Pro Se

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2009-2010 State Budget Advances Criminal Justice Agenda

Rockefeller Drug Law Reform

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The budget bill signed into law in early April contains the broadest criminal justice reforms in New York in decades and appears to mark the end of a 36-year-old social experiment called the Rockefeller Drug Laws, an experiment which treated drug abuse as an almost exclusively criminal, rather than public, health problem and which resulted in an explosion in New York's prison population.

The Rockefeller laws, passed in 1973, required harsh mandatory prison sentences for most drug offenses--from 15 to 25 years to life for an A-I drug felony, for example, and maximum terms of up to 25 years for B drug felonies. These laws led to a tripling of the State's prison population in the decades after they were passed.

Reforms, enacted in 2004 and 2005, reduced the most severe sentences and reduced the weight threshold of drugs needed for conviction of certain offenses. They also allowed A-1 and certain A-II offenders convicted prior to the reforms to petition for the new sentences. They continued to require mandatory prison sentences for most drug offenses, however, and more people were sent to state prison for non-violent drug offenses in the years 2005 to 2008 than in those preceding. In 2007, more than 35% of all persons sent to state prison were drug offenders.

"Merit Time" for Violent Felons

The 2009-2010 New York State budget bill adds a new § 803-B to the Correction Law titled "Limited Credit Time Allowance." The Limited Credit Time Allowance consists of a one-time, discretionary sentence credit, similar in many respects to merit time but, unlike merit time, is available to violent felony offenders.

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A Message from the Executive Director, Karen L. Murtagh-Monks

A Win In the Supreme Court

On May 26, 2009, the United States Supreme Court declared New York's Correction Law § 24, which prohibited inmates from bringing a civil action for damages against a DOCS employee in state court, unconstitutional. The decision, Haywood v. Drown, 2009 WL 1443136, is a major victory for inmates and a vindication of the principle that the courts must treat all litigants equally.

Correction Law § 24 provided that, "No civil action shall be brought in any court of the State…against any officer or employee of [DOCS]…for damages arising out of any act done or the failure to perform any act within the scope of the employment and in the discharge of the duties by such officer or employee." Under § 24, any damages action arising from the actions of a DOCS employee in state court would have to be filed in the Court of Claims, with the State, rather the individual employee, as the defendant, and any action under § 1983 (the federal civil rights act) could only be brought in federal court.

Plaintiff Haywood, an inmate, filed a 1983 action in state court alleging that DOCS' employees violated his civil rights in respect to several disciplinary proceedings and an altercation. The Attorney General argued that Correction Law § 24 prohibited the state court from hearing the case. The state supreme court agreed and dismissed the case. The Appellate Division, 3rd Department affirmed the order of the supreme court.

Haywood sought leave to appeal to the New York State Court of Appeals. The court appointed Jason Murtagh, formerly of Dechert, LLP, to represent Mr. Haywood. PLS, together with other agencies, filed an amicus brief in support of Mr. Haywood's case, arguing that Correction Law § 24 was unconstitutional because it violated the Supremacy Clause. The Supremacy Clause mandates that the U.S. Constitution and the Laws of the United States are the supreme laws of the land and that every state is bound by them. The Court of Appeals, however, concluded that because the statute did not discriminate against one claim in favor of another, but rather prohibited all damage claims against DOCS officials, both state and federal, there was no Supremacy Clause violation.

Plaintiff then filed a motion for certiorari in the U.S. Supreme Court and PLS prepared an amicus brief in support of Plaintiff's motion. Certiorari was granted and the case was argued before the U.S. Supreme Court on December 3, 2008.

The Supreme Court held that because New York had created "courts of general jurisdiction that regularly sit to entertain analogous suits [*i.e.*, federal lawsuits against non-DOCS employees], New York is not at liberty to shut the courthouse door to federal claims [against DOCS employees]." The Court concluded that, "Correction Law § 24 is effectively an immunity statue cloaked in jurisdictional garb."

What does Haywood mean for New York State prisoners? It means that if you believe that your civil rights have been violated and that you have been damaged, you now have the option of bringing a § 1983 claim in either state or federal court. Which venue to chose depends on a number of different factors that are too lengthy to discuss here. However, the Haywood decision itself is a victory, not just for New York State inmates, but for all U.S. citizens, as it reaffirms the strength and importance of the Supremacy Clause.

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The new reforms constitute a significant break with mandatory sentences. At the heart of the new laws is a Judicial Diversion Program, under which sentencing courts will have the option of diverting most drug offenders to in- or out-patient drug treatment in lieu of prison, or to the Willard Drug Treatment or SHOCK incarceration program. The new laws also reduce the sentences for some offenses and will, for the first time, allow some B drug felons convicted prior to the 2004 reforms to petition for resentencing. A detailed review of the new sentencing laws begins on page 4.

The new laws do not eliminate all vestiges of the Rockefeller-era laws. They leave undisturbed overly-harsh, mandatory sentences for A-1 and A-II drug offenders, 2d felony level B drug offenders who are not substance dependent, and anyone convicted of a violent offense within the last 10 years. They also continue the Rockefeller model of basing the principal criteria for guilt for most offenses on the weight of the drugs in a person's possession at the time of arrest, rather than the person's role in the transaction. Furthermore, they leave some 10,000 drug offenders behind bars without an opportunity to appeal for sentence reduction.

Nevertheless, the new laws represent a welcome break from the Rockefeller mentality that Governor Patterson recently called the "least successful criminal justice program" he could think of.

…merit time article continued from page 1

The new law provides that eligible inmates serving determinate sentences may reduce their *conditional release* dates by six months, provided they meet several criteria, and eligible inmates serving indeterminate sentences may reduce their *minimum* periods of incarceration by six months.

Eligible inmates are:

1) Individuals serving indeterminate sentences for A-1 felony offenses other than criminal possession of a controlled substance, criminal sale of a controlled substance, or an attempt or conspiracy to commit either of those offenses; and

2) Individuals serving indeterminate or determinate sentences for violent felony offenses, as defined in Penal Law § 70.02; and

3) Individuals serving indeterminate or determinate sentences for homicide offenses, except for Murder 1, as defined in Penal Law § 125.27 (that is, murder of a police, peace, or correction officer, or a murder committed by an incarcerated person).

Sex offenders are not eligible.

An inmate will lose eligibility if he or she is returned to DOCS on a violation of any form of supervised release without being sentenced to an additional determinate or indeterminate term.

The credit is available only once, even if an offender is serving multiple eligible sentences.

To earn the credit, the eligible inmate must:

✓ successfully participate in assigned work and treatment programs; and

✓ successfully complete one or more "significant programmatic accomplishments," which are defined as: participating in no less than two years of college programming; obtaining a masters or professional studies degree; participating as an inmate program associate for at least two years; receiving a certification from the State Department of Labor for successful participation in an apprenticeship program;

working as an inmate hospice aid for two years; and

- ✓ not have committed a "serious disciplinary infraction" or maintained an "overall negative institutional record," as defined in rules and regulations to be promulgated by the Commissioner; and
- ✓ not have received a "disqualifying judicial decision," meaning one found to have been frivolous under the Civil Practice Law and Rules or for which sanctions were imposed under Rule 11 of Federal Rules of Civil Procedure.

The program is discretionary and, as with merit time, DOCS is not required to grant the credit just because an inmate meets the eligibility criteria. The new statute provides that no person shall have a right to demand or require this credit. In addition, it states that the Commissioner may revoke the credit for a disciplinary infraction or for any failure to continue to successfully participate in any assigned work program after a certificate of earned eligibility has been awarded.

The law became effective April 7, 2009.

