tape of a witness's testimony, you should ask the hearing officer to place on the record the reason that the witness was not physically present at the hearing. If it appears that the reason is not related to safety or security, you should state your objection as follows: Seven N.Y.C.R.R. §254.5 requires that a witness come to the hearing unless doing so jeopardizes institutional safety or correctional goals. The reason you gave for taking the testimony when I was not present is not related to safety or security. I was prejudiced (hurt) by this because you were unable to observe the witness's demeanor when you assessed his credibility (if the witness testified by telephone) and/or I was not able to ask follow up questions (if you were not present when the witness testified). After you place your objection on the record, you should proceed with the hearing.

Parole

UPDATES

BOP Releases State's Oldest Prisoner

In the Winter 2006 issue of *Pro Se*, we reported on Matter of Friedgood v. Board of Parole, 802 N.Y.S.2d 268 (3rd Dep't 2005). That decision reversed a lower court's dismissal of Charles Friedgood's challenge to the Parole Board's decision denying him parole release. The court found that while the Parole Board knew that Dr. Friedgood – then 87 years old and the oldest prisoner in DOCS custody – had serious medical problems and a good disciplinary record and had expressed remorse and saved two lives while an inmate, the Parole Board did not mention these facts, and instead based its decision on the nature of his crime, saying that his offense shows that he is prone to extreme violence. The Court found that not only was there no support in the record for the Board's conclusion, but that it was so **irrational** (not based on reason) as to **border on impropriety** (close to misconduct). The court reversed the hearing and ordered a rehearing.

Pro Se is happy to report that on

November 7, 2007, the Parole Board voted to release Dr. Friedgood, now 89 years old. He served thirty-two years of a 25 year to life sentence imposed after he was convicted of killing his wife. Dr. Friedgood's daughter, a lawyer, represented her father in a challenge to the Parole Board's failure to release violent felons. In its decision granting parole, the Board of Parole imposed the condition that Dr. Friedgood have no contact with his children or grandchildren, without first getting permission from his parole officer.

After Court Orders New Hearing, DOP Releases Man Serving 18 Years to Life

Alvaro Sanchez was found guilty of felony murder and armed robbery for his role as the get-away driver in a 1986 robbery that resulted in the death of a janitor. He was sentenced to 18 years to life. Last summer, in Matter of Sanchez v. Dennison, 7/10/07 N.Y.L.J. 21, (col. 3), Index No. 1942-07, the Supreme

Court, Albany County, ordered the Parole Board to conduct a re-hearing of Mr. Sanchez's 2005 parole hearing. The court noted that **a determination of the Board of Parole will not be judicially disturbed** (the court will not reverse a parole board decision) unless it is "so irrational as to border on impropriety." This means that in order to succeed, an inmate must show that the Parole Board violated its **statutory mandate** in denying the inmate's application for parole release. The Board's statutory mandate is found in Section 259-I of the Executive Law.

The Parole Board's Statutory Mandate

Section 259-I states that the Parole Board shall not grant parole merely as a reward for good conduct while in prison, but must also consider if there is a reasonable probability that the inmate will live and remain at liberty without violating the law, and that release is not incompatible with the welfare of society and will not so **deprecate** (belittle) the seriousness of the crime as to undermine respect for the law. Section 259-I also requires that in making its release decision, the Board consider the inmates's institutional record; performance in temporary release programs; release plans; whether there is a deportation order; and statements from the victims of the crime.

The DOP's Decision to Deny Release

Noting Mr. Sanchez's Master's degree, clean disciplinary record, programming, and other accomplishments, and the facts relating to Mr. Sanchez's life at the time of the crime, the facts of the crime, and his callous disregard for the value of human life and the laws of the state, the Board found that parole release would be incompatible with the public safety and welfare and would so deprecate the seriousness of his crime as to undermine respect for the law.

The Court's Decision

The court found that the Board had violated its statutory mandate because it did not fully and fairly examine all of the available and relevant information, which, the court said, "clearly demonstrates [the petitioner's] extraordinary rehabilitative achievements and would appear to militate in favor of granting parole." Among these achievements were: Associate's, Bachelor's and Master's degrees, completion of more than nine prison programs, no tickets for 8 years, recommendations from ten correction officers, and a 26 page psychological report concluding that Mr. Sanchez should be released.

The court wrote that the Board has a duty to fully and fairly examine all of the factors set forth in §259-I, and that it did not do so in this case. Rather, the court found, the Board glossed over the fact that Mr. Sanchez had been in prison for 20 years, and simply noted several of his achievements. The court held that simply noting several of a great many accomplishments is not the same as considering them in a fair and thoughtful manner. The court noted the Board 's failure even to mention the references from 11 officers and the psychological report. Finding that not only had the Board erroneously concluded that the petitioner was an active participant in the victim's death, but that the Board had also failed to give due consideration to the items that the petitioner submitted and to apply the statutory standard, the court held that it was required to vacate the Board's decision and remitted the matter for a new hearing.

