Pro Se

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B Felony Re-sentencing for State Prisoners

Who Is Eligible?

New York State recently passed a sentence reform bill that allows some people who are in the custody of the Department of Correctional Services (DOCS) to apply to be re-sentenced. Under the new law, an individual who is serving an old law indeterminate sentence (a sentence with a minimum and a maximum term) with a maximum term of more than three years on a B level drug felony, may be eligible to apply to have his/her indeterminate sentence changed to a generally shorter determinate sentence (a sentence with one flat number). An individual who is eligible to be re-sentenced on a B felony sentence may also apply to have other C, D and E drug sentences imposed at the same time or included in the same commitment order changed. The new provision becomes effective on October 7, 2009.

Are All B Felony Drug Offenders Eligible?

An individual serving time on an old law B felony is not eligible for re-sentencing if within the past 10 years s/he was convicted of either a violent felony offense or an offense for which merit time is not available. The 10 years is extended by any time s/he was incarcerated for any reason during the period between the commission of the previous felony and the time of the commission of the present felony. Incarceration time after the commission of the present felony counts towards the 10 year period. If enough time has passed since the commission of the violent or non-merit eligible felony, the person is eligible to apply for re-sentencing.

Anyone who was ever convicted as a second violent felony offender or a persistent violent felony offender is also not eligible to be re-sentenced.

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A MESSAGE FROM THE EXECUTIVE DIRECTOR

Karen L. Murtagh-Monks

If You Count Them, Count Their Vote

In the Fall of 2006, the National Research Council issued a report commissioned by the United States Census Bureau finding that counting prisoners as residents of the prisons where they were housed distorted the political process and raised legitimate concerns about the fairness of the census itself. Thus, the issue of where to count prisoners in the census is not new, but it is percolating now because the 2010 census is just around the corner. Numerous articles have recently been written about this issue, but an Op-Ed piece published in the New York Times on August 5, 2009, caught my attention as a step toward providing a rational solution. With the permission of the author, and the *New York Times*, I reprint the article below.

While I agree with Professor Thompson that a compromise solution is available, since prisoners are transferred from prison to prison on a regular basis, it may not be practical to count them as residents of the county in which they are located at the time the census is done. In addition, any solution to this problem should be based on the premise that, in any system in which you count individuals for the purpose of determining political districts, the individuals who are counted, if age eligible, must be given the right to vote; to do otherwise is a blatant violation of our Constitution. New York's present system of counting prisoners as residents of their counties of incarceration but not allowing them to vote, has the effect of increasing the weight of the vote for voters in Upstate New York thereby distorting the principle of "one man – one vote."

Thus, as an alternative to Prof. Thompson's compromise, I would propose that the Census Bureau adopt a procedure whereby prisoners who will be returning to their home residence before the next census period be counted as residents of their home communities *and* be given the opportunity to vote. Those serving more than 10 years, if not allowed to vote, should not be counted for the purposes of drawing political district lines. This solution resolves the dilution issue and promotes re-entry efforts by giving prisoners who will be returning to their communities a vested interest in helping to shape the future of those communities.

Democracy Behind Bars

By Anthony Thompson

Published in the New York Times August 5, 2009

WHEN do communities want prisoners in their backyards? When the census rolls around. Counting inmates as residents — which is permitted under the Census Bureau's "usual residence" rule — skews political power, clout and resources. Unless the Obama administration acts soon to change the residence rule, these imbalances will be built into the 2010 census.

The problem is simple: the usual residence rule creates political districts that would not otherwise exist. For example, the district of State Senator Elizabeth O'C. Little, a Republican in upstate New York, has 13 prisons, adding approximately 13,500 incarcerated "residents." Without the inmate population, Ms. Little would face an uncertain future. Her district would probably have to be redrawn because it wouldn't have enough residents to justify a Senate seat.

The residence rule raises two fundamental issues:

First, inmates in nearly all states aren't allowed to vote, yet their presence affects electoral representation in places where they do not live permanently.

Second, a disproportionate number of state prison inmates are from urban areas. Most state prisons, however, are in rural areas. As a result, resources and electoral authority are transferred from inner cities to rural jurisdictions.

The effects are plain to see. Cities lose out on funds that could be used both for crime prevention and prisoner rehabilitation; rural areas do their best to thwart reform because they don't want to lose the benefits that prisons confer on them.

What can be done?

The politics are complicated. Municipal leaders — including the mayor of New York City — support counting inmates in their last known address before incarceration. Rural officials support keeping the residence rule as it is. Criminal justice experts think it's best to count inmates as residents of the communities where they are likely to return after their incarceration. (This, after all, is where the re-entry programs need to be.)

The Obama administration would do well to find a middle path. Commerce Secretary Gary Locke and Robert Groves, director of the Census Bureau, should propose an administrative change to the residence rule: Inmates returning to their home communities before the next census period — those serving a sentence of 10 years or less — should be counted in their home communities. Those serving more than 10 years should be counted where they are in custody. (The residence rules for other large transient groups, like college students, wouldn't be affected by this change.)

This proposal is not perfect, but it would begin to rectify the political imbalance inherent in the residence rule — an imbalance that distorts both the census and basic democratic principles.

Anthony Thompson, a professor at the New York University School of Law, is the author of "Releasing Prisoners, Redeeming Communities."

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Will DOCS Identify and Notify Eligible Individuals?