Rockefeller Drug Law Reform: A Closer Look

The Rockefeller Drug Law Reform provides for new sentencing options, including Willard, SHOCK incarceration, and judicial diversion to a drug treatment program for most drug felonies. Details are as follows**.**

First Felony Offenses

Class B: Imprisonment is no longer mandatory: Probation, a split sentence, a definite jail term, or a determinate state prison term between 1 and 9 years (with post-release supervision) will be authorized. If imposing a state prison sentence, the court may order that the defendant be directly placed in the Willard drug treatment program as part of a sentence of parole supervision. The court may also order the defendant directly placed in the SHOCK incarceration program.

Class C, D, and E: Imprisonment will be discretionary, not mandatory. All non-incarcerative dispositions are authorized. The sentencing court may order the defendant directly placed in the SHOCK incarceration program.

Second Felony Offenders (with prior non-violent felony)

Class B: Imprisonment is required unless a defendant is diverted for drug or alcohol treatment pursuant to new § 216 of the Criminal Procedure Law, which authorizes diversion at the court's discretion following an alcohol and substance abuse evaluation (see "Judicial Diversion Program" below). The minimum state prison sentence for Class B second felony drug offenders (with a prior non-violent felony) is reduced to 2 years (from 3½). The maximum is unchanged at 12 years. Therefore, Class B second felony offenders who are not judicially diverted to treatment, and are sentenced to less than 3½ years, will be SHOCK eligible, and may be directly placed in the program, provided they otherwise meet eligibility requirements [age, no prior DOCS commitments, no exclusion convictions--see Correction Law § 865 (1)].

Class C, D, and E: Imprisonment is not required –all non-incarcerative dispositions are authorized, including judicial diversion. In addition, Willard placement and judicial SHOCK placement are available sentencing options. Optional state prison sentences include:

Class C – a determinate sentence between 1½ (reduced from 2) to 8 years – plus PRS;

Class D – a determinate sentence between 1½ to 4 years (unchanged) – plus PRS;
Class E – 1½ - 2 (unchanged) – plus PRS.

Second Felony Offenders (with prior violent felony)

There are no sentencing changes available to defendants who are second felony offenders with a predicate violent felony conviction. These defendants still face mandatory imprisonment, as follows:

Class B – A determinate sentence between 6 - 15 years – plus PRS (categorical ineligibility for SHOCK);
Class C – a determinate sentence between 3½ – 9 years – plus PRS;
Class D – a determinate sentence between 2½ - 4½ years – plus PRS;
Class E – a determinate sentence between 2 – 2½ years – plus PRS.

Some Class C, D and E offenders will be eligible for SHOCK.

Judicial Diversion

The centerpiece of the reform bill is authorization for a court to divert most drug and marijuana offenders with an identified alcohol or substance abuse problem to treatment. It provides that courts may divert drug offenders (Class B through Class E), including second felony drug offenders, to in-patient or out-patient treatment programs in lieu of prison without consent of the D.A. Courts may also order judicial diversion for defendants charged with Willard eligible crimes (see CPL § 410.91). Various offenders are ineligible for diversion without D.A. consent. These include: second felony drug offenders with predicate violent felony offense convictions; defendants with a conviction for a merit time ineligible offense within the preceding 10 years (generally sex and homicide offenses); defendants with a Class A felony drug conviction within the preceding 10 years; and defendants who have ever been adjudicated a second violent felony offender or a persistent violent felony offender. Also ineligible for diversion without D.A. consent are defendants currently charged with a violent felony offense or a merit time ineligible offense, for which imprisonment is mandatory upon conviction, while such charge is pending.

After ordering and receiving an alcohol and substance abuse evaluation, the court must make findings with respect to whether:

a. the defendant is statutorily eligible for diversion;
b. the defendant has a history of alcohol or substance abuse or dependence;
c. such alcohol or substance abuse or dependence is a contributing factor to the defendant's criminal behavior;
d. the defendant's participation in judicial diversion could effectively address such abuse or dependence; and
e. institutional confinement of the defendant is or may not be necessary for the protection of the public.

A guilty plea will generally be required in exchange for judicial diversion, but the court may, in circumstances where the plea is "likely to result in severe collateral consequences," order diversion without a guilty plea. The court will have a range of options upon the defendant's successful completion of the diversion program, including allowing the defendant to withdraw a guilty plea and dismissing the indictment, or substituting a misdemeanor conviction in lieu of the felony. The court will also have a range of options

when a defendant is unsuccessful in the diversion program, including imposing a state prison sentence for the crime of conviction or a lesser offense. The legislation directs courts to consider that "persons who ultimately successfully complete a drug treatment regimen sometimes relapse by not abstaining from alcohol or substance abuse" and to consider using a "system of graduated and appropriate responses or sanctions."

Additional Criminal Justice Provisions of the 2009-2010 Budget Bill

Resentencing of Some Class B Drug Offenders Permitted

Beginning in October 2009, any eligible Class B drug felony offender in DOCS with an **indeterminate** sentence greater than one to three years can apply to the courts to be re-sentenced to a determinate term in accordance with the new ranges authorized by the Rockefeller Reform bill. The procedures are the same as those that were in effect when Class A-I offenders were allowed to apply for resentencing: the application should be made to the court which originally sentenced you; inmates who make a re-sentencing application will have the immediate right to appointed counsel to prepare and file the petition and the right to appeal from adverse determinations; the courts can take into account "any facts or circumstances" relevant to the imposition of a new sentence, including the inmate's participation or willingness to participate in prison programming, before deciding whether to grant the petition. As part of the application, the inmate may also move for resentencing on any Class C, D, or E drug or marijuana convictions "which were imposed by the sentencing court at the same time or were included in the same order of commitment as such class B felony."

Offenders will *not* be eligible for resentencing if, within the last ten years--not counting time in prison--they were convicted of a violent felony offense or an offense which would make them ineligible for merit time or if they have ever been adjudicated a second violent felon or a persistent violent felon.

Shock Incarceration Expanded

The Reform bill amends § 865 of the Correction Law to expand SHOCK Incarceration to inmates up to and including 49 years of age (up from 39), and to permit a second felony offender convicted of a Class B drug felony to enter the program. Prior law prohibited Class B drug felons from entering the program.

The new law also permits an otherwise eligible inmate to be selected from or apply to SHOCK directly from a general confinement facility if, in the case of an inmate with an indeterminate sentence, the inmate is within three years of parole eligibility, or, in the case of an inmate serving a determinate sentence for a drug offense, when the inmate is within three years of conditional release. Under prior law, eligible inmates could only enter SHOCK from a DOCS reception center.

Successful completion of the SHOCK program results in the granting of an earned eligibility certificate and, for inmates serving a determinate sentence, immediate consideration for conditional release.

Medical Parole Expanded

The new bill amends Executive Law 259-r to permit inmates who suffer from non-terminal medical conditions that render them "so physically or cognitively debilitated that they do not present a danger to society" to be released under medical parole. It also allows persons convicted of murder in the second degree,

manslaughter, or a sex offense to apply for medical parole, provided they have served at least half the minimum period of incarceration in the case of an indeterminate sentence, or half the term in the case of a determinate sentence. Previously, medical parole was only available to inmates with a terminal medical condition and was not available to persons convicted of murder, manslaughter, or a sex offense.

Parole Instructed to Consider Graduated Sanctions

The new law amends Executive Law 259-a to require the Division of Parole to "consider" graduated sanctions for parole violations that would include the concentration of supervision on new releasees, alternatives to incarceration for technical parole violators, and "the use of enhanced technologies" for parole supervision.

DOCS Allowed to Hold Offenders in Civil Commitment Proceedings

The new law allows DOCS to temporarily keep in custody a sex offender, beyond his or her maximum expiration date, who is the subject of a pending civil management proceeding and for whom a probable cause determination was found, finding cause to hold the offender for trial to determine whether civil management is required, provided that the offender and his counsel consent in writing to such an arrangement. Under prior law, a sex offender for whom probable cause was found would have to be transferred to a secure treatment facility operated by the Office of Mental Health ("OMH") upon his or her maximum expiration date, pending trial.