Board Approves Release

Mr. Sanchez appeared at a re-hearing in October 2007 and he was granted release to parole supervision. After 21 years in prison, on November 21, 2007, Alvaro Sanchez went home.

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OTHER PAROLE NEWS

Governor Nixes Settlement

In early 2006, ten inmates sued Governor Pataki, alleging that he had adopted an unwritten policy pursuant to which A-1 violent felony offenders were repeatedly denied parole based mainly or entirely on the nature of their crimes. While parole officials deny there is or was such a policy, on November 7, 2007, the New York Law Journal published an article reporting that the attorneys representing the plaintiffs had sent their clients letters saying that they and counsel for the defendants were working out a settlement of the lawsuit, known as Graziano v. Pataki, that would provide new hearings to all inmates who are serving maximum sentences of life for A-1 violent felony convictions and who had been denied parole prior to April 16, 2007.

Shortly after the article was published, Governor Spitzer announced that no settlement was in the offing and that he would fight the lawsuit. In an article published in the Daily News on November 15, the Governor's spokesperson was quoted as saying, "The state will absolutely litigate the case. The state has taken the position that the Parole Board has the right to reject parole for violent felons."

For additional information on developments in Graziano v. Pataki, see article under heading Federal Cases in this issue of Pro Se.

released from parole supervision, the District Attorney (DA) brought an Article 78 proceeding against the Chairman of the Board of Parole, asking the court to find that the Parole Board's decision to release the parolee from parole supervision prior to making restitution was 1) arbitrary and capricious, and 2) violated section 259-j(2) of the

Court Orders Reconsideration of Parolee's Release From Supervision

In an **unprecedented** (never done or known before) decision, a Supreme Court Judge ordered the Division of Parole (DOP) to reconsider its decision to grant early release from parole supervision to a parolee wh, while she was on parole, had failed to **make restitution** (pay money owed) as ordered by the court. In Matter of Lungen v. Dennsion, 2007 WL 3346127 (Sup. Ct. Sullivan Co. Oct. 13, 2007), the court vacated the decision by the DOP to release a parolee from parole supervision and to consider her sentence **satisfied** (completely served). In this case, the parolee had pled guilty to grand larceny and was sentenced to 5 to 15 years in prison and restitution in the amount of $866,000. While she was in prison, money was taken from her prison wages towards restitution. She was granted merit time and released to parole supervision. The same month that she was released, a restitution order for $869,222 replaced the original restitution order. A year later, although the parolee had not made any restitution since her release, the DOP granted her presumptive release from parole supervision.

Upon learning that the parolee had been

Executive Law. Section 259-j(2) provides that a merit **termination** (ending) is the end of a sentence to which it relates. The section also says that the DOP cannot grant a merit termination unless it is satisfied that the termination of sentence is in the best interests of society, and that the parolee, "otherwise financially able to comply with" a court imposed order of restitution, has made a good faith effort to make restitution.

A hearing was held on the DA's petition. At the hearing, witnesses from the DOP testified that they had checked with several state agencies, including the district attorney's office, and were told that there was no restitution order. The court found that the witnesses were not **credible** (believable) and that the DOP knew or should have known of the second restitution order. The court held that where the Executive Law **mandates** (requires) the DOP to check the restitution status of an applicant for presumptive release, and where the DOP knew that the original restitution order was for a large amount, and that the second restitution order was being made, the DOP's decision to grant presumptive release was arbitrary and capricious and violated Executive Law §259-j(2).

The court ordered that the decision to presumptively release the parolee be vacated and reversed, that the DA serve the restitution

order on the DOP and DOCS, and that the DOP make a **de novo determination** (as though the first decision had not been made) of the parolee's suitability for presumptive release.

Miscellaneous State Court Decisions

Visitation with Children

When Kenneth G. was arrested on a number of violent federal charges, his daughter Kendolyn was eight months old. When Kendolyn was four, Kenneth G. was sentenced on those charges to thirty-five (35) years in federal prison. Kenneth G. **petitioned** (asked) a court to order that his daughter's mother bring Kendolyn to visit him in federal prison. The petition was filed in the Family Court of the State of New York. Recently, that court issued a decision holding that twice a year, Kendolyn will visit with her father in prison. The visits are to be **supervised** (watched) by a social worker. The court also ordered that Kenneth G. be permitted to phone his daughter twice a month. The order requires Kenneth G. to pay Kendolyn's travel expenses. If Kenneth G. is transferred to a prison that is more than 130 miles from New York City, the visits will be stopped. The case is known as Kenneth G. v. Aricelis A., 11/9/2007 N.Y.L.J. 25, (col. 1), Index No. V13689-05/06 (Fam. Ct. N.Y. Co. 2007).

Best Interests of the Child Test

In reaching this result, the court used a **"best interests of the child"** test. This means that while the court listened to what the mother and father wanted, and thought about their concerns, at the end of the day, the court made a decision based on what it thought would be best for Kendolyn.