In an effort to identify those people who might be eligible for re-sentencing, DOCS issued a list of everyone whose most recent commitment is for an old law B felony. Defender organizations around the state have been using this list to figure out who is eligible and who is not. Some prisoners who are thought to be eligible have been receiving offers of representation from the defender groups.

The DOCS list does not include everyone who is potentially eligible for re-sentencing. When it compiled the list, DOCS was not able to identify people who owe time on an old law B felony and who are now also incarcerated on new crimes. Because the list is based only on people's most recent commitments, people who owed parole time on old B felonies and who are serving both the old law B and a sentence on a new crime are not on the list. We think these people are eligible to apply to be re-sentenced but we do not know who they are. There may be additional omissions in the list.

How Do I Start the Re-sentencing Process?

If you think that you are eligible to apply and you have not heard from a defender organization please contact the defender group from the county of your conviction. The address of each county's public defense service is listed on pages 19 through 27 of this issue of ***Pro Se***. To help speed evaluation of your case you should send a copy of your Criminal History Report (rap sheet) along with your request for representation. If you do not have a copy of your rap sheet, you can order one from: NYS Division of Criminal Justice Services, Record Review Unit, 4 Tower Place, Albany, NY 12203.

This article was written by William Gibney, Esq., of the Special Litigation Unit of the Criminal Defense Division of The Legal Aid Society.

News and Briefs

Ex-Offender Gets Second Chance To Be a Substitute Teacher in NYC

An ex-offender who challenged the NYC Department of Education's (DOE) denial of his application for a substitute teacher position was given a second chance to become a substitute teacher. In Matter of El v. NYC Dept. Of Education, Index No. 40151/08 (Sup. Ct. N.Y. Co. April 1, 2009), the court found that the Department of Education's denial of the petitioner's application was arbitrary and capricious because it gave undue weight to petitioner's 20 year old conviction and failed to give appropriate consideration to the evidence that he presented in his favor. Due to this error, the court ordered the DOE to re-consider petitioner's application.

When he was between 18 and 22 years old, Mr. El, who is now 42, pled guilty to Burglary, a class C felony, and five misdemeanors involving trespass, petit larceny and criminal mischief. In the intervening 20 years, Mr. El obtained a GED, a Bachelor's of Science degree in Human Resources from Trouro College, and a Master's of Science degree in Counseling and Education from Long Island University. He has a license to practice as a mental health counselor, is state

accredited as an alcoholism and substance abuse counselor trainee and is certified as a teaching assistant and provisionally certified as a school counselor. He has been employed as a counselor at Creedmoor Psychiatric Center, as a youth supervisor for Oneida County Workforce, and as a counselor for developmentally disabled adults in Albany. Mr. El also worked as a substitute teacher at two schools in Albany.

In 2007, the Board of Parole issued Mr. El a certificate of relief from disabilities. This certificate creates a presumption of rehabilitation with respect to the offenses specified in the certificate. Mr. El's certificate refers to his conviction for the crime of burglary in the second degree and "removes all legal bars and disabilities to employment, license and privilege," except those pertaining to firearms and the right to be eligible for public office.

Correction Law §752 bars discrimination against persons previously convicted of criminal offenses and prohibits the denial of employment based on an applicant's criminal record unless 1) there is a direct relationship between a previous criminal offense and the specific license or job sought or 2) the issuance of a license or the granting of employment would involve an unreasonable risk to the safety or welfare of specific individuals or the general public.

The DOE denied Mr. El's application stating that in light of his criminal record, granting employment would pose an unreasonable risk to the safety and welfare of the school community.

Section 753(1) of the Correction Law sets forth 8 factors which a potential employer must consider when making a determination pursuant to §752 as to whether the unreasonable risk exception applies. One of these factors is the information produced by the applicant in regard to his rehabilitation. The BOE focused its rejection of Mr. El's application on his criminal history, failed to take into account the certificate of relief from disabilities, and in the litigation, supported its position by citing cases which the court found to be factually distinct from the facts presented by Mr. El's case.

The court found that Mr. El's certificate of relief from disabilities, in conjunction with a presumption of that is created by a certificate of relief from disabilities and the State's long standing policy of eliminating bias against ex offenders, showed that the BOE's rejection of Mr. El's application was arbitrary and capricious.

The court **remanded** (sent back) the case to the BOE for "detailed consideration" of the factors set forth in Correction Law §753(1), including a determination of whether "the certificate of relief from disabilities would benefit this applicant in light of the public policy encouraging the employment of ex-offenders so that petitioner's positive factors outweigh the negative ones and warrant the granting of his application."

Governor Nominates Andrea Evans As Chair of the State Board of Parole

Andrea Evans is the new Chairperson of the Board of Parole and the Chief Executive Officer of the Division of Parole. Ms. Evans was formerly the Director of the Division of Parole for Region II, which includes Brooklyn, Queens and Staten Island. She began her career with the Division of Parole in 1986 as a parole officer. Ms. Evans was also a parole revocation officer, a senior parole officer, and an investigator in the Division of Parole's Office of Professional Responsibility.