News and Briefs

OMH Issues Report on the Sex Offender Management and Treatment Act

The Office of Mental Health has issued its second annual report on the implementation of the Sex Offender Management and Treatment Act of 2007 ("SOMTA"), which calls for enhanced "civil management," including possible civil commitment of sex offenders deemed pre-disposed to re-offend. The report shows that during the 12 month period between November 1, 2007 and October 31, 2008, 1,581 sex offenders were reviewed by OMH for possible civil management. Of those, 139 (9.3%) were referred for possible civil management based on their perceived risk of re-offending.

Referral for civil management results in a "probable cause" hearing, at which a judge is required to determine whether there is "probable cause" that the offender is a "dangerous sex offender in need of civil management." If so, the offender is placed in a secure OMH facility pending a trial by jury to determine whether he suffers from a "mental abnormality" which pre-disposes him to commit sex offenses. If the jury concludes that the offender suffers from such an abnormality, the judge must determine whether the offender is "dangerous" and should be therefore subject to civil commitment in a secure psychiatric facility or, instead, subject to "Strict and Intensive Supervision and Treatment" ("SIST"), a form of intensive parole supervision, in the community.

The report states that there have been 231 probable cause hearings held since the inception

of SOMTA and that all but one resulted in a finding of probable cause and the placement of the offender in a secure facility pending trial. The report also states that, as of October 31, 2008, 122 persons were in secure treatment facilities awaiting trial on whether they suffered a mental abnormality; 56 were designated to secure treatment facilities upon a judge's conclusion that they were dangerous sex offenders requiring civil confinement; and only 36 had been placed on SIST orders in the community. Of the 36 on SIST, 17 were pending a violation of either their SIST conditions or their conditions of parole.

The report concludes that SOMTA has resulted in much-higher-than-anticipated rates of civil confinement due to, among other things, the lengthy pre-trial detention periods, the high rates at which juries and courts find that offenders with mental abnormalities are too dangerous to be safely managed in the community, and the low rate at which offenders are released from secure confinement. The report states that a continued growth of civil confinement at the rate at which it has grown since the inception of SOMTA will be "unsustainable" in the near future and urges alternatives for the treatment and management of sex offenders.

The entire report can be obtained from the FOIL Officer, Office of Mental Health, 44 Holland Avenue, Albany, New York 12229.

Court Holds Local Sex Offender Residency Law Invalid

Sex offender residency restrictions have multiplied throughout New York State as local legislatures scramble to outmaneuver each other with highly restrictive ordinances designed to banish registered sex offenders from their communities. As many as 80 such NIMBY ("Not-In-My-Backyard") residency restrictions have been passed by counties, towns, and villages from Suffolk County to Niagara Falls. Police and prosecutors are now enforcing them, ordering sex offenders to move from restricted zones and filing criminal charges for non compliance. Even without vigorous enforcement, the ordinances interfere with parole and probation officers' efforts to find suitable housing for offenders.

In People v. Oberlander (Sup. Ct., Rockland Ct., January 26, 2009), a Rockland County Judge found one such law, imposed by Rockland County, illegal.

The court found that the Rockland County law was impermissible under the "preemption doctrine." The preemption doctrine prohibits local legislatures from passing laws in a field in which there is already extensive State legislation, because they may be inconsistent with the State's "transcendent interest" in the subject matter.

The court noted that New York State already has a Sex Offender Registration Act ("SORA") (Correction Law § 168) which establishes a scheme for the registration and classification of sex offenders based on their perceived risk of a re-offending. The court noted that SORA and other laws authorize community notification concerning most sex offender releases, that Parole officers in New York exercise broad veto authority over the proposed residences of sex offenders, and that, in 2005, the state legislature barred various categories of sex offenders from knowingly "entering"--and, for all practical purposes, residing--within 1,000 feet of the "real property boundary line of a public or private elementary [school], parochial, intermediate, junior high, vocational or high school."

The State laws, the court concluded, were "powerful indications of the New York Legislature's intention to 'occupy the field'" of community management of sex offenders, and that Rockland County's law "impermissibly conflict[ed]" with the State enactments by

prohibiting sex offenders from residing in areas that might be permissible under State law.

The court noted that, in the instant case, the defendant had found 15 residence locations in Rockland County that were acceptable to the Probation Department under State law but which were rejected by the County under the local law.

The ruling, if affirmed, could have a broad impact on NIMBY laws across the State, as sex offenders bring additional challenges to such laws in other localities.

State Cases

Disciplinary Cases

Inmate Found Not Guilty of Interfering With Nurse

Matter of Tevault v. Fischer, --- N.Y.S.2d ---- (3d Dep't 2009)

The petitioner in this case was charged in a misbehavior report with, among other things, interfering with an employee and abusing state property after it was discovered that he was missing a quantity of prescription medication. After being found guilty in a disciplinary hearing, he filed an Article 78 proceeding.

The court affirmed the charge that he had misused his prescription medication. The petitioner's assertion that he inadvertently dropped the medication on a wet floor, thereby accounting for the missing pills, "presented a credibility determination," held the court, and was therefore for the hearing officer, not the court, to resolve.

The court reached a contrary decision, however, with regard to the allegation that the petitioner had violated Disciplinary Rule 107.10. That Rule provides that "[a]n inmate shall not physically or verbally obstruct or interfere with an employee at any time" 7 NYCRR 270.2(B)(8) (i).

The facts of the case were that a fellow inmate had overdosed on the prescription medication Baclofen. This prompted the facility to confiscate the drug from all of the inmates for whom it had been prescribed, including the petitioner. The petitioner's alleged "interference" with an employee stemmed from the facility nurse having to interrupt her "typical" duties to do a pill count, ascertain how much of the petitioner's medication was missing, and author the misbehavior report.

The court held that"this is not the type of conduct that the subject rule was designed to prevent." The petitioner did not physically or verbally interfere with the nurse, there is no evidence that the underlying pill count effectively precluded the nurse from responding to any medical situations, and the petitioner's loss or abuse of his medication, "while improper," was not the precipitating event that gave rise to the pill count in the first instance. Accordingly, the court held that the finding of guilt for the charge of interference should be reversed and the matter remitted to DOCS for a redetermination of the penalty for the remaining charge.

Weapon Found in Area "Controlled" by Inmate Provided Sufficient Evidence to Support Disciplinary Judgement

Matter of Griffin v. Selsky, 878 N.Y.S.2d 204

Following a cell search during which a utility knife was found, the petitioner was found guilty in a Tier III proceeding of possessing a weapon and a penalty was imposed. He challenged the finding of guilt in an Article 78 proceeding, arguing that the evidence was inadequate because he did not have exclusive control over the cell. The court affirmed,

nonetheless, writing: "Although petitioner may not have had exclusive access to the area where the secreted utility blade was found, a reasonable inference of possession arises from the fact that the weapon, which was discovered inside the fold of a hat underneath petitioner's mattress, was located in an area within his control. To the extent that petitioner denied that the weapon was his and/or claimed that it had been planted underneath his mattress by his cellmate, this presented a credibility issue for the hearing officer to resolve."