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The "best interests" test is the test used in many cases in Family Court that involve children and their parents. Sometimes the mother's ideas about what is best for a child conflicts with the father's ideas. Sometimes the parents' ideas conflict with a state agency's ideas. In such cases, the law requires that the court listen to everyone, but decide the case based on what is best for the child. In some cases, what is best for the child will not be what any of the other people in the court proceeding are asking for.

The law in New York is that visitation with an incarcerated parent is **presumed** (does not have to proved) to be in the child's best interest, and there must be a full inquiry, usually a fact finding hearing, before a parent's right to visit with his or her child is denied. A parent's right to visit with his or her child can only be denied where there is **substantial evidence** that it would be harmful to the child's welfare. **Substantial evidence** is defined as: evidence upon which a reasonable person would rely in serious affairs.

Where have courts found visitation not to be in the best interests of the child?

In Davis v. Davis, 697 N.Y.S.2d 155 (2nd Dept. 1999), the court found that it would not be in a child's best interest to visit with an inmate-parent where the parent had committed a violent crime against the child or the child's other parent. And in Ellett v. Ellett, 698 N.Y.S.2d 740 (3rd Dept. 1999), the court held while it would be in the best interests of a seven year old to visit his father in prison twice a year, it would not be in the interests of a five year old to visit his father where he would have to travel ten hours by car. In reaching this result, the court noted that the older child had a relationship with his father while the younger child was five months old at the time that his father went to prison. The court did however, order that both children should have telephone calls with their father twice a month.

What will the courts look at when they decide what is in my child's best interest?

The court in Kenneth G. v. Arcelis A. suggested that the following factors are relevant:

- the age of the child;
- the distance to be traveled and the hardship that the travel imposes on a child;
- whether the visit will be supervised;
- who will transport the child and by what means;
- the physical and emotional effect of visitation on the child;
- whether the parent who is in prison has and shows a genuine interest in the child; and
- whether the parent in prison has maintained reasonable contact in the past.

In Kenneth G. v. Aricelis A., the court found that Kendolyn would at some point have to face the fact that her father is a felon serving a very long prison sentence. The court credited Kenneth G.'s statement that he had a real interest in his daughter and Arcelis A's testimony that she feared Kenneth but was committed to helping Kendolyn understand her father's identity and build a relationship with him. To help with Arcelis's fear, the court ordered supervised visitation. Because of the time and expense involved in traveling, the court ordered one to two visits a year, to be paid for by Kenneth G., and, to increase contact between father and child, two phone calls a month. Recognizing that federal inmates can be transferred to prisons all over

the country, the court ruled that if Kenneth G. was transferred to a prison more than 130 miles from New York City, the visits would cease.

Court Overturns TAC Decision

Seven N.Y.C.R.R. §261.4 provides that an inmate is entitled to a hearing before the Time Allowance Committee (TAC) when the TAC is considering taking away good time beyond that which was recommended as a result of prison disciplinary hearings. Like decisions made by the Board of Parole, decisions made by the Time Allowance Committee will only be reversed when they are not made in accordance with law. See Corrections Law §803(4); Matter of Staples v. Goord, 695 N.Y.S.2d 190 (3rd Dept. 1999). In Matter of Feliciano v. Napoli, unpublished, Index No. 2007-1682 (Sup. Ct. Chemung Co. Oct. 15, 2007), the petitioner alleged that his TAC hearing – following which he was deprived on one month of good time for failure to program – had lasted only "25 seconds," and that he had not been allowed to testify. The court noted that 7 N.Y.C.R.R. §262.4(f) and (g) require that at a TAC hearing, the committee interview the inmate, and, after informing him or her of the circumstances that appear to support a withholding of time, "afford him the opportunity to comment thereon and to make any statement that he may care to submit." The court found that where the respondent did not submit any proof to **refute** (counter) the petitioner's claim that the entire hearing lasted only 25 seconds, and that he was not permitted to speak, it was required to accept these facts as true. The court then held that assuming the truth of the facts alleged by the petitioner, it cannot be said that the determination was made in accordance with the law. As with court ordered reversals of Parole Board decisions, the only remedy that the court can give an inmate whose TAC decision was not made in accordance with the law is a new hearing. In this case, the court ordered that the TAC either conduct a new hearing, or only deprive Mr. Feliciano of the good time that hearing officers at Tier III hearings had recommended he lose.

Federal Cases

HIV Class Action Settled

The Prisoners' Rights Project of The Legal Aid Society has settled a class action brought in 1990 on behalf of all New York State prisoners with HIV. The case is Inmates of New York State with HIV v. Pataki, et al., 90-CV-00252. After many years of litigation and about two years of negotiation, a private settlement agreement was signed in January 2007. On August 28, 2007, Judge Gary L. Sharpe of the U.S. District Court for the Northern District of New York held a fairness hearing, pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, and approved the agreement. Under the terms of the settlement, NYS DOCS has agreed to specific **criteria** (standards) for referral of HIV infected prisoners to HIV Specialists and to standards for **credentialing** HIV Specialists (a process that ensures medical care providers who treat inmates with HIV have certain training and experience). Other provisions include: mandatory HIV-related training for health care providers; notification to patients of their laboratory results; and implementation of a quality assurance program to monitor HIV-related care and treatment. There is also a

process established that requires DOCS to respond to complaints submitted on behalf of class members by attorneys for the class. The settlement agreement will be in effect until January 18, 2009. If you are experiencing problems with HIV care or if you want to have more information about the settlement, you may contact Milton Zelermyer, Staff Attorney, The Legal Aid Society, Prisoners' Rights Project, 199 Water Street, 6th Floor, New York, NY 10038.