UCC Liens and Tier III Hearings

In 2006, based on false liens that he had filed against prosecutors involved in a prior prosecution, Jovan Fludd was convicted of offering a false instrument for filing in the first degree, falsifying business records in the first degree, and obstructing governmental administration in the second degree. After Mr. Fludd was transferred to DOCS custody, a cell search conducted in 2006 led to the recovery of UCC-1 statements listing DOCS staff who had been involved in a Tier III proceeding charging Mr. Fludd with kiting mail. An administrative segregation proceeding held in connection with the recovery of these materials was administratively reversed. In 2008, following a court decision finding that a order from the sentencing judge permitting DOCS to confine Mr. Fludd in administrative segregation (ad seg) was improper, DOCS staff recommended that Mr. Fludd be placed in ad seg on the basis of the UCC-1 forms found in his cell in 2006, his conviction for false UCC-1 filings, and kiting violations in 2006 and 2007. Security staff stated that these items demonstrated that Mr. Fludd's presence in general population posed a threat to the safety and security of the prison. The hearing officer accepted the recommendation, and Mr. Fludd appealed.

In Matter of Fludd v. NYS DOCS, 879 N.Y.S.2d 606 (3d Dep't 2009), the court found that because at the most recent ad seg hearing there was evidence that had not been presented at the prior ad seg hearing (that had been administratively reversed), the hearing officer's determination was not based solely on the evidence that was before the hearing officer at a prior ad seg hearing; evidence that was not before the hearing officer at the first ad seg hearing consisted of the prior conviction for fraudulent UCC filings and a second incident of kiting that occurred while petitioner was in SHU. This evidence, in combination with the other evidence, was sufficient to permit the rational inference that petitioner intended to file the false UCC forms and to continue his efforts to circumvent the correspondence rules. Thus, the court found, there was substantial evidence to support the finding that Mr. Fludd's presence in general population was a threat to safety and security. The court also found that the hearing officer had not violated Mr. Fludd's rights to procedural due process.

Related Emergency Rules Adopted by DOCS

In response to what DOCS calls inmate schemes to fraudulently utilize the provisions of the Uniform Commercial Code (UCC) to file baseless liens with the Secretary of State against DOCS employees and others, DOCS has enacted several emergency rules. These rules went into effect on July 14, 2009 and are effective until October 11, 2009. Public comments on the emergency rules will be received until August 28, 2009. Between August 28 and October 11, DOCS will decide whether, based on the comments or other factors, it wants to revise the rules before they become permanent. These emergency rules replaced emergency rules intended to deal with the same issue that were filed and effective on April 16, 2009.

Standards of Inmate Behavior: 7 N.Y.C.R.R. §270.2

Rule 107.21 provides that an inmate shall not file or record any document or instrument which purports to create a lien or record a security interest of any kind against any person or property of any officer or employee of

DOCS, the State of New York, or the United States without prior written authorization from the superintendent or a court order authorizing such filing. Violation of Rule 107.21 is a Tier II or III rule violation.

Rule 113.30 prohibits an inmate, in the absence of the superintendent's prior written approval, from possessing any Uniform Commercial Code (UCC) Article 9 form, including but not limited to any financing statement (UCC1, UCC1Ad, UCC1AP, UCC3, UCC3Ad, UCC3AP, UCC1CAd), correction statement (UCC5) or information request (UCC11), whether printed, copied, typed or hand written, or any document concerning a scheme involving an inmate's "strawman," "House Joint Resolution 192 of 1933," the "Redemptive Process," "Acceptance for Value" presentments or **document indicating copyright or attempted copyright of an inmate's name** absent prior written authorization from the superintendent. Violation of Rule 113.30 is a Tier II or III level violation.

Recently amended, on an emergency basis 7 N.Y.C.R.R. §721.3(a)(2) provides that outgoing mail addressed to the secretary of state, department of state, corporation division or uniform commercial code unit of any state must be submitted by the inmate unsealed and will be subject to inspection.

Recently amended, on an emergency basis, 7 N.Y.C.R.R. §721.4(a)(2) (Incoming Mail), provides that all incoming mail will be inspected for contraband and subpart (d)(7) provides that the documents listed in Rule 113.30 (set forth above), absent prior written approval from the superintendent, are prohibited. Such material and any other material contained within the correspondence shall be examined by the superintendent in consultation with Counsel's Office, and may be withheld for investigation. An inmate may request authorization from the superintendent to receive specific materials by providing the superintendent with specific, legitimate legal reasons why such materials are required.

"Think Outside the Cell" Writing Contest

Resilience Multimedia is sponsoring a writing contest for people who are or were in prison, and their loved ones. The best submissions will be included in a series of books called **"Think Outside the Cell."** This series is intended to help incarcerated and formerly incarcerated individuals tackle hard challenges and have successful lives.

Contestants may write personal stories about one or more of these topics:

Re-entering society after incarceration

Waiting for loved ones to return home from prison

Prison marriages and relationships

Three winners will be chosen for each topic. The prize for first place is $300.00; for second place, $150.00 and for third place, $75.00. Stories that do not win cash prizes will still be eligible for inclusion in the series.

Contest Rules

Stories must be original and about events or situations that actually happened.

Writers may submit stories on more than one topic.

Stories may be up to 3,000 words.

Stories should be typewritten and double-spaced.

Handwritten stories will be accepted as long as they are legible.

Each page must include a page number and the author's name, contact information and story title.

Resilience Multimedia reserves the right to edit stories for clarity, punctuation, spelling and grammar, and retains the rights to stories in order to ensure the widest possible publicity and distribution, both in the United States and abroad.

Story entries will not be returned.

ALL ENTRIES MUST BE POSTMARKED BY OCT. 1, 2009. WINNERS WILL BE ANNOUNCED ON DECEMBER 1, 2009.

