Pro Se

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Using Juvenile's Age as a Mitigating Factor, Court Finds Tier III Sanction Excessive

In an unprecedented decision, the Appellate Division, Fourth Department held that the sanction imposed on a juvenile in DOCCS' custody was so disproportionate to the offense as to shock one's sense of fairness. The petitioner, who was 17 years old at the time of the incident, had been found guilty of, among other charges, assault on staff. The hearing officer imposed a penalty of 4 years SHU, 4 years recommended loss of good time, 4 years loss of phone, commissary and package privileges. In Cookhorne v. Fischer, 2013 WL 1031464 (4th Dep't. Mar. 15, 2013), Mr. Cookhorne challenged the hearing, arguing that the decision was not supported by substantial evidence and that the sanction imposed was excessive. He also sought a declaratory judgment ordering that the age of sixteen and seventeen year old prisoners in DOCCS custody must be considered as a mitigating factor in all prison disciplinary proceedings.

The Fourth Department found that the determination of guilt was supported by substantial evidence. However, the Court went on to hold that considering that Mr. Cookhorne was only 17 years old at the time of the incident, the circumstances surrounding the incident, as well as the DOCCS' disciplinary guidelines, the maximum penalty that should have been imposed was 18 months SHU, 18 months recommended loss of good time and 18 months loss of phone, commissary and package privileges.

This decision is unprecedented for two reasons. First, before this case, no New York State court had held that a sanction imposed at a prison disciplinary hearing was so disproportionate to the offense as to shock one's sense of fairness. Add to that the penalty was reduced by 62.5% and the significance of this holding is even more apparent.

Second, before the Cookhorne decision, no New York State Court had recognized that a prisoner's youth **could** be a mitigating factor in determining the appropriate penalty at a prison disciplinary hearing. This is an expansion of the court's prior holdings that mental illness and intellectual capacity can be mitigating factors in the determination of the penalty to be imposed at a prison disciplinary hearing.

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New York's Aging Prison Population

A Message From the Executive Director – Karen L. Murtagh

On March 28, 2013, Albany Law School hosted a panel discussion on issues associated with America's aging prison population. Benjamin Pomerance, formerly a PLS Intern and currently a 3rd year law student at Albany Law School and an Edgar & Margaret Sandman Fellow for Aging Law and Policy, organized the conference after he wrote an in-depth report on issues affecting America's aging incarcerated population. The article is entitled, "When Prison Gets Old: Examining New Challenges Facing Elderly Prisoners In America," a Sandman Fellowship Report. As a culminating event for Mr. Pomerance's year-long fellowship, the Government Law Center at Albany Law School agreed to sponsor and host the panel discussion. On the panel with me were Brian Fischer, Commissioner, NYS DOCCS; Dr. Robert Greifinger, former DOCCS's Chief Medical Officer, healthcare consultant and author; Hon. Robert Muller, Supreme Court Judge, Warren and Essex Counties; Soffiyah Elijah, Executive Director, Correctional Association of New York; and Andy Pallito, Commissioner, Vermont Dept. of Corrections. All of the panelists acknowledged that the aging prison population has grown exponentially over the past decade and that there are critical issues that must be addressed regarding American's aging prison population. My comments were focused on what PLS sees as the most critical issues facing New York's aging prison population. Below is an excerpt from my presentation at the panel.

Over the past 5 years, the population of prisoners who are 50 years or older in NYS has increased from 11% to 16%. That increase is predicted to continue. Although the Department of Corrections and Community Supervision (DOCCS) does provide some specialized care, like its hospice programs, New York's aging prison population still faces significant unmet needs. There are a number of reasons why such unmet needs exist including cost, an inadequate and unyielding medical parole statute and a cultural attitude that most often chooses punishment over treatment, even in those cases where an incarcerated New Yorker may be elderly or extremely sick.

Take, for instance, the case of Steven, who was a 56 year-old man with a medical diagnosis of advanced Stage 4 stomach/esophageal junction cancer undergoing regular chemotherapy treatments. He was a survivor of extreme childhood sexual abuse, had a mental health diagnosis of both schizo/affective disorder and bi-polar disorder and had tried to commit suicide. Steven contacted PLS in July 2012 because he was suffering from severe panic attacks leaving him confused and with difficulty breathing, but he didn't want to apply for medical parole because he knew how difficult it was to get and he had a conditional release date of January 31, 2013. We advocated on his behalf and he was immediately scheduled to be seen by a psychiatrist to address his anxiety issues. Unfortunately, Steven died in prison on January 1, 2013.

Or consider PLS client Gary, who came to prison in 1969 for a murder conviction. When we went to visit him in November 2012, he was 71 years old and dying of cancer. At that point, he was not even eligible to apply for medical parole because he was still ambulatory and coherent. He told us that he and his friends would keep us apprised of his health. Three months later, on February 15th, we were notified that Gary had died in prison.

Of course, the issues associated with the incarceration of the elderly become even more problematic when they are coupled with the issues associated with the placement of elderly prisoners in long term solitary confinement, especially when an elderly prisoner is sick or infirm. Currently there are approximately 3,800 prisoners being held in solitary confinement and roughly 14% of them (532) are over the age of 50. The effects of isolation – especially decompensation − are well documented and attract concern across the political spectrum. John McCain talked about his experience in solitary confinement as a prisoner of war in Vietnam where he spent five and a half years in isolation. He stated: "It's an awful thing, solitary . . . . [i]t crushes your spirit and weakens your resistance more effectively than any other form of mistreatment."