Two Provisions of Article 10 of the MHL Are Unconstitutional

In Mental Hygiene Legal Services v. Spitzer, 2007 WL 4115936 (S.D.N.Y. Nov. 16, 2007), the court found that two provisions of Article 10 of the Mental Hygiene Law – the law that permits DOCS to start a legal process to confine an inmate in a psychiatric facility when he is released from prison – deprives inmates of their liberty without due process of law, a Fourteenth Amendment claim. The procedures for finding that an inmate requires civil management are set forth in Article 10.

(See article on page 6 of this issue of Pro Se for a step-by-step description of the Article 10 procedures).

Here, the court found the following two sections unconstitutional:

> Section 10.06(k) requires involuntary civil detention pending the commitment trial (Step 3 of the civil management process) based on a finding at a probable cause hearing (Step 2 of the civil management process). The court found that because some of the people subject to the provision will need civil *management* but not civil *confinement*, not all of the individuals with respect to whom a probable cause finding is made are dangerous. The court held that without a finding of current dangerousness, it would be unconstitutional to detain an inmate with respect to whom a finding of probable cause had been made. The court issued a preliminary injunction prohibiting detention pending trial absent a specific individualized finding of probable cause to believe that a person is sufficiently dangerous to require confinement and that lesser conditions of supervision will not suffice to protect the public during the pendency of the proceedings.

> Section 10.07(d) permits the civil commitment of a person found incompetent to stand trial who was not convicted of any offense if the court finds, *by clear and convincing evidence*, that he or she committed a sexual offense. The court found this provision to be unconstitutional because it allows the state, after the commitment trial (Step 3) to detain a person with respect to whom there has not been a finding, beyond a reasonable doubt, that he or she committed the acts that constituted the crime with which he or she was charged.

The court found that §10.05(f), which permits the Attorney General to issue a securing petition to detain certain inmates beyond their max dates prior to holding a probable cause hearing (Step 2 of the civil management procedures); §10.07©, which gives authority to the **fact finder** (a judge or jury) to make a retroactive determination by clear and convincing evidence, that certain non-sex crimes were committed with a sexual **motivation** (the reason behind the conduct) and §10.05(e), which permits the psychiatric examinations during Step 1 of the civil

management procedures to take place prior to the assignment of counsel, were not unconstitutional.

Practice Pointer*: *A preliminary injunction is a form of "extraordinary relief." It is a pre-trial order prohibiting the defendant from doing something that the court finds, based on the evidence before it, is legally wrongful. To get a preliminary injunction, the plaintiff must show a strong likelihood of success on the merits and that irreparable harm (harm that cannot be fixed) will result if the defendant is not ordered to stop the unlawful conduct.

Class Certified in Challenge to Parole Denials for A-1 Felony Offenders And Defendants' Motion To Dismiss Denied

In Graziano v. Pataki, et al., the plaintiffs, inmates who were convicted of A-1 violent felonies, allege that the defendants, including the former Governor and former Chairman of the Board of Parole, in violation of the United States Constitution, did away with or reduced the Parole Board's discretion when making parole release decisions for A-1 violent felony offenders. On December 5, 2007, the court denied the defendants' motion to dismiss the case, and granted the plaintiffs' motion for class certification.

Class Certification

When a group of plaintiffs is too numerous for each of its members to be named as individual plaintiffs, the law provides that the court, if certain requirements are met, can allow the named plaintiffs to **represent** (act on behalf of) themselves and the other members of the class. If the court agrees that the named plaintiffs can represent the interests of the class, the relief granted by the court is granted as to each of the members. Here, the eight named plaintiffs, each of whom was convicted of an A-1 violent felony, had been denied parole release because of the seriousness of their offenses, and, with the exception of one plaintiff, had been sentenced to less than the statutory maximum, asked for class certification of a class consisting of all inmates who met this criteria.

According to Rule 23 of the Federal Rules of Civil Procedure, class certification in federal court is proper where:

1. **NUMEROSITY**: the members of the class are so numerous that **joining** (naming) all of them as plaintiffs is not **practicable** (can not reasonably be done),

2. **COMMONALITY**: there are questions of law or fact common to the class,

3. **TYPICALITY**: the claims of the named plaintiffs are typical of the claims of the other class members,

4. **ADEQUACY OF REPRESENTATION**: the named plaintiffs will fairly and adequately protect the interests of the class.