To enter, mail your story, indicating which topic it addresses to: Resilience Multimedia, 511 Avenue of the Americas, Suite 525, New York, NY 10011.

Prisons to Close

In response to budgetary issues, DOCS plans to close several prisons. DOCS is considering closing the following prisons: Camp Gabriels, Camp Pharsalia, and Camp Mount McGregor. In addition, DOCS plans to vacate the annexes at Eastern C.F., Green Haven C.F., Groveland C.F., Lakeview C.F., Sullivan and Washington Correctional Facilities, as well as the minimum portion of Butler C.F. The medium security portion of Mount McGregor C.F. will remain open.

State Cases

Disciplinary

Res Judicata Bars Second Tier III Hearing

On April 17, 2007, Bashir Gustus was involved in a physical altercation with another inmate. He was charged with fighting and disobeying a direct order. A few days after the incident, following an investigation into the altercation, and relying on confidential information, Petitioner Gustus was issued a second misbehavior report, charging him with assault and violent conduct. At a hearing on the first misbehavior report, Mr. Gustus was found guilty of fighting and refusing a direct order. At a hearing on the second misbehavior report, Mr. Gustus was found guilty of assault and violent conduct. On administrative appeal, the fighting charge was reversed but the guilty determinations for assault, violent conduct and refusing a direct order were affirmed.

Mr. Gustus filed an Article 78 challenge to the second hearing, arguing that charging him twice for the same conduct violated the principle of administrative res judicata. This principle bars a cause of action that was raised and adjudicated, or could have been raised and adjudicated, in a prior action or proceeding. In Matter of Gustus v. Fischer, 2009 WL 2045448 (3d Dep't July 16, 2009), the court found that having proceeded against Mr. Gustus for fighting, DOCS could not file additional charges of assault and violent conduct, and conduct a second proceeding relating to conduct in the same incident. The Court stated, "Once a claim is brought to final conclusion, all other claims arising out of the

same transaction or series of transactions (the same incident) are barred, even if based upon different theories or seeking a different remedy." The court concluded that because both misbehavior reports charged Petitioner Gustus with rule violations related to the same altercation, and while the second report was based on information from an investigation, all the information underlying the charges was available before the first hearing began (the second hearing began one hour after the first hearing concluded), the second hearing was barred by the doctrine of res judicata.

Petitioner Gustus was represented by Joel Landau of the Albany Office of Prisoners' Legal Services.

Abusive Language in Grievance Found to be a Basis for Discipline

Petitioner Tafari was charged with harassment in connection with what the court said was his use of vulgar and abusive language during the DOCS grievance process. He challenged the determination of guilt, arguing that 7 N.YC.R.R. §701.6(b) prohibits **reprisals** (retaliation) of any kind against an inmate or employee for good faith utilization of the grievance process, and specifically states that "[a] grievant shall not receive a misbehavior report based solely upon an allegedly false statement made by the inmate to the grievance committee." The lower court ruled in petitioner's favor and ordered the report expunged.

On appeal, DOCS argued that the lower court had erroneously found that 7 N.Y.C.R.R. §701.6(b) applied to the petitioner's conduct. The appellate court agreed with DOCS, and in Matter of Tafari v. Fischer, 881 N.Y.S.2d 509 (3d Dep't 2009) held that petitioner had not been disciplined for his grievance stating that a correction officer had said that she wanted to poison petitioner's food and wanted him dead. Rather, he had been disciplined for his obscene and abusive descriptions of the officer which, the court said, were totally irrelevant to the actual grievance, and if proffered (used) outside of the grievance process, would have been a proper basis for punishment. The court went on to hold that prohibiting the use of such language in petitioner's grievance does not undermine the protection afforded the good-faith use of the grievance process. The court reversed the lower court's judgment and dismissed the petition.

Petitioner Did Not Provide Information Needed to Identify His Witness

In Matter of Perez v. Fischer, 879 N.Y.S.2d 232 (3d Dep't 2009), the petitioner challenged the determination that he had threatened another inmate, claiming that by denying his request to call as a witness the officer who was responsible for locking prisoners in their cells on the day of the incident, the hearing officer had violated his right to due process of law. The court held that because there were 50 officers who could have been the officer in question, and the petitioner was unable to provide additional identifying information, the petitioner had not provided sufficient information and it could not say that the hearing officer had failed to use reasonable efforts to secure the witness.

Remedy for Reversal of Hearing Is Limited

In Matter of Grant v. Fischer, 880 N.Y.S.2d 850 (3d Dep't 2009), the court **reiterated** (again said) that even if an inmate's security status changes as the result of a determination of guilt following a Tier III hearing, reversal of that hearing will not result in an order requiring DOCS to restore the inmate to his prior security status. In Grant, the petitioner had been found guilty of Tier II and Tier III offenses. The Tier III offense was reversed, but references to it were not removed from the petitioner's records and this caused his security status to be raised to maximum from medium. The petitioner's Article 78 challenged the failure to expunge the references to the Tier III from his record and noted that this failure had led to the increase in his security status. The court ordered the references expunged but declined to order that the petitioner be restored to the lower security status. The appellate court, finding that inmates have no constitutional or statutory rights to prior housing or programming status, affirmed the trial court's judgment.