Imagine being subjected to this at the age of 60 or 70. We have a client, David, who is 67 years old. He was accused of being out of place and refusing a direct order. As a result he was given a Tier III disciplinary hearing. His defense at his hearing was that he was suffering chest pains, entered a yard area to seek assistance and did not hear the order from the officer to disperse from the yard. The undisputed facts show that immediately after the incident it was determined that he was in cardiac arrest and he was taken to an outside hospital and given emergency medical attention. Regardless of these facts, he was found guilty of the charges and given 12 months in solitary confinement with 6 months suspended.

There are literally hundreds of other cases like the ones I have told you about today. These cases, and the many others like them, demonstrate the need to change the way in which we address the needs of the aging prison population. There are four areas that I believe require immediate attention.

First, elderly prisoners should be given the option of separate senior housing with separate dining and day rooms. This would allow the older prisoners to interact with the younger population, but also give them a place to go if they need peace and quiet. However, elderly prisoners who are healthy enough to participate should never be denied access to any programs, work or education available to other prisoners.

Second, palliative care and hospice programs should be located at various facilities throughout the State and prisoners who need such care should be housed in those facilities that provide the easiest option for visitation by family and friends. Such visitation should be encouraged and supported by DOCCS. Extensive training in palliative and hospice care for corrections and healthcare staff, as well as other prisoners is also crucial and extremely important to insure that the needs of the infirm and dying can be met in the most dignified and supportive way possible.

Third, we need a cultural shift in the way that we deal with elderly, sick and dying prisoners: we need to change our focus from punishment to treatment. One of the primary purposes of the penal law is "the rehabilitation of those convicted and the promotion of their successful and productive reentry and reintegration into society." As such, we should focus on treatment over punishment for all incarcerated New Yorkers but at the very least we should begin with the vulnerable populations; juveniles, those suffering from medical or mental illness, the elderly and the infirm. Certainly solitary confinement for such individuals should be an absolute last resort. And along those lines, I want to commend DOCCS's current Commissioner − Brian Fischer − for moving us to a better place on this issue. I am hopeful that his successor will continue his fine work in this area.

Finally we need to expand the eligibility for medical parole and expedite the medical parole process so as to reflect the civilized view that as people age or become sick and infirm, our societal interest in humane treatment of all people, must trump our desire to punish. Such action will allow New York State to provide more humane responses to prisoners like Steven, Gary and David.

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Finally, the Court remitted the issue of whether declaratory relief is warranted to the Supreme Court, Erie County. On remittal, the Supreme Court will determine whether the age of 16 and 17 year old prisoners in DOCCS custody **must** be considered as a mitigating factor in all prison disciplinary programs.

Prisoners' Legal Services of New York represented the petitioner in Matter of Cookhorne v. Fischer.

Pro Se Victories!

Jessie Barnes v. Brian Fischer, Franklin County Supreme Court, Index No. 2011-1211. Jessie Barnes successfully challenged a razor deprivation order that had been upheld by the Central Office Review Committee (CORC) of the Inmate Grievance Program.

Under 7 NYCRR § 304.5(b), an inmate in SHU has the right to shave twice a week. The regulation provides that shaving equipment must be returned after each use. An inmate can be deprived of shaving privileges where it is determined that a threat to safety or security of staff, inmates or State property exists. Shaving deprivation orders must be reviewed daily by a higher ranking member of the facility security staff and can be renewed weekly.

Petitioner Barnes filed a grievance which the court interpreted as alleging that he had been deprived of a razor for over 25 consecutive days without a deprivation order. The response to the grievance stated that an order had been issued and stated that the order was attached to the grievance answer. However, the court noted, the initial order was not attached to the grievance response nor was it attached to any of respondents' other pleadings. Respondents' papers documented one deprivation order renewal and one deprivation order daily review between the date that the deprivation order was allegedly issued and the filing of petitioner's grievance, roughly a 30 day period.

The court found that there was nothing in the record before the court to indicate that the initial razor deprivation order was followed up by daily reviews and/or weekly renewals as mandated by 7 N.Y.C.R.R. §305(c). The court therefore found that the CORC determination of the petitioner's grievance was irrational and/or arbitrary and capricious and ordered the decision overturned. The court determined that the razor deprivation order had lapsed.

Derrick Hamilton v. Steven Wenderlich, Chemung County Supreme Court, Index No. 2011-2305. Derrick Hamilton successfully challenged a Tier II hearing.

Derrick Hamilton was charged with inmate movement violation, harassment and creating a disturbance based on allegations that he was argumentative, laughed at an officer and did not pick up his belongings when asked to. The hearing officer found Mr. Hamilton guilty of the charges.

In his Article 78, Petitioner Hamilton alleged, among other claims, that the hearing officer had violated his right to call witnesses when he refused to call his social worker as a witness and that he was wrongfully excluded from the hearing.