Inmate Not Guilty of Smuggling Contraband

Hizbullahankhamon v. Fischer, 876 N.Y.S.2d 795 (4th Dep't 2009)

The petitioner commenced an Article 78 proceeding to annul the determination that he violated various inmate rules relating to his alleged possession and smuggling contraband--to wit, a pornographic videotape. The charges were based on allegations that while he was distributing food at his correctional facility, another inmate placed a commissary bag on the petitioner's cart. A correction officer who searched the bag found a pornographic video in it. The court noted that, although a misbehavior report may by itself constitute substantial evidence of guilt, "here there was no evidence that petitioner had possession of the videotape or that he and the other inmate were attempting to smuggle it." On the contrary, the court found, the record established that, based on the order of the correction officer, the petitioner immediately delivered his cart with the bag to the correction officer and, according to the correction officer, the petitioner never touched the bag or otherwise took possession of it. Furthermore, there was no evidence of a scheme between the petitioner and the other inmate to smuggle the videotape. Therefore, there was no evidence that he violated the inmate rules in question.

Witness to Inmate's Mental Health Status Found Redundant to OMH Testimony

Matter of Gray v. Kirkpatrick, 873 N.Y.S.2d 816 (4th Dep't 2009)

The petitioner commenced an Article 78 seeking to expunge the determination that he violated two disciplinary rules. The court agreed with the petitioner's first argument--that his employee assistant had failed to interview requested witnesses and to collect requested documentary evidence--but it nevertheless concluded that "[t]he Hearing Officer remedied any alleged defect in the prehearing assistance by ensuring that petitioner was offered all [relevant] documentation which he requested, ensured that petitioner's many objections were addressed, [and] exercised considerable patience in allowing petitioner to develop the record" at the hearing.

The court then went on to reject all of the petitioner's remaining contentions, including his claim that the testimony of an inmate concerning his mental health status had been improperly denied. The court found that, "because the Hearing Officer previously had conducted a confidential interview with an employee from the Office of Mental Health…any additional testimony concerning petitioner's mental health status would have been redundant."

Practice pointer: *In Huggins v. Coughlin, 548 N.Y.S.2d 105 (3d Dep't 1989), aff'd 76 N.Y.2d 904 (1990), the New York Court of Appeals held that a hearing officer is required to consider an inmate's mental condition in making a disciplinary disposition when the inmate's mental state is at issue. The court said this principle was "in conformity with the well-established proposition that evidence in*

mitigation of the penalty to be imposed or that which raises a possible excuse defense to the charged violation is relevant and material in a disciplinary proceeding." Following additional class action litigation, DOCS adopted regulations stating that when an inmate's mental health is at issue, the hearing officer shall "interview an OMH clinician" concerning the inmate's mental condition ***and*** *"inquire of other witnesses to the incident…concerning any observations that they may have regarding the inmate's mental condition…at the time of the incident." 7 N.Y.C.R.R. 254.6(c).*

In our view, a direct witness to an inmate's mental condition who has testimony to offer which goes above and beyond that of the OMH clinician--and which may be at odds with that of the clinician--would not be "redundant" and, under 7 N.Y.C.R.R. 254.6(c), should have been admitted.

Sentencing Cases

DLRA Resentencing Does Not Authorize Reconsideration of Whether Sentences Should Run Concurrently or Consecutively to Other, Non-Drug Offenses

People v. Vaughan, 876 N.Y.S.2d 82 (2d Dep't 2009)

The Drug Law Reform Act of 2004 (the "DLRA") substituted shorter determinate sentences for the lengthy indeterminate sentences previously required under the Rockefeller Drug Laws for drug-related offenses. It also authorized individuals serving sentences for Class A-I felony drug offenses to apply for re-sentencing under the newly-enacted sentencing structure.

In this case, the defendant was serving a sentence of 15 years to life for an A-1 drug felony offense consecutively to sentences of 9 years to life and 6 years to life for several non-drug related offenses, resulting in an aggregate term of 30 years to life. He moved for resentencing under the DLRA. Specifically, he asked to be resentenced to a determinate prison term of 15 years plus a 5-year period of post-release supervision for the drug offense. In his motion papers, however, he pointed out that if the three prison terms were still required to run consecutively, the substitution of a determinate prison term of 15 years for the original indeterminate prison term of 15 years to life would not alter his aggregate prison term, which would still be 30 years to life. He therefore asked for an order that the new sentence run concurrently with the indeterminate sentences.

The court held that this was not authorized by the DLRA. Criminal Procedure Law § 430.20 provides: "Except as otherwise specifically authorized by law, when the court has imposed a sentence of imprisonment and such sentence is in accordance with law, such sentence may not be changed, suspended, or interrupted once the term or period of the sentence has commenced." While the DLRA does authorize the court to change a sentence, the court held, the scope of that authorization is limited. It was "not designed to grant the resentencing court plenary power over the defendant's sentence, including the determination as to how the sentence should be served in relation to sentences imposed for other, violent, non-drug-related felonies" wrote the court. "There is no indication that the Legislature intended that the issue of concurrent versus consecutive sentences should be reopened when a defendant is resentenced in conformance with the new sentencing structure adopted in the 2004 DLRA. The purpose of the resentencing provision of the 2004 DLRA is simply to retroactively reduce the level of punishment for certain drug offenses. A decision that a sentence for such an offense should run consecutively or concurrently in relation to sentences for other offenses is

unrelated to the ameliorative purposes of the 2004 DLRA."

Inmate May Bring Petition to Annul Post-Release Supervision Portion of Sentence

Matter of Johnson v. Fischer (Sup Ct. NY Co. March 24, 2009)

As many inmates know, the Court of Appeals, in Garner v. Department of Correctional Services, 10 NY3d 358 (2008), held that only a sentencing court can impose a period of post-release supervision, and any PRS administratively imposed by DOCS is unlawful.

The petitioner in this case, like many other inmates, commenced an Article 78 proceeding to annul a period of post-release supervision which had been administratively added to his sentence by DOCS. Notwithstanding the Court of Appeals' decision in Garner, DOCS opposed the petition. It offered two grounds for its opposition. First, DOCS argued, because the petitioner had failed to provide a copy of his sentencing minutes to the court, he had failed to *prove* that the PRS component of his sentence had been imposed by DOCS, rather than the sentencing court.

The court dismissed this argument as "wholly without merit." The petitioner, the court noted, "was present at his sentencing and speaks with personal knowledge." DOCS itself had not presented the sentencing minutes "or any other document to cast doubt on petitioner's allegation in the verified petition" that the petitioner's PRS was administratively, rather than judicially, ordered.

Second, DOCS pointed out that, after Garner, the State had passed legislation--Correction Law § 601-d--providing for the resentencing of persons who were subject to illegal, administratively imposed PRS. Under the statute, the resentencing process is commenced by either DOCS or the Division of Parole, referring such a person to their sentencing court. DOCS argued that resentencing, not nullification of the administratively imposed PRS, was the only remedy available to the petitioner. Moreover, DOCS continued, after Correction Law § 601-d was passed, DOCS had entered into a Memorandum of Understanding with the NYS Office of Court Administration, under which (DOCS contended) the petitioner could not be referred to his sentencing court for re-sentencing "until at least 60 days before the release date." Therefore, DOCS argued, the instant case was not "ripe" for review and the court lacked jurisdiction.

The court characterized these arguments as "a complete mischaracterization." Under Garner, the petitioner had a right to have his administratively imposed PRS term vacated. In addition, the Memorandum of Understanding, the court pointed out, actually states the opposite of what DOCS said that it states. The court wrote:

> When the Court of Appeals, in Garner v. NYS Department of Correctional Services, 10 NY3d 358 (2008), confirmed the illegality of administratively imposed PRS the Legislature promulgated Correction Law § 601-d to require that DOCS arrange for the resentencing of any inmate whose PRS had been unlawfully imposed by the agency, rather than the court. Recognizing that a large number of inmates would be affected, the Memorandum was agreed upon to establish priorities for resentencing to facilitate the process. The first priority, to be addressed within weeks of the Memorandum, was inmates in DOCS custody solely based on a technical violation of PRS which had not been set by the sentencing court. Persons such as

> petitioner, who were not eligible to be released onto PRS until after October 1, 2008, were to be referred to the sentencing courts "*at least* 60 days prior to their release date."