Misbehavior Report Was Written As Soon As Practicable

Forty days after the alleged incident, Petitioner DeCastro was charged with violating the rules of temporary release and facility correspondence. At the hearing, he pled guilty to the charges, but argued that the hearing officer was required to dismiss them because of the delay between the date of the incident and the date that the report was written. In Matter of DeCastro v. Prack, 881 N.Y.S.2d 513 (3d Dep't 2009), the court held that the petitioner's regulatory rights had not been violated because 7 N.Y.C.R.R. §251-3.1(a), the regulation governing the writing of misbehavior reports, requires only that the report be written "as soon as **practicable** [possible]." Here, the court held, the report resulted from an investigation – as opposed to something observed by corrections staff – and the report was written within a week of when an investigator interviewed the petitioner, and following the conclusion of the investigation. Under these circumstances, the court found, the report was **tendered** (issued) in a timely manner.

Testimony From Medical Staff Supports Conclusion That Inmate Waived Right to Attend Hearing

In Matter of McFadden v. Dubray, 878 N.Y.S.2d 468 (3d Dep't 2009), the petitioner alleged that the hearing officer, by insisting that Petitioner McFadden attend two hearings in a wheelchair, had violated his right to attend the hearings. Petitioner claimed that he was bedridden due to a disabling ankle injury and could not go to the hearing, even in a wheelchair. A facility nurse testified that petitioner was able to stand and should be able to use the wheelchair. When the petitioner said that he was dizzy, the hearing officer questioned the nurse and a mental health clinician to determine the petitioner's current ability to participate in the proceedings. The hearing officer warned the petitioner that if he did not attend the hearing, it would be held in his absence. Under these circumstances, the court concluded that there was no basis for disturbing the hearing officer's conclusion that the petitioner had waived his right to attend the hearings.

Waiver of Right to Attend Hearing Also Waives Right to Challenge Any Procedural Irregularities

In Matter of McFadden v. Dubray, 878 N.Y.S.2d 468 (3d Dep't 2009), the court found that the petitioner had waived his right to attend two hearings. See preceding article for a description of the factual basis for this finding. The court also concluded that having declined to attend the hearings, the petitioner had waived his right to challenge any violation of his rights to procedural due process of law that may have occurred. In support of this conclusion, the court cited Matter of Cooper v. Selsky, 842 N.Y.S.2d 111 (3d Dep't 2007) and Matter of Abdur-Raheem v. Burge, 835 N.Y.S.2d 457 (3d Dep't 2007).

Scissors in Backpack Supported Charge of Weapons Possession

Accused of taking scissors from the prison chapel, petitioner Wilcox defended herself by arguing that another inmate had put them in her backpack. The hearing officer found her guilty of weapons possession. Having admitted that the scissors were in her backpack and that on the morning that the scissors were found, she had access to the area where the scissors were normally located, the court, in Matter of Wilcox v. Fischer, 881 N.Y.S.2d 555 (3d Dep't 2009), found that the hearing officer's determination of guilt was supported by substantial evidence.

The petitioner also argued that the hearing officer's refusal to dust the scissors for finger prints violated her right to due process of law. The court rejected this claim, noting that the absence of fingerprints on the scissors would be insufficient to defeat the inference of possession established by the fact that they were found in her backpack. Also, because the petitioner stated that the inmate whom she thought had put the scissors in her backpack would have used the scissors in the past, her fingerprints on the scissors would not have shown that she placed them in the backpack.

Court Confirms Hearing Officer's Adjudication of Conspiracy to Escape

A parole officer, searching a parolee's **residence** (dwelling), found a letter from petitioner Anderson in which the petitioner asked the parolee to help him to escape. After being found guilty at a Tier III hearing, petitioner Anderson brought an Article 78 proceeding alleging that the hearing officer, by refusing his request to call the parole officer as a witness and by failing to produce the parolee as a witness, violated his right to call witnesses. In Matter of Anderson v Fischer, 880 N.Y.S.2d 867 (3d Dep't 2009), the court rejected the petitioner's arguments, and held that having been shown a copy of the letter, the parole officer's testimony was irrelevant, and having made numerous attempts to get in touch with the parolee, all of them unsuccessful, the hearing officer had fulfilled his obligation to produce the witness. Finally, the court noted that petitioner's right to documentary evidence was not violated by the hearing officer's decision to withhold the letter from petitioner until the hearing because the petitioner was able to review the letter at the hearing.

Grievance Decisions

Court Finds Kanji Cards to be Contraband

The package room at Sing Sing C.F. refused to allow petitioner Binkley to receive the Kanji Cards that he had ordered. Petitioner filed a grievance, protesting this decision. He stated that the cards were Japanese language flashcards for the purpose of memorizing Japanese writing and vocabulary. The Central Office Review Committee upheld the package room decision and the petitioner brought an Article 78 proceeding, challenging the **propriety** (correctness) of the decision.

The court, in Matter of Binkley v. NYS DOCS, 881 N.Y.S.2d 922 (3d Dep't 2009), ruled against the petitioner. The court noted that correction officials are granted **wide latitude** (a lot of freedom) to ensure safety and security and that decisions such as this will only be overturned if they are **arbitrary and capricious** (not rational). The court went on to note that the Directive No. 4911, the directive cited by CORC in support of its decision, prohibits inmates from possessing any item not specifically authorized by the regulations. As Kanji Cards are not specifically authorized, they are contraband and inmates can be prohibited from possessing them. Thus, the court found, the grievance decision was a rational interpretation of the directive.