The court found that the hearing officer did not allow the petitioner to explain the relevancy of the social worker's proposed testimony, i.e., that she would testify to "the overall complications that [Mr. Hamilton] has been having," and misstated the intended proffer when he set forth as the basis for not calling the witness: "requested [the social worker] to testify on his behalf about how he is being harassed by security staff, I ask him if she had any knowledge of this exact incident and he stated . . . no she did not so I am denying him that witness." The court found this refusal problematic given the nature of the testimony from the officers relative to petitioner's weird behavior, which was the **crux** (root) of the disciplinary hearing.

Further, the officers all testified that the petitioner was not argumentative. Rather, they said, he was acting weird, did not promptly pick up his property when ordered to do so and laughed at the officers. The court found that without further inquiry into the basis of petitioner's request that his mental health social worker be called as a witness, there was no basis for the hearing officer's

determination as to the relevancy of her testimony. Further, the court noted, the social worker's testimony would have been proper if not to determine the context of petitioner's weird behavior, then in mitigation of any contemplated penalty. Based on this analysis, the court found that the hearing officer had improperly deprived the petitioner of his right to call witnesses.

The Court also found that the hearing officer had violated petitioner's right to attend the hearing when he excluded petitioner. The Court noted that when an inmate is excluded from the hearing, the reason for the exclusion must appear in the record. Here the court found that the record established no indication that petitioner posed any threat to institutional safety or correctional goals. Rather, the court found, petitioner merely slowed the hearing process by asking questions and trying to place his objections on the record when the hearing officer was interrupting and refusing to allow him to do so. The court concluded that the petitioner's behavior never rose to the level of disruption that would have warranted his removal.

Finally, the court noted that while there was no need to address the remaining issues in the petition, the behavior of the hearing officer would certainly support a finding of bias resulting in the deprivation of the petitioner's constitutional right to a fair and impartial determination. In reaching this conclusion, the court referenced what it referred to as a diatribe by the hearing officer.

The court ordered the disciplinary determination annulled and the expungement of all references thereto from petitioner's records.

Patrick A. Ashley v. Brian Fischer, Franklin County Supreme Court, Index No. 2011-772. Patrick Ashley successfully challenged DOCCS' failure to notify the Division of Criminal Justice Services (DCJS) that certain of its records were inaccurate.

After exhausting his administrative remedies by means of the inmate grievance program, Petitioner Ashley brought an Article 78 action seeking an order requiring DOCCS to seal or expunge all parole entries made to his criminal history report by DOCCS after October 9, 2003. In filing this action, petitioner was seeking to cleanse his DCJS records of the references to violations of post release supervision which had been administratively imposed by DOCCS, a practice which was later judicially determined to have had no legal impact.

In 1999, the court imposed a determinate term on Mr. Ashley and did not impose a term of post release supervision (prs). DOCCS imposed a term of prs on Mr. Ashley, and after his release from prison, Mr. Ashley was violated and returned to DOCCS custody four times between 2004 and 2008.

After the 4th violation, the Supreme Court, Wyoming County issued a decision and order vacating the administratively imposed period of prs and directing DOCCS to recompute Mr. Ashley's 1999 sentence without reference to any period of prs. Following the recomputation, DOCCS determined that Mr. Ashley's maximum expiration date had been in 2003.

In 2011, petitioner filed a grievance after he discovered that the parole violations between 2004 and 2008 were still referenced in his DCJS records. He asked that the court order DOCCS to notify DCJS that the entries pertaining to these parole violations should be expunged as his sentence expired in 2003. In a decision upheld by CORC, the grievance was denied and petitioner was directed to send his request to the Division of Parole.

The Division of Parole, had, in the meantime, directed DOCCS to remove all documents referencing parole violations between 2004 and 2008 from the petitioner's Departmental records.

The court noted that DCJS records continue to show petitioner's four prs violations, each of which occurred after the recomputed maximum expiration date of the 1999 sentence and that there is nothing in the record before the court to indicate that DOCCS officials had initiated any contact with DCJS for the purpose of having the references to the prs violations removed. The DCJS entries, the court concluded, were created solely based on input from the Division of Parole.

DOCCS argued that by re-computing petitioner's sentence, it had fully complied with the Wyoming County Court order and that nothing in that order required the Department to seal all references to petitioner's incarceration history concerning prs and that nothing in Correction Law §601-d, Penal Law §70.85, Criminal Procedure Law §160.50 or any other statute authorized the Court to grant such relief.

The court noted that in its 2009 decision, the Supreme Court, Wyoming County, found the

administratively imposed period of prs to be of "no effect." The court was troubled by the fact that either the old Division of Parole or DOCS had electronically transmitted data with respect to petitioner's "violations" of administratively imposed prs, where information pertaining to such violations remains a part of petitioner's record. Under the facts and circumstances of this case, the court found it appropriate to direct the Commissioner of DOCCS to notify DCJS that petitioner's four violations of administratively imposed prs, as previously reported to DCJS and which currently appear in DCJS records, are invalid and that all references to such violations have been expunged from DOCCS' own records.

Matter of Raymond Mentor v. Andrea Evans, Chair New York State Board of Parole, Albany County Supreme Court, Index No. 5455-12. Raymond Mentor defeated the respondent's motion to dismiss for inadequate service.