The court found that 540 inmates met the class definition, including 441 of which had been sentenced to less than the statutory maximum for an A-1 felony and concluded that the numerosity requirement was met. The court also concluded that the members of the class have in common questions of law and fact, including whether the Parole Board's discretion when making parole release determinations was unlawfully **curtailed** (restricted), and if so, whether the practice violated the class members' rights under the Constitution. The court also reviewed information prepared by the plaintiffs and agreed that the proposed class members had all been denied release based on the nature of

their offense; thus, the court ruled, the typicality requirement had been met.

Finally, the Court noted that Rule 23 has a fifth requirement: The party opposing the class must have acted on grounds generally applicable to the class, thereby making appropriate final relief to the class as a whole. Here the court said, the defendants are alleged to have carried out a policy of denial of parole release to the class of A-1 violent felons as a whole. Assuming that the allegations in the complaint are true, final injunctive or declaratory relief preventing the defendants from continuing this policy would be appropriate. Having shown that they met the Rule 23 requirements, the court granted the plaintiffs' motion to certify a class.

Defendants' Motion to Dismiss

The defendants asked the court to find that because Defendants Pataki and Dennison, who were but are no longer, respectively, the Governor and Chairman of the Parole Board, had been sued only in their **official capacities,** the case is moot. Official capacity lawsuits seek **injunctive relief,** an order to do or refrain from doing certain actions. Personal capacity lawsuits seek money damages from the defendants. The court noted that a case is **moot** when the problem sought to be fixed no longer exists, and there is no reasonable expectation that the problem will arise again. Here, the court stated, the plaintiffs allege that it is the unofficial policy or practice of the Parole Board, as **instigated** (set in motion) by then Governor Pataki, and executed by the Division of Parole under Chairman Dennison, to unlawfully do away with or reduce the Parole Board's **discretion** (judgment) when making parole release decision for prisoners serving sentences for A-1 violent felonies. Thus, the court concluded, the change in office does not necessarily mean that the policy or practice of the Parole Board that the plaintiffs seek to have **remedied** (fixed) has ceased or that there is no reasonable expectation that the wrong will be repeated. For this reason, the court denied the motion to dismiss.

Pro Se Practice

LEGAL BASICS: FEDERAL RIGHTS AND FEDERAL COURTS

While convicted felons are serving their sentences in state prison, they lose many of the legal rights that they had on the street. However, as Justice Brennan said in Wolff v McDonnell, a case discussing the rights that prisoners have before they can be put in disciplinary special housing, "prisoners do not shed **all** constitutional rights at the prison gate." Wolff, 418 U.S. 539 (1974). In New York, among the rights lost by prisoners are, the right to vote, the right of free association, and the right to be free from unreasonable searches and seizures. In addition, there are some rights, such as freedom of expression and access to courts, which, though not completely lost, can be restricted, if the limitation is reasonably related to valid **penological** (relating to the field of corrections) goals. Nonetheless, as noted by Justice Brennan, prisoners retain some of their rights, including the right to assigned counsel in criminal cases, the rights of disabled prisoners to be reasonably accommodated, and the right to only have their religious freedoms restricted for compelling reasons, and then only in the least restrictive manner. Finally,

prisoners, actually have some rights that non-prisoners do not have, such as the right to treatment for serious medical and mental health needs. This article is an introduction to

the federal rights that prisoners retain or are accorded by statute and/or constitution, the federal court options that prisoners have when their federal rights are violated, and the courts that are responsible for enforcing these rights. In addition, as part of our commitment to teaching prisoners new to the study of law some of the legal basics, included in this article are instructions for reading a case citation.

An Overview of Federal Rights

For the most part, in the context of prisoners' rights litigation, the federal courts decide cases involving claims that DOCS' employees violated a prisoner's **civil rights** (rights protected by the United States Constitution) or rights created by federal statutes. Typically, prisoners bring cases alleging the violation of the following rights:

The United States Constitution

1st Amendment – Guarantees the Right of Freedom of Speech and Religion

According to Turner v. Safley, 482 U.S. 78 (1987), prisoners retain the rights to freedom of speech and religion, **but** these rights can be limited by valid security concerns. This limitation also applies to the reading material, such as books and magazines, that prisoners are permitted to receive and possess. The right of freedom of religion has broader protection than the right of freedom of speech due to a Federal Statute known as the Religious Land Use and Institutionalized Persons Act (RLUIPA). This is explained more fully later in this article.

Guarantees the Right to Petition the Government

The right of access to the courts comes from the First Amendment's right to petition the Government for redress of grievances. Accordingly, the Constitution guarantees that prisoners, like all citizens, have a reasonably adequate opportunity to raise constitutional claims before impartial judges. Lewis v. Casey, 518 U.S. 343 (1996). However, the Department of Correctional Services (DOCS) can place reasonable restrictions on the exercise of this right, assuming that the restrictions are reasonably related to valid penological purposes, such as safety and security.