Court Rejects Petition For Experimental Treatment

Petitioner, who suffers from hepatitis C, filed a grievance asking that he be provided with the treatment recommended by his treating physicians. When CORC denied his grievance, the petitioner filed an Article 78 action seeking a court order that the denial of treatment was arbitrary and capricious and deliberately indifferent to his serious medical needs. In opposing the order, DOCS informed the court that it had refused to approve the treatment because the treatment had not been approved by the Food and Drug Administration and was therefore considered to be experimental and because there were no long term studies showing that the treatment was effective. The court, in Matter of Wooley v. NYS DOCS, 876 N.Y.S.2d 568 (3d Dep't 2009), ruled that under these circumstances, the Department's position was not arbitrary and capricious. The court also found that the Department's conduct did not demonstrate deliberate indifference to a serious medical need. Based on these findings, the court dismissed the petition.

Sentencing

Although The Court Imposed Multiple Sentences, They Merged Into One Sentence

In People v. Delk, 875 N.Y.S.2d 101 (2d Dep't 2009), the defendant moved to be re-sentenced on his A-II drug felony. In 2002, he had been convicted of criminal possession of a controlled substance in the second degree, a Class A-II felony offense, and criminal possession of a weapon in the second degree, a Class C violent felony offense. He was sentenced to a determinate term of 5 years on the weapon possession count and to an indeterminate term of 8 1/3 to life on the drug possession count, to be served concurrently. In 2007, the defendant moved to be re-sentenced pursuant to the Rockefeller Drug Law Reform Act of 2005 (2005 DLRA). The lower court denied the application because the defendant was serving a sentence imposed for

a violent felony offense, and was therefore ineligible for re-sentencing.

On appeal, the court noted that to be eligible for re-sentencing under the 2005 DLRA, a defendant must be eligible to earn merit time credit. Correction Law 803(1)(d) provides that an inmate who is serving a sentence for a violent felony offense is not eligible for merit time. Here, the defendant argued that since he had been incarcerated for more than 5 years, he had finished serving the determinate sentence imposed for the weapon possession conviction, and thus was no longer serving a sentence for a violent felony offense.

The Second Department rejected the defendant's argument. The court stated that concurrent sentences are not served separately. Rather, where the defendant is subject to multiple sentences running concurrently, Penal Law § 70.30(1)(a) provides that the maximum term or terms of the indeterminate sentences and the term or terms of the determinate sentences shall merge in and be satisfied by discharge of the term which has the longest unexpired time to run. Thus, the court noted, when served concurrently, "two or more sentences are made into one" and represent a single punishment measured by the sentence for the highest grade offense into which all concurrent sentences merge. Accordingly, the court found, the defendant is still serving the sentence imposed upon his conviction for criminal possession of a weapon in the second degree, rendering him ineligible for merit time relief and therefore not eligible for re-sentencing under the 2005 DLRA.

Successful Article 78 Challenge to Administrative Imposition of PRS

The Appellate Division, Second Department, recently held that an inmate whose determinate sentence did not include a period of post release supervision (PRS) could use an Article 78 to challenge DOCS's addition of PRS to his sentence. In Matter of Pace v. Fischer, 876 N.Y.S.2d 456 (2d Dep't 2009), the petitioner filed a grievance challenging DOCS's authority to add 5 years of PRS to his 15 year sentence. After his grievance was denied by the Central Office Review Committee, and when he was still 8 years from his conditional release date, he filed an Article 78 challenge to the alteration of his sentence. The court rejected the basis of lower court's decision to dismiss the petition -- that because the petitioner was not eligible for conditional release, his action was premature (brought too early) – and held that having pursued and exhausted his administrative remedies, and having obtained a final agency determination, the petitioner was entitled to promptly challenge that determination in an Article 78 proceeding.

Addressing the merits of the petition, the court found that DOCS did not have the authority to alter a sentence imposed by a court and that by doing so, DOCS had **usurped** (wrongfully taken) the function of the sentencing judge. The court granted the petition and ordered DOCS to delete from petitioner's sentence the five year period of PRS which it had administratively added.

Parole

Loss of Sentencing Minutes Leads to Positive Inference

In Matter of Duffy v. NYS Division of Parole, Index No. 2934/09 (Sup. Ct Kings Co. June 4, 2009), the petitioner asked the court to vacate a decision denying release to parole supervision and order the Division of Parole (DOP) to conduct a new hearing because the parole board had not considered his sentencing minutes when it considered his application for release.

In 1981, petitioner was convicted of murder in the second degree and sentenced to 20 years to life. He committed the crime at the age of 19 while he was high on drugs.

Petitioner was denied parole and given 24 months holds, at his parole hearings in 2001, 2003, 2005, and 2007. Prior to his hearing in 2007, petitioner asked that a copy of his sentencing minutes be produced at the hearing. He was told that they were "unavailable."

At his parole hearing in 2007, evidence was introduced that while he was in prison, petitioner earned his GED, an associate's degree in substance abuse counseling, and credits towards a bachelor's degree. He had not received a ticket in over 10 years. He took full responsibility for the crime. If paroled, petitioner had lined up a job at an electrical business.

As at the preceding three hearings, the Board denied parole, stating that there was a reasonable probability that he would not live and remain at liberty without violating the law and that release was incompatible with the welfare of society and the safety of the community.

Petitioner challenged the parole denial, arguing that the Board was required to consider the sentencing minutes. In his answer, the respondent stated that the sentencing minutes could not be produced.