Raymond Mentor submitted an Article 78 for filing by means of an order to show cause. The show cause order signed by the court directed Mr. Mentor to serve the order and pleadings by first class mail upon "each named Respondent and upon the Attorney General for the State of New York, at the Department of Law, State Capitol, Albany, New York 12224." Petitioner served both the Respondent and the Attorney General by mailing the pleadings and order to the Department of Law in Albany.

Respondent Evans moved to dismiss the petition arguing that because the petitioner had failed to serve her in the manner set forth in the order to show cause, the court did not have jurisdiction over her.

The court denied the motion to dismiss, finding that the respondent had failed to demonstrate that the self-represented inmate petitioner did not substantially comply with the show cause order. In reaching this result, the court noted that the order to show cause did not specify that Respondent Evans was to be served only at a particular address and found that it was not an unreasonable, literal reading of the order by a self-represented litigant to serve both parties at the only address in the order. The court also found that because the petitioner was self-represented, he should be held to less stringent standards than lawyers are.

STATE COURT DECISIONS

Disciplinary/Ad Seg/IPC

Court Finds Evidence Is Consistent With Claim That Charges Were Fabricated

During a cell search prompted by two anonymous letters indicating that Chris Hynes' safety was in jeopardy because he had unpaid gambling and drug debts, security staff allegedly recovered football betting slips. Security staff also claimed that the roommate of Mr. Hynes' girlfriend's had been arrested for bringing drugs into the prison where Mr. Hynes was confined. Based on this information, an involuntary protective custody proceeding (IPC) commenced following which the hearing officer accepted the recommendation that Mr. Hynes be placed in IPC. That determination was affirmed by the Office of Inmate Disciplinary Programs (OIDP). Mr. Hynes then filed an Article 78 challenge to the determination.

In Matter of Hynes v. Fischer, 956 N.Y.S.2d 604 (3d Dep't 2012), the petitioner argued that because the hearing officer did not properly ascertain the reliability of the confidential information upon which he based his determination that petitioner needed to be placed in IPC, the determination was not supported by substantial evidence. The Third Department agreed with the petitioner. The court found that the officers who testified at the hearing were unable to identify the prisoners who had written the anonymous letters and did not provide a reasonable basis for concluding that the threats in the letters were legitimate based upon their own knowledge and/or independent investigation. The court observed that while there was a correction sergeant who might have been able to provide relevant testimony about this aspect of the letters, the hearing officer denied petitioner's request that the sergeant be called as a witness. Moreover, the court wrote, it was not established at the hearing that either petitioner or his

girlfriend had any involvement in drug transactions within the prison.

The court found that the evidence presented was consistent with petitioner's claim that the IPC recommendation was fabricated to have him transferred to another prison due to his involvement with inmate committees.

Based on this finding, the court concluded that the determination was not supported by substantial evidence and had to be annulled.

Christopher Hynes represented himself in this Article 78 proceeding.

Violation of Duty to Record Hearing Leads to Reversal and Expungement

The decision in Matter of Whitted v. N.Y.S. DOCS, 954 N.Y.S.2d 278 (3d Dep't 2012), involves challenges to the determinations of guilt resulting from two misbehavior reports which were **adjudicated** (ruled upon) at one hearing. The first misbehavior report (MR1) charged fighting, violent conduct and disobeying a direct order. The second misbehavior report (MR2) charged assault on an inmate and use of a weapon. The hearing officer found the petitioner guilty of all of the charges. Following an unsuccessful administrative appeal, the prisoner filed an Article 78 challenge to the hearing.

Because the petitioner had pled guilty to the charges in the MR1, the court held that he was **precluded** (barred) from challenging the sufficiency of the evidence supporting those charges.

With respect to MR2, the respondent agreed that the determination that petitioner had used a weapon had to be annulled and references thereto expunged from petitioner's records. The court ruled that the remaining charge in MR2 – assault on an inmate – also had to be annulled. The charges in MR2, the court wrote, were based on allegations that the petitioner had injured another inmate with a cutting type weapon which was not recovered. Petitioner requested that two witnesses testify about this charge: the inmate with whom he fought and another witness who had observed the fight. In his appeal, the petitioner wrote that these witnesses gave relevant testimony. The transcript however, completely excludes the testimony of one of the witnesses and provides only "sporadic and scattered words or phrases" from the other. Accordingly, the court ruled, it could not agree with the respondents' argument that the transcript was adequate for purposes of meaningful appellate review.

Further, the court found, the hearing officer had promised to bring back the author of MR2 so that petitioner could question him after the petitioner had received certain documents. While the respondents argued that petitioner had waived his request to question this witness, the court did not find a basis in the transcript upon which to conclude that a waiver had been made. The court therefore found that there was doubt that the petitioner had been afforded his constitutional right to call a relevant witness.

The court concluded that the appropriate remedy was to expunge the remaining charge in MR2 and, since a loss of good time was imposed as a penalty for all charges, including those in MR2, the court remitted the matter a redetermination of the penalty as to the sustained charges in MR1.

Anson Whitted represented himself in this Article 78 proceeding.