Thus, the court noted, the 60 days is the *latest*, not the earliest, time for resentencing, under the Memorandum.

Therefore, the court held, the petitioner was entitled both to have his administratively imposed period of PRS vacated and to be brought before his sentencing court for resentencing "without delay."

***Practice pointer**: Despite this case, DOCS adheres to a policy of not referring inmates who had PRS administratively added to their sentences but who are not yet eligible for release for resentencing until they are within 60 days of their earliest release date. This can be problematic. In some cases, for example, it may develop at resentencing that the defendant was not told that PRS had to be a part of the sentence prior to entering his or her plea. In those cases, the defendant would be entitled to revoke the plea and, possibly, negotiate a lesser term of incarceration. In other cases, the sentence to which PRS was administratively added was on a prior sentence, not the current sentence. In those cases, resentencing on the prior sentence--particularly if it is to a term without PRS--might alter the computation of the current sentence. In both scenarios, if the defendant is not resentenced until the current sentence is exhausted, the benefit of the resentencing may be lost.*

As this case indicates, however, there is no legal reason for DOCS to wait until such inmates are within 60 days of their release date to refer them for resentencing. On the contrary, as this case suggests, an inmate who has had PRS unlawfully added to his or her sentence has a right to be resentenced at a time of his or her choosing. If DOCS refuses to refer such an inmate for resentencing on request, an Article 78 proceeding may be an appropriate remedy.

Appellate Court Rejects Claim That Double Jeopardy Prohibits Adding PRS to a Sentence

People v. Hernandez, 872 N.Y.S.2d 455 (1st Dep't 2009)

Correction Law § 601-d, passed last summer, permits the State to resentence inmates who were not sentenced to post-release supervision by their sentencing courts. At re-sentencing, the court may add the missing period of post-release supervision to the sentence.

Some defendants' advocates have argued that, in cases in which the inmate had already completed the underlying term of incarceration, such resentencings would violate the constitutional prohibition against "double jeopardy."

The Double Jeopardy Clause of the Constitution prohibits successive prosecution or multiple punishment for "the same offence." It is intended to provide for "finality" in a criminal judgment and protect against multiple punishments for the same offense.

As we reported in the last issue of ***Pro Se***, at least one lower level court agreed that adding PRS to a sentence, where the defendant had already served the sentence that was imposed, would violate double jeopardy. That case was People ex rel. Pamblanco, 23 Misc. 3d 776 (Supreme Court, Bronx Co., November 28, 2008).

Since then, however, the Appellate Division, First Department, has rejected a defendant's claim that double-jeopardy rendered a resentencing unconstitutional. In People v. Hernandez, 872 N.Y.S.2d 455 (1st Dep't 2009), the court noted that the Legislature had specifically granted courts the authority to resentence in these circumstances and held that

the defendant "had no legitimate expectation of finality with respect to a determinate seven-year sentence with no attending PRS component."

> [The] defendant could not have had a legitimate expectation in the finality of a sentence that is manifestly contrary to law. As noted, both the Court of Appeals and the Legislature have determined that failure to impose PRS is a defect that is correctable, notwithstanding the expiration of the People's time to appeal or move for re-sentencing. Finally, defendant's resentencing did not offend notions of fundamental fairness, as he was resentenced only to the originally promised determinate term of seven years, along with the required five-year term of PRS.

The First Department of the Appellate Division governs cases that arise in Manhattan and the Bronx. Since Pamblanco was decided by a Bronx County Judge, that decision is now overruled.

***Practice pointer**: Lower courts have rejected other objections to resentencing. For example, in People v. Thompson, Sup. Ct., Bronx Co., February 11, 2009, the defendant argued that resentencing him to a term with post-release supervision after he had already served his term of incarceration and spent some time serving the illegal PRS term would be "inconsistent with notions of fairness embodied in the due process clause." The court rejected this claim, characterizing it as "the right of a convicted felon to resist being resentenced to additional punishment mandated by law if he has fully served the original, illegally lenient sentence and the state has not sought resentencing for such an appreciable period of time." The court found "no federal or state authority" supporting the proposition that there is a fundamental liberty interest protected by the due process clause in being resentenced under those circumstances. The same court also rejected the defendant's argument that it had lost jurisdiction to resentence by unreasonable delay--because, the court opined, the defendant had not shown that he had been prejudiced by the delay:*

> *[D]uring the period since the initial sentencing proceeding defendant was incarcerated for a determinate term commensurate with both the original, albeit illegal sentence and that which the law required, and he was released to the albeit illegal DOCS imposed supervision of the Division of Parole on the same date and under the same conditions as he would have been had PRS been imposed at the initial sentencing proceeding. Nor does defendant allege that as a result of the delay in resentencing he has lived under any legal disability or been otherwise prejudiced in a manner which he would not have suffered if the illegality of his original sentence had been remedied sooner.*

It appears, in brief, that the courts will not look favorably on arguments that inmates who were erroneously not sentenced to PRS cannot or should not be resentenced now.

Parole Cases

Parole Denied

Sagaria v. New York State Board of Parole (Supreme Court, NY Co., March 3, 2009)

The petitioner filed an Article 78 proceeding to challenge the determination of the New York State Division of Parole denying his release. He argued that the Board disregarded his

"impressive institutional record," his "triumph over substance abuse," along with training, work assignments, and other accomplishments, when it denied parole.

The minutes of the parole hearing revealed that the Board credited the petitioner with having completed transitional services, orientation, ASAT, and with working as a plumber and a porter. The Board also noted certificates on file for transitional service and Group Industries and Group Ministries. The minutes also showed that the Board considered numerous positive letters, including positive statements from the D.A., correction officers, and family. The petitioner noted his recovery, not having used drugs since 1997. The minutes also showed, however, that the petitioner had had several disciplinary infractions in prison.

The court noted that: "[A] reviewing court may not substitute its judgment for that of the agency's determination but must decide if the agency's decision is supported on any reasonable basis. Once the court finds a rational basis exists for the agency's determination, its review is ended. The court may only declare an agency's determination 'arbitrary and capricious' if it finds that there is no rational basis for the determination."

Here, the court found that although the Parole Board did not explicitly commend the petitioner for his having overcome his drug addiction, the fact that he had stopped using drugs was made clear during the interview: the Board specifically noted that his "institutional programming demonstrates progress and achievement, which is to [his] credit." It also stated that its decision was made only after "careful review and deliberation of [petitioner's] record and interview." But the interview, according to the court, also "revealed other considerations which the board had to weigh and balance against the above." Under the circumstances, the court concluded, "it cannot be said that the Board of Parole's decision was arbitrary or capricious**"** and, therefore, its decision was affirmed.

Criminal Cases

Inmate Guilty of Promoting Prison Contraband

People v. Aponte, 874 N.Y.S.2d 646 (3d Dep't 2009)

Penal Law § 205.25(2) provides that a person confined in a detention facility is guilty of promoting prison contraband in the first degree when he or she "knowingly and unlawfully makes, obtains or possesses any dangerous contraband." An item is dangerous contraband if "its particular characteristics are such that there is a substantial probability that the item will be used in a manner that is likely to cause death or other serious injury, to facilitate an escape, or to bring about other major threats to a detention facility's institutional safety or security." (See, People v. Finley, 10 N.Y.3d 647 [2008]).

In this case, the defendant was incarcerated at Ogdensburg Correctional Facility when a correction officer found a sharpened piece of metal in his pocket during a search. Found guilty of promoting prison contraband in the first degree, he appealed. In his appeal, he did not dispute that the evidence was sufficient to prove that the item in question was contraband or that it was found on his person. He challenged the evidence that the item was dangerous.