8th Amendment – Prohibits Cruel and Unusual Punishment

The Eighth Amendment's ban on cruel and unusual punishment prohibits:

- force which is malicious and sadistic, and used solely for the purpose of causing harm. Hudson v. McMillian, 503 U.S. 1 (1992);

- deliberate indifference to serious medical– including dental and mental health – needs. Estelle v. Gamble, 429 U.S. 97 (1976);

- deprivation of basic human needs or the minimal civilized measure of life's necessities, Rhodes v. Chapman, 452 U.S. 337 (1981), in the absence of a valid penological justification for the deprivation, Trammel v. Keane, 338 F.3d 115 (2d Cir. 2003); and

• deliberate indifference to the need to protect a prisoner from assault by other prisoners. Snyder v. Dylog, 188 F.3d 51 (2d Cir. 1999).

14th Amendment – Protects prisoners from the deprivation of liberty without due process of law

In Wolff v. McDonnell, 418 U.S. 539 (1974), the United States Supreme Court held that prisoners have a 14th Amendment Right not to have their liberty further restricted without due process of law. That case established the minimum rights that prisoners have at prison disciplinary hearings. Twenty years later, in Sandin v. O'Conner, 515 U.S. 472 (1995), the Court limited its recognition of a liberty interest to those conditions of confinement that impose **atypical** (unusual) and significant hardship in relation to the ordinary incidents of prison life. In New York State, the courts have held that 305 or more days of confinement to disciplinary special housing satisfies the Sandin test. To determine whether confinement to disciplinary special housing of between 101 and 304 days is a deprivation of liberty, requires evidence of the conditions and their impact on the plaintiff.

Federal Laws Conferring and Affecting Prisoners' Rights

The Americans with Disabilities Act (ADA)

The ADA provides that no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

According to U.S. v. Georgia, 546 U.S. 151 (2006), the ADA prohibits a "somewhat broader" range of conduct than the Constitution itself forbids.

Religious Land Use and Institutionalized Persons Act (RLUIPA)

The RLUIPA provides that no government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution that receives federal funds, unless the burden is absolutely necessary to meet a compelling government purpose.

This statute protects a broader range of religious conduct than does the First Amendment. The statute does not permit DOCS to impose "a substantial burden" on a person's religious exercise unless it is "absolutely necessary" to meet a "compelling" government purpose. The First Amendment permits DOCS to burden the free exercise of religion based on valid penological interests.

The Civil Rights Act

Forty-two United States Code §1983 (often referred to as 42 U.S.C. §1983 or simply §1983), known as the Civil Rights Act, permits individuals, including prisoners, whose civil rights have been violated by people **acting under color of state law** (in a prison setting, typically correctional staff who engage in the allegedly unconstitutional conduct while at work), to sue for **damages** (money), **declaratory** (a decision finding that a practice or action is unlawful) and **injunctive** relief. "Damages" is money to compensate (repay) the victim of unconstitutional conduct for what s/he lost. Declaratory relief is a finding that a practice or action violated the victim's constitutional rights. Injunctive relief is an order telling a party to do or not to do something and is typically only granted after a

hearing where both parties have had an opportunity to present testimony and legal arguments.

The Prison Litigation Reform Act (PLRA)

Passed in 1996, and amending various sections of the United States Code, the PLRA restricts and discourages litigation by prisoners. Among other rules, the PLRA 1) requires that prior to filing federal litigation, prisoners exhaust their administrative remedies, 2) limits awards of compensatory damages to situations where there are physical injuries and 3) allows a judge to deny future filings where he or she finds that a prisoner has filed three frivolous lawsuits. The PLRA also severely restricts injunctive relief in class actions.

The Structure of the Federal Courts

There are three levels of federal courts: the District Court, the Court of Appeals, and the United States Supreme Court. Federal actions are started in the district courts by filing a complaint or, in the case of an action for habeas relief, a petition. There are four district courts in New York, the Northern District, the Southern District, the Eastern District and the Western District. Each district court hears cases that arise within a specific geographic area. PLS publishes an address packet that gives the address of each of the district courts and describes the geographic area from which the court accepts cases.

Like the district courts, each Federal Court of Appeals handles appeals from cases that were decided by the district courts within a specific geographic area. The Court of Appeals that hears appeals from cases filed in the district courts in New York is the Second Circuit Court of Appeals. The Second Circuit also hears appeals from the district courts in Connecticut and Vermont.

Prisoners have a *right* to appeal district court decisions relating to Section 1983, ADA, and RLUIPA actions to the Second Circuit. Unless the district court issues a Certificate of Appealability (COA) at the time that it denies a petition for a writ of habeas, prisoners must get permission from the Second Circuit to file an appeal from a denial of a petition for habeas relief.

The United States Supreme Court hears appeals from decisions made by the federal Courts of Appeal and from some decisions issued by the state courts. There is *no right* to appeal to the Supreme Court. The party who wants to appeal must petition the court to hear his or her appeal.