When Requesting Witnesses, Be Prepared to Explain Relevancy

In Matter of Jones v. Fischer, 957 N.Y.S.2d 774 (3d Dep't 2013), the petitioner challenged a Tier III hearing, arguing, among other claims, that his right to call witnesses had been violated when, faced with a witness refusal form that was unsigned and did not set forth an explanation of the circumstances of the refusal, the hearing officer failed to find out the reason that a witness had refused to testify. In spite of this deficiency, the court ruled that petitioner's right to call witnesses had not been violated. Instead of looking at the hearing officer's response to the purported witness refusal, the court focused on the petitioner's failure to establish the relevancy of the possibly refusing inmate's testimony. The court noted that when the hearing officer asked whether the witness had been present when petitioner allegedly engaged in the misconduct, the petitioner failed to respond. Because the petitioner failed to provide information from which the hearing officer could determine whether the witness's testimony was relevant, and it

was not apparent from the information before the hearing officer that the testimony was relevant, the petitioner had not shown that the hearing officer failed to call a witness whose testimony would be relevant to the issues to be decided at the hearing.

The right to call witnesses at a prison disciplinary hearing is limited to witnesses whose testimony would be relevant. Sometimes it is evident from the circumstances of the charged misconduct that a witness has relevant testimony. For example, if a misbehavior report alleges that the accused prisoner conspired with another prisoner, the relevancy of the other prisoner's testimony can be inferred from his role in the incident as it is set forth in the report. Under those circumstances, a hearing officer's failure to investigate the alleged refusal of the witness to testify would not be trumped by the prisoner's failure to tell the hearing officer what he thought the witness would say. But where it is not clear from the documents, testimony or other evidence at the hearing why the witness would have information about the incident that gave rise to the misbehavior report or about the accused prisoner's defense, courts may not find that the accused prisoner's right to call witnesses was violated by the hearing officer's failure to investigate an inmate witness's alleged refusal to testify.

Petitioner Jones represented himself in this Article 78 proceeding.

Court Finds HO Constructively Denied Petitioner's Right to Call Witnesses

In Matter of Benito v. Calero, 102 A.D.3d 778, __ N.Y.S.2d __, 2013 WL 163831 (2d Dep't Jan. 16, 2013), the court reviewed a hearing determination finding the petitioner guilty of having alcohol in his cell. Petitioner had not been present in his cell when the alcohol had been recovered and asked that two prisoners who had been there be called as witnesses. The hearing officer concluded the testimony of the prisoner-witnesses would not be relevant and denied the request. The court noted that the hearing officer did not permit petitioner to fully explain his reasons for wanting to call these witnesses before denying the request. In addition, when petitioner tried to question a witness about his conclusion that the substance found in the petitioner's cell was alcohol, the hearing officer refused to allow the question.

On review, the court concluded that the determination of guilt was supported by substantial evidence. Nonetheless, the court granted the petition. "A hearing officer's actual outright denial of a witness without a stated good faith reason, or lack of any effort to obtain a requested witness's testimony constitutes a clear constitutional violation," the court wrote. A hearing officer does not violate an inmate's right to due process by precluding testimony that is redundant or irrelevant, the court noted, but here the hearing officer could not have know whether the proposed witnesses' testimony would have been relevant because she repeatedly refused to allow the petitioner to explain why he wanted the witnesses to testify. In addition, the court found, the hearing officer refused to allow the petitioner to question the witnesses who did testify. Under these circumstances, the court held, the hearing must be annulled and the matter remitted for further proceedings (a new hearing).

Daniel Benito represented himself in this Article 78 proceeding.

Parole

Court Finds that Exigent Circumstances Justify Delay in Transfer to Willard D.T.C.

When Petitioner Welch was under parole supervision, he was arrested on a parole violation warrant and on criminal charges. At a final parole revocation hearing held roughly 2 months after his arrest, the parties agreed that in exchange for his plea of guilty, Petitioner Welch would receive a 12 month time assessment with an alternative substance abuse program to be served within 90 days. Petitioner remained at Rikers Island for roughly 2 more months before he was declared "state ready" by the City Department of Correction. Petitioner was then sent to Willard D.T.C. and graduated approximately 6 months after he accepted the plea promising his release within 90 days. It

appears that this petition for a writ of habeas corpus was filed before petitioner Welch was transferred to Willard D.T.C. but not decided until after he had graduated.

In Matter of Welch v. Warden of Rikers Island, 38 Misc.3d 1208(A), 2013 WL 92711 (Sup. Ct. Bronx Co. Jan. 9, 2013), the petitioner argued that he should be released from custody because he had not been transferred to Willard in time to avoid his being held beyond the 90 day deadline for release (assuming that he successfully completed the program) that had been imposed at his final parole revocation hearing. The petitioner contended that the remedy for the failure to honor the plea agreement that was embodied in the parole revocation decision was to vacate the parole violation warrant and to restore him to parole supervision.

DOCCS argued that 1) the petition is moot because the petitioner had by the time of its answer, been transferred to Willard D.T.C., 2) even if the delay in transfer to Willard exceeded 12 months, no requirement exists that the parole warrant be vacated and 3) even if petitioner were to serve longer than 12 months, habeas corpus is not the required remedy because such imprisonment merely creates eligibility for re-release consideration and not automatic release. Even if the court found that petitioner's transfer was wrongly delayed, DOCCS argued, because the petitioner could only have been released following successful completion of a 90 day drug treatment program, the appropriate remedy would be transfer to the treatment facility and not release to parole supervision.