The court rejected his appeal. The evidence included, among other things, the testimony of several correction officers who had observed the contraband. Although there were some variations in their description of the item, they all testified that it was a sharpened piece of metal. They also testified about the use of similar items as weapons. The item itself was

placed in evidence and was available for inspection by the jury. The court found that the evidence could "certainly lead a rational person to conclude that the item was dangerous." Therefore, it concluded, the jury's verdict should not be disturbed.

Programming/Other

Denial of Temporary Release Was "Rational"

Matter of Herber v. Joy, 876 N.Y.S.2d 555 (3d Dep't 2009)

The petitioner, a financial services provider serving a prison term of 3 to 9 years for grand larceny based upon his misappropriation of client funds, was denied temporary release based on the nature of his offense. He appealed administratively and, after his appeal was denied, filed an Article 78 proceeding. In it, he argued that it was irrational for DOCS to deny him temporary release based on the nature of his offense: The offense was not a violent felony, it did not make him statutorily ineligible for temporary release, and he had an otherwise positive disciplinary record.

The court rejected his claim, noting: "It is well settled that participation in a temporary release program is a privilege, not a right." The mere fact that an inmate is statutorily eligible for temporary release does not automatically entitle him or her to temporary release. Where, as here, an inmate has been denied participation in such a program, the scope of court review of DOCS' decision "is limited to whether the denial violated any statutory requirement or constitutional right of the inmate, and whether the determination was affected by irrationality bordering on impropriety."

Here, the court found, "it was within [DOCS'] discretion to consider petitioner's positive institutional program history and nevertheless conclude that the particular circumstances surrounding his crimes render him unsuitable, at this time, for temporary release. In particular, respondent rationally based the denial upon the "serious and sophisticated" nature of petitioner's offenses, *i.e.*, petitioner's abuse of his relationship with his clients by stealing large sums of their money."

Practice pointer: *Decisions which the law grants to the discretion of DOCS' administrators--such as the decision in this case to grant or deny temporary release to an inmate who is statutorily eligible for it--are reviewed by courts under a "rational basis test." Under this test, the court will not substitute its judgment for that of the DOCS administrator. It asks only whether there was some "rational basis" for the administrator's decision. If so, it will affirm the decision.*

As this case illustrates, it is very difficult for an inmate to win a case that is being reviewed under the "rational basis" test. What may appear to the affected inmate to be irrational--such as denying temporary release to an inmate who meets the statutory eligibility requirements for the program and has an otherwise positive institutional record--will likely be affirmed so long as DOCS can articulate some "rational" basis for its decision.

Inmate Entitled to "Violent Felony Override" From Sentencing Court

People v. Cumberbatch, --- N.Y.S.2d ----

Correction Law § 851(2) provides that no person who is under sentence for a crime involving:

"(a) infliction of serious physical injury upon another as defined in the penal law or

(b) any other offense involving the use or threatened use of a deadly weapon

may participate in a temporary release program without the written approval of the

commissioner [of the Department of Correctional Services]."

DOCS has published a list of offenses which would make an inmate presumptively ineligible for temporary release under § 851(2) because they involve infliction of serious physical injury or the use or threatened use of a deadly weapon. The list includes such offenses as Assault1st and 2d, Burglary 1st and 2d, Robbery 1st and 2d, and Criminal Possession and Criminal Use of a Firearm. (For a full list, see, 7 NYCRR § 1900.4[c].)

Under certain circumstances, however, a person may be convicted of one of the offenses on the DOCS' list without having been convicted of a crime involving the infliction of serious physical injury or the use or threatened use of a deadly weapon. For example, one may be convicted of Burglary 2d under Penal Law § 140.25(1) if, during the crime, he or she caused physical injury to anyone not a participant in the crime and/or used or threatened the use of a deadly weapon. But, one may also be convicted of Burglary 2d under Penal Law § 140.25(2) merely by knowingly entering or remaining unlawfully in a building, if the building is a dwelling.

In such cases, DOCS rules state that if the inmate can "provide the TRC chairperson with a court-generated document or document generated by the Office of the District Attorney which establishes that his/her current commitment is for a subdivision of one of the above listed crimes which did not involve either the use or threatened use of a deadly weapon or a dangerous instrument or the infliction of a serious physical injury as defined in the Penal Law [he or she] shall be otherwise eligible for temporary release." This procedure is widely known as obtaining a "Violent Felony Override."

The defendant in this case, an inmate, made a motion to his sentencing court for an order granting him a "Violent Felony Override." Specifically, he requested a document stating that, although he plead guilty to Attempted Robbery in the Second Degree, a violent felony offense, the particular subdivision to which his plea was entered did not involve the use or threatened use of a deadly weapon or a dangerous instrument or the infliction of a serious physical injury.

The court noted that no such document with the title "Violent Felony Override" exists and that there is no specific legal procedure for obtaining one. Nevertheless, the court agreed that the defendant's conviction--in this case, Attempted Robbery in the Second Degree under Penal Law § 160.10(1)--did not involve the use or threatened use of a dangerous instrument or the infliction of serious physical injury. The court ordered that its finding be treated as the requisite "court-generated document" contemplated by DOCS rules. It then "hasten[ed] to note," however, that its decision did not mean that the defendant must be granted temporary release. The court took "no position" as to that issue, noting that the defendant's ultimate eligibility for temporary release would be decided by DOCS, and that the applicable rules and regulations for temporary release "contain other provisions not addressed in the defendant's papers which might otherwise disqualify him from obtaining the relief he seeks."

Practice pointer: *It should not generally be necessary to file a motion with your sentencing court to obtain a "court-generated document" stating that you were not convicted of an offense which makes you ineligible for temporary release. Your commitment sheet or your rap sheet should show which section of the law you were convicted under. This, in turn, should be sufficient to establish whether you were convicted of an offense which would make you ineligible for temporary release.*

Court Finds Halva Confiscation "Not Unreasonable"

Frejomil v. Fischer, 872 N.Y.S.2d 746 (3d Dep't 2009)

The petitioner, an inmate at Great Meadow Correctional Facility in Washington County, was denied a package of halva, a Middle Eastern confection, that was packaged in a two-pound plastic container. He filed a grievance that was denied by the facility superintendent. Upon review, the Central Office Review Committee upheld that determination. The petitioner filed an Article 78 proceeding.

The court affirmed DOCS' decision. "There can be no doubt but that correction facility officials must be accorded wide latitude in their efforts to insure the safety and security of correctional facilities under their supervision and, in that regard, have the right, albeit, the obligation, to control what property is permitted to be introduced into these facilities," wrote the court. "A determination regarding the confiscation of impermissible items, if rationally based, is entitled to deference and should not be disturbed unless there has been a showing that it was arbitrary and capricious."

In this case, the court continued, a sergeant at Great Meadow had confiscated the two-pound plastic container because the contents appeared to "be a paste," which he considered to be "a condiment like a spread" and DOCS Directive No. 4911 provides that a food item in this type of container could not be admitted into correction facilities if it weighed more than 16 ounces. The petitioner claimed that the paste-like substance in the plastic container was, in fact, halva--a candy, not a condiment--and that the regulation establishing the 16-ounce weight limitation therefore did not apply. But, the court found, the container did not identify the paste as a candy. The facts as presented to the sergeant who confiscated it established that the decision to do so was rationally based; the container he was presented with did not identify its contents beyond listing its ingredients, weighed more than 16 ounces, and contained a paste which was a food stuff. These facts, taken together, establish that the decision to confiscate this package, as well as CORC's determination denying the petitioner's grievance, were both based upon a rational interpretation of Directive No. 4911.