The Life of a Federal Case

Filing and Service

A Section 1983 federal case begins with the filing of a summons and complaint in the District Court. After a case is filed, it must be served on the defendants. Rule 4 of the Federal Rules of Civil Procedure (FRCP) explains how to serve the defendants. Rule 12 of the FRCP provides that the defendants have 20 days from the date that they are served with the summons and complaint to file their answers. They can request additional time to answer from the court.

Where the plaintiff is seeking relief from the defendants under §1983, RLUIPA, or the ADA, the action is known as a plenary action.

Unless the action is dismissed or the parties settle, a plenary action is one in which a full trial is held on the merits of a complaint following full discovery. With the exception of Petitions for Writs of Habeas Corpus, the actions that prisoners typically file in federal court are plenary actions. The following stages describe the life of a federal case filed pursuant to one of these three statutes.

Pre-Trial Discovery

Once the defendants have answered, discovery begins. This is the period during which the **parties** (the plaintiff and the defendants) ask each other for materials relating to the claims and defenses raised by the Complaint and Answer. Rules 26 through 37 of the FRCP describe the discovery process. During this process, the plaintiff seeks information in the possession of the defendants that may be relevant to proving his/her case at trial and also seeks information relating to the defenses raised by the defendants. The defendants seek information in the possession of the plaintiff that may cast doubt on his/her claims, and/or is supportive of the defenses raised in the Answer.

Discovery requests for written materials are called **Requests for Production of Documents**. Rule 34 of the FRCP controls document requests.

Rule 30 of the FRCP describes the deposition process. At a deposition, one party, usually through his/her lawyer, questions the opposing party, or the opposing party's witness, about the events that gave rise to the lawsuit. A deposition is a proceeding held in front of a court reporter and the person answering the questions is **under oath** (is sworn to tell the truth). Although no judge is present at a deposition, it is a court proceeding. If the parties disagree about whether a question must be answered, the parties or their attorneys can contact the judge by phone.

Other forms of discovery include **Interrogatories** (written questions posed by one party to which the opposing party must give written answers) and **Requests for Admissions** (a series of factual statements posed by one party that the opposing party must admit or deny). These procedures are described in Rules 33 and 36, respectively, of the FRCP.

Dispositive Motions

There are two pre-trial motions that can dispose of a case before trial. The **Motion to Dismiss** is described in Rule 12 of the FRCP. It permits a court to dismiss an action before discovery begins where the defendant persuades the court that even if the plaintiff is able to prove the facts alleged in his/her complaint, s/he will not be entitled to the relief that s/he is seeking. One reason a case might be dismissed is the failure to allege a federal claim. For example, a prisoner brings a §1983 for inadequate medical care alleging that the defendants were negligent. He does not allege that the defendants were deliberately indifferent to a serious medical need. Because negligent medical care does not rise to the level of an Eighth Amendment violation, the defendants will move to dismiss the action.

Usually upon completion of discovery, but sometimes at an earlier point, a party may move for **Summary Judgment**. See Rule 56 of the FRCP. In making this motion, the party states that based on the evidence submitted with the motion, the moving party is entitled to a judgment on the merits. The basis of the motion is that the undisputed evidence shows that the moving party is entitled to judgment on the merits. The other party responds to the motion by submitting evidence which the party alleges shows that there are **material facts** (those facts which are critical to deciding who wins the case) in dispute. The responding party can also assert in a cross motion that the undisputed evidence shows that it is entitled to

summary judgment. If the court concludes that material issues of fact are in dispute, it will set the case for trial. If the court decides there are no material facts in dispute, it will grant judgment to one side or the other. The court will grant judgment to the plaintiff if the court determines that the plaintiff has submitted enough evidence to show that s/he is entitled to a judgment in his/her favor.

Trial

The plaintiff and the defendant both have the right to request a jury trial. Only if both waive their right to a jury, will the case be tried before a judge. The primary difference between a jury trial and a bench trial is whether a group of twelve people without legal backgrounds, or a single person with a legal background, determines whether the facts show that the plaintiff is entitled to a judgment in his/her favor. Assuming that one of the parties requests a jury, the trial begins with jury selection and ends with a verdict.

Following jury selection, each party has the chance to make an opening statement. An opening statement gives each party the chance to tell the jury its theory of the case and what evidence it will produce in support of its theory.

After the opening statements, the plaintiff puts on evidence to prove its claim. Evidence is introduced through witnesses and comes in the form of testimony, records, photographs, etc. After the plaintiff has called all of its witnesses, the judge decides whether the plaintiff has made a **prima facie case (**has produced enough proof that the jury could issue a verdict in its favor). If the plaintiff has not produced enough evidence, the judge will dismiss the case. If the plaintiff has produced enough evidence, the defendant is given the opportunity to put on a defense. Defense evidence is introduced by the same process as the plaintiff's evidence.

After the defense **rests** (finishes putting on its case), the parties make closing arguments, following which the court instructs the jury on the law, and the jury leaves the court room to deliberate. The result of the jury's deliberation is its verdict.