Finding that petitioner was not state ready until 2 months after his final parole revocation hearing, the court ruled that petitioner's transfer to Willard D.T.C. had not been wrongfully delayed. In reaching this result, the court recognized that in People ex rel. Woelfle, v. Poole, 15 Misc.3d 1101A, (Sup. Ct. Seneca Co. 2007), a court of comparable jurisdiction had held that *absent* ***exigent*** *(pressing) circumstances*, a parolee who is permitted to receive treatment at Willard D.T.C. should be transferred within 40 days from the day that he receives his final parole revocation determination. Here, the court found, exigent circumstances were present: between the final parole revocation hearing and the day that petitioner was transferred to Willard D.T.C., because during this period, criminal charges were pending against the petitioner. For this reason, the court concluded, the petitioner was not entitled to the relief he was seeking in the habeas petition.

Court of Claims

No Damages for Continuation of Level III Status at Southport C.F. After Reversal of Hearing

The trial in Callender v. State of New York, 956 N.Y.S.2d 792 (Ct. of Clms. 2012), was held by means of a videoconference from Elmira C.F. In this case, Claimant Callender (claimant) alleged that employees at Southport C.F. failed to follow procedures controlling timely decisions of Tier III appeals. In addition, the claimant alleged that he was denominated as a Level I or II prisoner at Southport for 36 days beyond the date upon which the hearing which had led to that status was reversed by the Office of Inmate Disciplinary Programs (OIDP), and seeks damages for the 36 day that he did not spend as a Level III prisoner.

The claim alleges that at the time that the misbehavior report which resulted in the SHU time at issue, the claimant was on Level III at Southport C.F. This means that he was subject to the fewest restrictions and granted the greatest number of privileges which are available to individuals at Southport C.F. The misbehavior report alleged that the claimant had committed an unhygienic act. He was immediately dropped to Level I, where he was subject to the highest level of restraints and restrictions and given the minimum privileges available to individuals at Southport C.F. In addition, he was placed in a cell with a plexiglass shield.

The claimant was found guilty and sentenced to six months SHU with 2 months suspended. His release date from SHU was extended by 4 months. The claimant appealed the determination of guilt. The Office of Inmate Disciplinary Programs did not respond to his appeal within 60 days of receiving it, as is required by 7 NYCRR §254.8. More than four months passed from the date that the hearing ended before the claimant was informed that the hearing had been reversed. He was not advised of the reason

for the reversal. Thirty six days later, the claimant was restored to Level III housing and privileges.

The court wrote that the claimant's allegations sounded in wrongful confinement, the label given to a claim of unjust conviction when an already incarcerated individual seeks damages for time spent in more restrictive confinement. To prove this claim, the claimant must show that:

1) the defendant intended to confine him;
2) the plaintiff was conscious of the confinement;
3) the plaintiff did not consent to the confinement; and
4) the confinement was not otherwise privileged.

In this case, the court found that the claimant had failed to establish two necessary facts. First, the court wrote, the claimant's placement on a more restrictive confinement level pursuant to Southport C.F.'s policies does not constitute confinement for the purposes of a wrongful confinement claim. Second, the court held, there was no violation of any regulation or policy so that even if the change in level had constituted confinement, the claim would nonetheless have failed.

While placement in SHU has generally been treated as confinement, not every action by corrections staff that increases a prisoners restraints or limits his privileges may be deemed confinement. For example, the court wrote, a prisoner has no constitutional, statutory or precedential right to his prior housing or programming, nor may he bring a claim based on his transfer from one prison to another, even if one has harsher conditions of confinement. Rather, the court noted, a wrongful confinement claim has its roots in due process considerations. The state is not immune from such claims if a prisoner is placed in SHU without any process, or where the prison authorities did not comply with minimal due process requirements. But, a prisoner may not claim damages for the prison authorities' failure to comply with their own regulations and policies, where the authorities had the legal right to deny the prisoner any procedural safeguards in the first place.

Citing Sandin v. O'Connor, 515 U.S. 472 (1995), the court wrote that the due process clause does not protect every change in conditions of confinement having an adverse impact on a prisoner. Due process protections are only required where the prisoner is subject to an "atypical and significant hardship" in relation to the ordinary incidents of prison life. The court found that the general principles of Sandin are applicable to facts proven by the claimant. Certain changes in conditions of confinement for the worse are within those matters ordinarily contemplated by a prison sentence and a cause of action should not arise out of disciplinary confinement that mirrors that imposed on prisoners for administrative reasons. Thus, to be actionable, the restraints imposed must represent a substantial departure from those to which other prisoners are subject before they can be deemed confinement within the correctional setting.