Inmate, Denied Jogging Suit, Was Not Discriminated Against

59 A.D.3d 798, 2009 N.Y. Slip Op. 01059

Matter of Keesh v. Smith, 872 N.Y.S.2d 743 (3d Dep't 2009)

The petitioner, an inmate at Shawangunk Correctional Facility in Ulster County, ordered two jogging suits from an outside vendor. When the jogging suits arrived at the facility and were inspected, the tops were classified as sweatshirts with zippers, which are prohibited under DOCS' Directive No. 4911 (V) (Attachment D) (E) (4) (d). The petitioner thereafter filed a grievance contending, among other things, that he arbitrarily was denied the jogging suit tops based upon alleged religious discrimination. CORC denied his grievance, and he commenced an Article 78 proceeding.

The court dismissed his claim. To prevail, the court wrote, the petitioner would have to demonstrate that CORC's determination was irrational or arbitrary and capricious. "This," the court found, "he failed to do." The record contained no evidence to support the petitioner's claims of religious discrimination, the directive at issue plainly imposed a "no zippers" restriction upon sweatshirts and sweatpants, and the court could "perceive no irrationality in CORC's determination that a

jogging suit top qualifies as a zippered sweatshirt."

Inmate's Claim That DOCS' Negligence Caused Him to Fall Down Stairs Will Go to Trial

Reid v. State of New York, 875 N.Y.S.2d 641 (3d Dep't 2009)

The claimant, an inmate at Southport Correctional Facility, brought a negligence action against the State contending that, while being housed in the Special Housing Unit, he slipped and fell on wet stairs as he was being transported to the recreation yard. Following discovery, both parties moved for summary judgment--a decision without a trial--on the issue of liability. The Court of Claims denied the parties' motions and the claimant appealed.

The Appellate Division affirmed the lower court. For the claimant to prevail on his summary judgment motion based on his allegation that a dangerous condition existed on the stairway that caused him to fall, he would have to establish, as a matter of law, that defendant "either created [the] dangerous condition or…had actual or constructive notice" of it prior to his fall. The evidence presented, however, showed that it was an open question whether the stairs were wet at the time of the claimant's fall and, if they were, whether DOCS had notice of the existence of this condition. Consequently, trial was required on that issue.

The claimant's claim that DOCS was negligent by requiring him to descend the stairs without an escort while his hands were handcuffed in front secured to his body by a waist chain also required a trial. Although the State owes inmates "a duty to use reasonable care to protect its inmates from foreseeable risks of harm," handcuffing an inmate in this manner is required when transporting Special Housing Unit inmates (see 7 NYCRR 305.3[b]). Also, although the claimant presented evidence that, as restrained, he was not able to reach the handrail on the staircase to steady himself once he slipped or made a misstep on the stairs and began to fall, a review of the videotape made while the claimant was being transported does not establish that, had he not been restrained, he would have been able to grasp the handrail on the staircase once he began to fall. Moreover, DOCS submitted videotaped evidence demonstrating that individuals who were handcuffed like the claimant could grasp the handrail while descending the staircase. Under the circumstances, the court concluded that the question of whether DOCS breached its duty to protect the claimant from foreseeable harm by the manner in which he was restrained and whether the restraints employed played a role in causing him to fall was one which should go to trial.

Pro Se Practice

QUESTIONS ABOUT TIME SERVED ON ILLEGAL POST-RELEASE SUPERVISION

As many inmates are aware, a number of courts over the last several years, including the Second Circuit Court of Appeals and the New York State Court of Appeals, have held that a period of post-release supervision ("PRS") cannot be administratively added to a determinate sentence by DOCS, even though it is required by law to be part of such sentences. It must, instead, be added by a judge, at sentencing. Moreover, these courts have ruled, a period of Post-Release Supervision that was *not* judicially imposed is invalid, or "null and void." See, generally, Earley v Murray, 451 F3d 71 (2nd Cir 2006); Garner v. New York State Department of Correctional Services, 10 NY3d 358 (2008).

In response to these rulings, the State passed legislation in 2008 requiring that inmates who had been sentenced to determinate terms since 1998 without PRS be resentenced. Under the legislation, the sentencing courts were authorized to impose a new sentence with PRS or, in certain circumstances, affirm the original sentence, without PRS.

Questions have arisen, however, about the consequences of these new sentences for inmates who may have served prison time for a *violation* of PRS prior to being resentenced. What effect does the resentencing have on the time served on the now-illegal PRS? Does that time "count"? If not, is there some remedy available for the fact that the inmate had to serve it? Can the time served, for instance, be credited to some other sentence? Or, can the inmate get money damages for it?

These questions have not yet been fully resolved by the courts. Nevertheless, we attempt to present a guide to the answers that have emerged to date.

New York State first required that inmates sentenced to determinate ("flat") terms serve a period of PRS after their release from prison in 1998. Under the law, the PRS period begins as soon as an inmate with such a sentence is released from prison.

If an inmate is released from prison to PRS prior to the expiration of the term of incarceration (for example, at his or her merit eligibility or conditional release date), the term of incarceration is interrupted. Time owed to the term of incarceration is "held in abeyance," pending completion of PRS.

If the period of PRS is successfully completed, the time served on PRS is credited to time owed to the incarcerative term, in most cases eliminating it. For example, if an inmate owed one year to his or her term of incarceration and served three years of PRS, once the three years PRS had been completed, it would be credited to the one year of incarceration, eliminating it.

If PRS is revoked before being completed, the period of PRS is interrupted and any time served on the revocation, either in a local jail or in prison, is credited, first, to any time owed on the term of incarceration and, second, to time owed to PRS.

If PRS is revoked and the inmate is returned to prison with a new consecutive sentence, the time owed to the term of incarceration on the prior sentence is added to the new sentence.

But what happens if PRS has been revoked, but the inmate is then subsequently resentenced on the grounds that PRS was not properly imposed--*i.e.*, was illegal? That is the subject of the rest of this memo.

As we see it, there are several possible scenarios:

- Inmate resentenced to original sentence with PRS added, but court does not specify what effect the new sentence will have with respect to any violation of PRS that occurred prior to resentencing.

In these cases, DOCS takes the view that resentencing "rehabilitates" the PRS violation. This interpretation can have the effect of lengthening the period of PRS an inmate must serve. For example, if an inmate served six months in prison on a PRS revocation in 2005, the time served was credited, first, to time owed to the term of incarceration (if any) while the period of PRS was interrupted. If the PRS violation is "rehabilitated" by resentencing, then the inmate will owe six months of PRS that he or she would not owe if the violation were considered "null and void."

At least one appellate court, however, has disagreed with DOCS' view. In State v. Randy M., 870 N.Y.S.2d 490 (3d Dep't 2008), the court considered the case of an individual who was originally sentenced without judicial PRS. He was conditionally released, returned to DOCS as a PRS violator, and then subsequently resentenced to his original term, with PRS. The question before the court was whether he could still be held in prison as a PRS violator.

The court held that he could not. It found that an inmate *cannot be incarcerated for violating the terms of PRS during a time when PRS was not properly imposed.* The later resentencing, the court held, "did not operate retroactively to cure the illegal imposition of [PRS], meaning [the inmate] could not validly be punished for violating the terms of post release supervision until after it was imposed by a court."

Under the reasoning of the Randy M. case, therefore, a resentencing should eliminate all consequences of a violation of PRS that occurred before the resentencing. *See, also,* People ex rel Benton v. Warden, 20 Misc.3d 516 (Sup. Ct., Bronx Co., 2008) (same).

- Inmate resentenced to original sentence with PRS added, but court orders that any PRS revocation that occurred prior to resentencing be considered null and void.

In these circumstances, DOCS has been obeying the courts' direct order that the PRS revocation should not be considered and it is recalculating sentences accordingly.

- Inmate resentenced *without* PRS.

In these circumstances, DOCS will consider any PRS violation that occurred prior to the resentencing to be null and void and should recalculate the sentence accordingly.