Petition for a Writ of Habeas Corpus

A petition for a writ of habeas corpus is an action seeking release from prison or jail. A habeas corpus action is a summary action. Unlike a plenary action, a summary action generally does not involve pre-trial discovery or a trial. Rather, a summary action is decided on the papers that the parties submit to the court.

The party who brings the summary case is called the petitioner. S/he starts the action by filing a petition. Attached to the petition are exhibits that the petitioner alleges show that s/he is entitled to the relief that s/he seeks. Filed with the Petition is a **brief** (a written legal argument) that explains why the petitioner is entitled to the relief that s/he is requesting.

The person against whom the petition is filed is called the respondent. Instead of filing an Answer, the respondent files a Response. Attached to the response are the documents that the respondent claims show that the petitioner is not entitled to the relief s/he seeks. The respondent also submits a brief that explains why the court should not grant the relief requested by the petitioner.

Usually the court decides a summary case "on the papers." The court may schedule oral argument.

Reading Federal Case Citations

Court decisions are published in bound volumes called reporters. Generally, reporters are identified by the court that issued the

decisions that are published in the reporter. For instance, decisions made by the United States Supreme Court are published by the U.S. Government in the *United States Reports* (abbreviated *U.S.*). There are two parallel or "unofficial" citations for Supreme Court cases, those published by West, in the *Supreme Court Reporter* (abbreviated *S.Ct.*) and those published by LexisNexis, the *United States Supreme Court Reports, Lawyer's Edition* (abbreviated *L.Ed.*) Some reporters publish only the decisions issued by a certain group of courts. For example, the *Federal Reporter,*

only publishes decisions made by the federal courts of appeal. The reporter that publishes decisions made by the federal district courts is called the *Federal Supplement*.

There are 999 volumes in each series of reporters. Decisions are published in the order that they are issued. Thus, a decision published in volume 1 of a reporter was issued earlier than a decision published in volume 50. The volume number is the first number in a case cite. Following the volume number is the abbreviation of the Reporter, which is followed by the page number of the volume. Here is a break down of the most commonly used federal citation formats.

Example of a decision from the United States Supreme Court which was published in the United States Reporter and the Supreme Court Reporter:

Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963 (1974).

This is a citation to a decision in the appeal in a case involving the parties Wolff and McDonnell; the portion of the case citation that is underlined names the parties. The party who petitioned the Supreme Court to take the appeal was Wolff, which is why that name is first. Charles McDonnell was the prisoner-plaintiff who filed the case.

The year that the decision was issued by the court is in parentheses at the end of the citation. In this case, the court issued the decision in 1974.

The portion of the citation immediately following the parties is the **official** case citation – 418 U.S. 539. The first number is the volume, the letters tell you the reporter – here the reporter is United States Reporter – and the number following the Reporter is the page number of the volume on which the decision begins. Thus, 418 U.S. 539 means that you can find the Supreme Court's decision in Wolff v. McDonnell on page 539 of volume 418 of series one of the United States Reporter.

The unofficial case citation is 94 S.Ct. 2963. The reporter is the Supreme Court Reporter, and the decision in Wolff v. McDonnell begins on page 2963 of volume 94 of the Supreme Court Reporter.

Until you know whether the law library to which you are sending your request for a copy of a case decision has the official or the unofficial reporters, if you know both citations, you should send both. If you only know one, use the one you have. Law librarians know how to convert from the official to unofficial citations.

The Federal Reporter, in which the decisions of the federal courts of appeal are published, is abbreviated by the letter "F." For example, 1 **F.** 14 (1880) is the case cite for Micon v. Lamar, an appeal from a decision of one of the federal district courts in New York that was published in the first volume of the first series of the Federal Reporter in 1880.

After volume 999 in the first series of a reporter has been published, the next volume published is volume 1, of the second series. You can tell that a reporter is in its second series by the identifying numeral (the number after the reporter abbreviation). For example, 1 **F.2d** 24 is a case citation from volume 1 of the second series of the Federal Reporter. Case decisions are now being published in the third series of the Federal Reporter. The same system is used for all the reporters in which court decisions are published.

Examples:

2 F.Supp. 4 is a citation to page 4 of volume 2 of the first series of Federal Supplement Reporter (the reporter that publishes federal district court opinions)

126 F.Supp.2d 95 is a citation to page 95 of volume 126 of the second series of the Federal Supplement Reporter.

A case citation gives you valuable information about the decision to which it refers. You can determine the court that issued the decision, when the decision was issued, the names of the parties, and whether the decision is from a trial court or an appellate court. In addition, using the case citation, you can find out whether other decisions, issued in the years since the case was issued, have cited to the decision.

When you write briefs and memoranda of law, you use case citations to direct the court to earlier decisions that you think would be helpful to the court in deciding your case.

We hope that this introduction to federal rights, federal courts and case citations will be helpful to you in researching the law, reading cases, reading *Pro Se,* and representing yourself in court should you ever need to do so.

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