Using this standard, the court found that when the claimant was not moved to Level III after the expiration of his disciplinary sentence, he was not "confined" for the purposes of a wrongful confinement action. The operation of the level system is entirely within the Superintendent of Southport C.F.'s discretion. Due process does not attach where conditions of confinement are discretionary, especially where, as here, transfer from one level to another may occur for a variety of administrative reasons – including arrival at the facility − unrelated to wrongdoing by the prisoner. In addition, the varying gradations of restrictions and privileges associated with the various levels, while of importance to prisoners, are not "significant" for the purposes of due process, particularly when compared to the deprivation which a prisoner experiences on being placed in SHU at Southport C.F.

Finally, the court held that even if the change in conditions that the claimant experienced did constitute confinement, the defendants were protected from liability by privilege. In the Court of Claims, a defendant's actions are privileged – given quasi judicial immunity – unless corrections personnel act in violation of the governing rules and regulations. See Arteaga v. State of New York, 532 N.Y.S.2d 57 (1988); see also, Mitchell v. State of New York, 819 N.Y.S.2d 617 (3d Dep't 2006) (defendant is immune from liability for actions of DOCS' employees concerning the discipline of inmates if the employees act under the authority of and in compliance with the governing rules and regulations). Failure to adhere to regulations governing prison disciplinary proceedings renders

the confinement that results "not privileged," meeting the fourth element of the test for wrongful confinement.

Turning to the question of whether the defendant's conduct − holding claimant 36 days at Level III beyond the date upon which the hearing leading to that status was reversed − was privileged, the court observed that the record provides no detail as to why the claimant was confined as a Level III prisoner for the 36 days in question. However, the court found that the Southport Orientation Manual gives full discretion to correctional staff to determine at which level each prisoner should be placed. Thus, the court concluded, the fact that the disciplinary hearing sanction was overturned did not require claimant's movement to a different level. Further, the Manual permits Southport C.F. staff to hold an inmate at a given level even after he is qualified to advance to a higher level, depending on availability of higher level cells. Based on the discretion provided to Southport C.F.'s security staff with respect to moving prisoners to higher levels, the court ruled that no cause of action arose from the defendant's use of that discretion and dismissed the claim.

Claimant Callender represented himself in this Court of Claims action.

Court Awards Damages for Time Wrongfully Spent in Keeplock

In Lamage v. State of New York, 31 Misc.3d 1205 (N.Y. Ct. Cl. Dec. 22, 2010), the claimant sued the State for damages for wrongful confinement. Here the claimant alleged that he was charged in a misbehavior report which stated, in substance: After exiting the metal detector, inmate Lamage was called by Inmate S. using a nickname. After being identified by Inmate S. as the inmate who passed him an envelope containing a can lid, inmate Lamage was questioned and denied giving the envelope to inmate S. Claimant was found guilty at a hearing and the hearing officer imposed a sanction of 115 days of keeplock. The hearing was reversed after the claimant had served 115 days in keeplock.

The claimant moved for summary judgment. He argued that the misbehavior report was invalid because it did not comply with 7 NYCRR §251-3.1(b). This regulation requires that a misbehavior report be written by an employee *who has observed the incident or who has ascertained the facts of the incident*. In support of his motion, the claimant submitted the answers to interrogatories given by the author of the misbehavior report. In his answers, the officer who wrote the report admitted that he had not observed the claimant in possession of the envelope or its contents and had not observed the claimant pass the envelope to Inmate S. The officer also stated that he had not ascertained that the claimant passed the envelope and its contents to Inmate S. The claimant asked for damages in the amount of $25.00 per day for each day that he was wrongfully held in keeplock.

The court held that the misbehavior report was not in compliance with the regulation because the officer had neither observed the incident nor ascertained the facts of the incident from an established reliable source. For the latter point – the requirement to ascertain the facts of the incident from a *reliable* source − the court cited to Matter of Cotto v. Bautista, 676 N.Y.S.2d. 373 (4th Dep't 1998). Rather, the court found, the only information implicating the claimant came from Inmate S., the inmate who was found in possession of the contraband and who claimed to have received the contraband from the claimant. The court compared the facts before it with the facts of the cases which defendant argued controlled the case and mandated a grant of summary judgment in the defendant's favor. Those decisions, the court held, were based on determinations that the writers of the misbehavior reports had ascertained the facts in the report from reliable sources, e.g., the victim of an assault where the victim lacked a motive to falsely implicate the person whom he accused. Here, to the contrary, the officer's sole source of information did not have an indicia of reliability – he was a wrong doer caught in the act. Further the only evidence showed that Inmate S. had a motive to fabricate the charges against the claimant – to shift blame from himself.

Based on these findings, the court granted judgment in the claimant's favor and ordered that the defendant pay him $2,875.00 for 115 days of wrongful keeplock confinement.

Claimant Lamage represented himself in this Court of Claims action.

Court Holds that Sexual Assault Was Not Reasonably Foreseeable

In Anonymous v. State of N.Y., 37 Misc.3d 1224(A), 2012 WL 5898055 (Table) (N.Y.Ct.Cl. Sept. 27, 2012), the claimant sought to impose liability on the State of New York for its failure to protect him from a sexual assault by the prisoner with whom he shared a cell at Upstate C.F. The trial was conducted by videoconference. The parties were at Upstate C.F. and the judge was in Saratoga Springs.