The court noted that its job is to review the record and determine whether the decision is supported by substantial evidence and is not arbitrary and capricious. If the decision is supported by substantial evidence and has a rational basis, it must be sustained. Where an agency fails to comply with its own rules and regulations, the agency has acted arbitrarily and capriciously. Judicial intervention is warranted only when there is a showing of irrationality bordering on impropriety.

The court noted that the Board is required by statute to consider recommendations made by the court at sentencing and that the Criminal Procedure Law requires that a copy of the sentencing minutes be provided to DOCS when an individual is placed in DOCS custody. Petitioner was able to point to two instances in which the failure to consider sentencing minutes led to the reversal by the Appeals Unit of parole denials. This, the court stated, rendered the Appeals Unit's affirmation of the denial of parole in petitioner's case arbitrary and capricious and an abuse of discretion which demonstrates irrationality bordering on impropriety.

The court went on to state that petitioner had been before the Board four times, and not once had the Board attempted to get his sentencing minutes. The court found this indifference to the statutory requirement that the Board consider the sentencing minutes "unconscionable." Under the circumstances, the court held that the Board must conduct a new hearing, and at that hearing, must afford petitioner a favorable inference on the issue of the sentencing recommendation, that is, the Board must infer that the sentencing judge made a recommendation that petitioner be released on his original parole eligibility date.

Practice Note: In a case with a related issue, the court found that where the sentencing minutes presented to the court showed that the sentencing judge had made no recommendation, the Board's failure to review the sentencing minutes at the petitioner's parole hearing was harmless error. See, Matter of Abbas v. NYS Division of Parole, 877 N.Y.S.2d 512 (3d Dep't 2009).

Parolee's Failure to Comply With Special Condition Leads To Revocation

Petitioner, a parolee convicted of manslaughter in the first degree in connection with his father's death, was conditionally released to parole supervision. In light of his extensive mental health history, he agreed to a special condition that he attend a counseling program until his parole officer told him that he could stop attending. Petitioner was found guilty of violating the special condition, and a 24 month hold was imposed.

In a legal challenge to the revocation, the court, in Matter of Ariola v. NYS Division of Parole, 880 N.Y.S.2d 367 (3d Dep't 2009), held that there was substantial evidence that petitioner had failed to comply with the special condition, and that the special condition was imposed in accordance with the law. In addition, the court held, a special condition may be imposed prior to or subsequent to release, and the circumstances of the parolee's crime may be taken into account when setting the conditions.

Failure to Consider Statutory Factor Leads to De Novo Hearing

In Matter of Turner v. NYS Board of Parole, Index No. 405431/07 (New York Co. June 24, 2009), the court reversed a denial of parole and ordered a re-hearing where the court found that the Board of Parole had failed to consider whether the petitioner could live and remain at liberty without violating the law. Petitioner was convicted of, at the age of 17, first degree manslaughter and second degree attempted murder. She received an aggregate term of 10½ to 31½ years. Her crime consisted of killing one of the men who had for years sexually abused her and wounding another. When the Parole Board denied her application, she had been in prison for 18½ years, more than half of her life. While in prison, she had gotten her GED, accumulated college credits, and participated in a number of in-prison programs. She had recommendations from a college professor, the coordinator of one of the programs in which she worked, and a television reporter.

The court noted that under Executive Law §259-i(1)(a), the Board of Parole must determine whether there is a reasonable possibility that the inmate, if released, will live and remain at liberty without violating the law, and in making this determination, must consider a number of factors, including the inmate's institutional record including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy, and interpersonal relationships with staff and inmates.

In denying petitioner's application, the Parole Board found that her release was incompatible with the public welfare as it would so deprecate the seriousness of her offenses as to undermine respect for law. The court found that the Board did not consider whether there was a reasonable possibility that the petitioner, if released, would live and remain at liberty without violating the law. The court noted that the Court of Appeals has held that consideration of this factor was critical. Here, the court commented, it was quite possible that the Board had failed to speak to this required factor because at this point in time, the Board was unable to state that the petitioner is a danger to the community and that there is not a reasonable probability that she can live free outside of jail without again violating the law. The Board's failure, the court found, was fatal to the Board's decision and required reconsideration of the petitioner's application at a hearing de novo.

Court of Claims

Inmate Claimant Fails to Meet Burden of Proof at Trial

While in DOCS custody, Alejandro Rosa worked as a carpenter and was injured while using a table saw when the blade stopped, restarted and propelled a piece of wood into one of his fingers. He filed a claim against the State, alleging that this had happened because the saw did not have a ventilation system, and therefore sawdust and debris built up around the blade.

When the case went to trial, claimant Alejandro did not produce evidence showing either that after the accident, the saw had been inspected and it had been determined that the reason for the malfunction was the absence of a ventilator or that a ventilation system could have prevented the malfunction. The state presented evidence from the claimant's supervisor, an experienced woodworker and carpenter, who stated that the accumulation of sawdust would not restrict the blade. The trial court held that the claimant had not established that the state was negligent.

On appellate review, in Rosa v. State, 881 N.Y.S.2d 527 (3d Dep't 2009), the court stated that while the defendant correctional authorities owe a duty to provide inmates engaged in work programs with reasonably safe equipment, negligence cannot be inferred solely from the fact that an accident happened. In reviewing the evidence, the court found that the claimant had not shown that an inspection had been done following the accident to determine what had caused the blade to stop and claimant had failed to offer any **competent** (worthy of belief) evidence to establish that the accumulation of sawdust could have caused the accident, or that a ventilator would have prevented it. The claimant's supervisor presented evidence to the contrary. Thus, the court found, there was no basis for disturbing the trial court's determination that claimant had failed to prove by a preponderance of the evidence that defendant did not provide him with safe equipment.