Whether a period of time served in prison on the revocation of illegal PRS is counted does not change the fact that it still had to be served. The question then arises: Can an inmate receive compensation for having to serve time on a now-illegal period of PRS?

Compensation might take one of two possible forms. One is *credit* for the time served, either against the sentence on which the time was served or against some subsequent sentence. The other is money damages.

1. Can I get credit for time served on illegal PRS?

If you are in prison on the same sentence on which you served the illegal PRS term, the time served on any revocation that occurred prior to

resentencing should already be credited to the incarceration period of your sentence. Therefore, there is no additional credit to receive.

If, however, you are serving a new sentence for a latter offense, you could benefit by receiving credit for time serve on a revocation of illegal PRS on a past sentence. Unfortunately, it is unlikely a court would order such a credit. For example, in Hawkins v. Coughlin, 72 N.Y.2d 158 (1988), a court held that an inmate was not entitled to credit time served on a sentence, which was later held to be unconstitutional, against an unrelated sentence imposed later.

2. Can I get money damages for time served on illegal PRS?

There are at least two kinds of lawsuits that could potentially be brought to obtain money damages for time served on illegally imposed PRS. The first is a federal civil rights action, under 42 USC § 1983. The second is a claim for "false imprisonment" in the State Court of Claims. Unfortunately, both present numerous obstacles.

A. *A federal civil rights claim*

In Earley v. Murray, the Second Circuit Court of Appeals held that the administrative imposition of PRS violated the due process clause of the federal constitution. Forty-two U.S.C. § 1983 allows persons to sue state officials in federal court for money damages for injuries caused by a violations of civil rights. Thus, an inmate could sue state officials for damages in federal court that resulted from the decision to administratively add PRS to their sentence, if the decision caused them some injury--like, for instance, causing them to serve time in a local jail or state prison due to a revocation of the illegally imposed PRS.

There are numerous difficulties associated with such claims, however. First, if the inmate is currently in prison, he or she will be subject to the Prison Litigation Reform Act, or PLRA. Under the PLRA, you must exhaust administrative remedies before you can file a 1983 action. What does it mean to exhaust administrative remedies in the PRS context? Does being resentenced constitute exhaustion? Or, must you also file and exhaust an administrative grievance? These question have not yet been addressed by the courts.

A potentially more significant problem is the federal doctrine of "qualified" or "good faith" immunity. Under the qualified immunity doctrine, state officials are immune from the consequences of unconstitutional acts in federal court if, at the time they acted, the constitutionality of their acts was not "clearly established."

This could be particularly difficult to overcome in the PRS context because the first important holding, that administratively added PRS was unconstitutional, was not made until 2006. Any decision to add PRS to your sentence or revoke PRS made prior to 2006 might be subject to qualified immunity. At least one federal district court judge has already so-held. See, Scott v. Fischer, (S.D.N.Y., March 30, 2009) (Buchwald, J.).

On the other hand, the Earley court relied heavily on a Supreme Court decision issued in the 1930s. Thus, there should be at least an arguable claim that state officials should have been aware that their actions were unconstitutional before Earley.

One option that could be considered is joining the federal class action lawsuit seeking damages for persons who were subject to detention as a result of illegally imposed PRS filed by the law firm of Emery, Celli, Brinckerhoff & Abady LLP. To learn more about this lawsuit and whether you are eligible to participate in it, write to:

Matt Brinckerhoff, Esq.
Emery, Celli, Brinckerhoff & Abady LLP
75 Rockefeller Plaza, 20th Floor
New York, NY 10019

B. *A State Court of Claims Action*

If you decide not to file a federal civil rights claim, the other option would be to file a state claim in the State Court of Claims for wrongful confinement. In order to state a claim for wrongful confinement, you must show that, "(1) the defendant intended to confine him, (2) the plaintiff was conscious of the confinement, (3) the [claimant] did not consent to the confinement and (4) the confinement was not otherwise privileged."

At least one Court of Claims judge has found the State liable to someone who served time on illegally imposed PRS under this standard. In Donald v. State of New York, Claim # 115414 (February 5, 2009) (Milano, J.), the court held: "Because the imposition of post-release supervision on claimant by DOCS was a legal nullity, claimant could not be lawfully confined for violating its terms. Any period of claimant's confinement caused by DOCS' unlawful and extra-jurisdictional imposition of the post-release supervision is not privileged and is actionable by claimant."

A different Court of Claims judge, however, has come to the opposite conclusion. In Nazario v. State, Claim # 114318 (February 27, 2009) (Collins, J.), the court noted: "It has long been recognized that public officials regardless of their job title are entitled to absolute immunity for discretionary or quasi-judicial determinations involving the construction and application of governing law in the performance of their official functions." Applying that principle, the court found that since the claimant's parole revocation took place at a time when "both the plain language of the statute and the then prevailing decisional law addressed PRS as an integral part of a determinate sentence arising by operation of law," any decision by DOCS to add PRS administratively when the sentencing court had failed to do so "was within the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based."

> That hindsight proved this discretionary determination erroneous provides no basis for defeating the privilege…. While DOCS obviously has no discretion to alter a sentence, its interpretation of the statute as mandating postrelease supervision for those individuals meeting the statutory criteria, and the subsequent determination to administratively apply a period of postrelease supervision to all such individuals, though incorrect in hindsight, was a discretionary quasi-judicial function for which DOCS is entitled to absolute immunity.

Another difficulty with a Court of Claims action is the Statute of Limitations. The Statute of Limitations (or "SOL") for a wrongful confinement lawsuit in New York is one year, measured from the date the claimant was released from the wrongful confinement. To commence a suit in the Court of Claims, a claimant must either file a "Notice of Intent" to sue within 90 days of the date the SOL starts running or seek permission to file a late claim within the period of the SOL. Thus, an inmate wanting to sue over a period of imprisonment under illegal PRS from which he or she was released on November 1, 2005 would have to file a Notice of Intent by February 1, 2006 (and the claim itself by November 1, 2006) or file a

request to file a late claim, with the claim itself, by November 1, 2006.

Some have argued that the Statute of Limitations for wrongful confinement in these circumstances should not start to run until the State Court of Appeals had decided, in Garner, that it was illegal for DOCS to administratively impose PRS. Prior to that date, the argument goes, there was no legal basis for a lawsuit and there is a general rule that a Statute of Limitations does not run until there is a legal right to relief. "Stated another way, accrual occurs when the claim becomes enforceable, *i.e*., when all elements of the tort can be truthfully alleged in a complaint." Kronos, Inc. v. AVX Corp., 81 N.Y.2d 90, 1993. In Britt v. Legal Aid Soc., Inc., 95 N.Y.2d 443 (2000), for instance, the Court held that a legal malpractice claim "could not accrue while plaintiff's conviction remained a jural fact." Id at 447. That kind of reasoning would seem applicable here: The wrongful confinement claim could not have "accrued" before it was established, in Garner, that it was "wrongful."

But even granting this argument, Garner was decided in April of 2008. If the SOL were extended to that date, any lawsuit would have to be filed by April of 2009.

Furthermore, at least one Court of Claims judge has rejected that argument. In Vazquez v. State of New York, Claim # 115574 (February 10, 2009), the court (Collins, J.) found that "[n]othing in… Britt v. Legal Aid Socy. requires a different result [other than dismissal of the claim]." "As damages arising from false imprisonment are reasonably ascertainable upon the release from confinement, it is on this date that a cause of action for false imprisonment accrues. The claim served and filed on July 24, 2008 was therefore untimely as to both periods of alleged false imprisonment, which ended on July 21, 2004 and March 13, 2008, respectively."

Conclusion: Although a claim for damages for time served on illegal PRS is possible, in both federal and state courts, inmates making such claims will have to overcome significant legal barriers in order to prevail.

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