Defendants Must Plead and Prove Comparative Negligence

Claimant, an inmate at Odgensburg C.F., who had slipped on an improperly cleaned gymnasium floor and injured his shoulder, brought a claim against the state alleging that his injury was caused by the negligence of the cleaning staff. At the close of the trial, the court found that the defendant was negligent in creating an unsafe condition but that the claimant had a duty to observe the substance on the floor that caused him to fall. The court **apportioned** (divided) liability: 50% was the defendant's fault and 50% was the claimant's fault.

The claimant appealed the court's determination that he was 50% responsible for the injury. In Jones v. State, 878 N.Y.S.2d 509 (3d Dep't 2009) the appellate court reversed the trial court's **apportionment** (division) of liability. The court noted that comparative negligence is an affirmative defense which must be pled and proved by the party alleging it. While the defendants pled the affirmative defense in their answer, in response to the plaintiff's demand for a bill of particulars specifying the acts that he had engaged in that were negligent, the defendants responded that his injury was sustained by tripping on his own feet or the feet of other players; there was no allegation that claimant was negligent by playing on a floor that he should have seen was in dangerous condition. Nor did the defendants advance this theory at trial. Further the court found, defendants bore the burden of proving comparative negligence and there was no evidence that the claimant

was culpable in causing his injuries. Thus, there was no basis for the trial court's finding that claimant and the defendants were equally liable for causing the claimant's injuries. The court reversed that portion of the trial court's determination that held the claimant equally liable for causing his injuries.

Federal Cases

Rule Prohibiting the Organization of Work Stoppages Not Unconstitutional

While at Sing Sing C.F., the defendant-officer searched the inmate-plaintiff's cell and found several copies of a pamphlet entitled "Wake Up." The pamphlet, which the plaintiff admitted he had written, urged inmates to engage in work stoppages. The defendant officer wrote a ticket charging the plaintiff with violating the rule prohibiting organizing other inmates to participate in a work stoppage. On the second day of the hearing on this charge, plaintiff stated that he no longer wanted to participate. The hearing officer found him guilty, the hearing was affirmed on appeal, and plaintiff then filed a §1983 action arguing that the defendant officer wrote the misbehavior report in retaliation for the plaintiff's exercise of his First Amendment right to freedom of speech.

In Pilgrim v. Luther, 571 F.3d 201 (2d Cir. 2009), the federal appellate court affirmed the district court's order granting summary judgment to the defendants. In reaching this result, the court reviewed its earlier decision in Duamutef v. O'Keefe, 98 F.3d 22 (2d Cir. 1996), the only other decision in the Second Circuit which considered whether the rule in question violated an inmate's First Amendment rights. In Duamutef, the plaintiff wrote a petition, signed by 33 inmates, asking for improved prison conditions and was charged with the same rule violation as Plaintiff Pilgrim. The Duamutef court recognized that although the act of preparing and circulating a petition implicates First Amendment rights of freedom of speech and association, these rights must be weighed against the prison's legitimate safety interests. Consistent with United States Supreme Court precedent established by Turner v. Safley, 482 U.S. 78 (1987), the court wrote, the rule will be upheld if it is reasonably related to legitimate penological goals.

Here the court found, the rule supported the penological goal of safeguarding the prison from disorder and conduct that might lead to violence or to collective action designed to take over the prison. Thus, there was a valid rational connection between the rule and a governmental interest. So long as inmates have the grievance system, regulations limiting their rights to organize and petition are reasonable restrictions designed to further the government's interest in the orderly administration of prisons. For this reason, the court affirmed the district court's order granting summary judgment to the defendants.

Exhaustion of Administrative Remedies And "Outside" Health Care Providers

The Prisoner Litigation Reform Act (PLRA) requires that prior to filing a federal claim, prisoners must exhaust their administrative remedies. In New York State, to exhaust administrative remedies, inmates must follow the procedures set forth in Directive 4040, Inmate Grievance Program. In Middleton v. Falk, 2009 WL 666397 (N.D.N.Y. March 10, 2009), the court

examined the relationship between the exhaustion requirement and care provided to inmates by doctors who are not DOCS employees.

While in DOCS custody, Plaintiff Middleton had an eye condition that required medical treatment by specialists. DOCS sent him to a medical center where he was treated by doctors who were not DOCS employees (outside medical care providers). After three surgeries over a period of approximately one year by the outside medical providers, Plaintiff Middleton had lost all vision in his left eye. Believing that the loss of vision was caused by deliberate indifference to his serious medical needs, Plaintiff Middleton sued two of the outside medical care providers.

The outside medical care providers moved for summary judgment alleging that the plaintiff, who had not filed a grievance in accordance with the Directive 4040, had not exhausted his administrative remedies and therefore the court should grant judgment in favor of the defendants. The court ruled that because 1) DOCS had contracts with the outside medical care providers; 2) plaintiff Middleton was treated by these doctors at the request of DOCS, which was responsible for providing medical care to him; and 3) the IGP process would have afforded plaintiff Middleton opportunities for a remedy and DOCS the opportunity to correct the asserted deficiencies, his claim of deliberate indifference by the outside medical care providers was subject to the requirement of exhaustion of administrative remedies.

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