At the trial, the evidence showed that when the claimant arrived at Upstate, he requested a single cell, because, he told the Office of Mental Health, he had been sexually assaulted at Upstate C.F. several years before; he was generally known as a snitch; he was vulnerable and needed protective custody. The claimant also told prison officials at Upstate C.F. that he was a homosexual and victim prone. None of the forms that were completed at or around the time of the claimant's arrival at Upstate C.F. indicated that he is a homosexual or that he had reported the sexual assault to prison officials. The prison officials determined that the claimant was not highly assaultive, extremely violent or victim prone and that that he was OMH Level 4. Following a medical evaluation, the claimant was approved for double bunking.

The claimant then wrote to the Superintendent requesting a single cell because his life was constantly in danger, he was victim prone and had been in protective custody 12 times during his incarceration and he had three years ago been sexually assaulted by an inmate while at Upstate C.F. and continued to take medication for his mental condition as a result of the assault. The claimant asserted that his victim prone history spoke for itself and that DOCCS officials had been made aware that his life is in danger regardless of with whom he shares a cell. The court noted that in this letter, the claimant did not assert that he was a homosexual.

A staff member from outside the facility investigated the assertions in the letter. The staff member found that the claimant had not reported a sexual assault during his previous incarceration at Upstate C.F; that many times, the claimant's requests for protective custody had been denied; and that prior placements in protective custody were mostly voluntary and resulted from being labeled a snitch by members of the Bloods and not because he had been sexually assaulted or was sexually vulnerable. Based on the investigation, the staff member concluded that the claimant's allegations were not sufficiently substantiated and that the claimant was fabricating a story in an attempt to remain single celled.

Based on this investigation, and an interview with the claimant, the Superintendent decided that the claimant could be safely double celled.

Evidence in the form of the fourteen requests for voluntary protective custody, nine of which were granted, showed that the claimant was admitted to VPC because he was being threatened or extorted by inmates, labeled a snitch by Bloods, or assaulted. No VPC request mentioned the claimant's sexuality.

The claimant testified that during the first month that he was in a double cell, the inmate who shared the cell with him, whom the claimant identified as a Blood, sexually assaulted the claimant. The assailant was neither of the two inmates at Upstate C.F. who were identified as enemies of the claimant. When a day or two after the assault, the claimant attempted to inform the security staff of the assault, the assailant hit the claimant in the head. The claimant also testified that his assailant was a known homosexual predator.

In his statement to the State Police, made on the same day that the assailant hit him in the head, the claimant said that he was attacked by his cellmate following a cell search by correction officers, when claimant was about to ask the corrections officer where his dentures were.

Having reviewed the evidence presented at trial, the court discussed the law controlling failure to protect claims brought by prisoners. Briefly stated, the State owes a duty of care to safeguard inmates, even from attacks by other inmates. Sanchez v. State of New York., 754 N.Y.S.2d 621 (2002). The scope of the State's duty is limited to providing reasonable protection against foreseeable risks of attack by other prisoners. Id. Foreseeability rests upon a determination of what the State actually knew, as well as what it could have reasonably known about the risk of attack on a claimant. Id. It is the claimant's burden to prove his case by a preponderance of the evidence. Pursel v. State of New York, 640 N.Y.S.2d 660 (3d Dep't 1996). In this case, the claimant had to show by a

preponderance of the evidence that the defendant knew or should have known that there was a risk that the claimant would be attacked by his cellmate.

Applying the law to the facts before it, the court first summarized the claimant's theory: Claimant argues that because his requests for VPC had been granted in the past and because he identifies as victim prone, any attack against him would be foreseeable. The court rejected this argument, concluding that under this theory of foreseeability, the state would be the insurer of claimant's safety. The court also found that the evidence did not show that the claimant was generally victim prone.

As to whether the claimant was generally victim prone, the court noted that the evidence showed that when the claimant was placed in VPC, it was because he was at risk of attack by gang members and by certain specific gang members. Thus, prison officials had reason to know that the claimant was at risk of being assaulted by a member of the Bloods gang. In this instance, the court found, there was no evidence, other than the claimant's testimony, that the person who assaulted him was a member of the Bloods gang. Thus the prison officials had no reason to know that the assailant presented a risk to the claimant. In other words, the attack was not foreseeable.

Although the claimant alleged that his assailant was a homosexual predator, the court again found that because there was no evidence of this other than the claimant's testimony, to which the court accorded little weight.

The court concluded that the preponderance of the credible evidence at trial failed to establish that the sexual assault was reasonably foreseeable and for this reason, the court issued a verdict in favor of the defendant.

Claimant represented himself in this Court of Claims action.

***Practice Point**: In failure to protect cases alleging that the risk of harm was reasonably foreseeable, the claimant is advised to have evidence other than his own testimony that prison officials were aware of the risk that the assailant presented to him or her. Sometimes this evidence can be obtained in pre-trial discovery. For example, the claimant in Anonymous v. State of New York could have sought DOCCS records showing that the assailant was known to DOCCS officials as being in the Bloods gang or that he had committed other acts of sexual assault on inmates while in prison. Because these kind of cases often get decided based on lack of notice to DOCCS' officials that the assailant was a danger to the claimant, it is also important to the success of such a claim that the individual who believes that he or she is at risk of harm from another incarcerated individual provide written notice to DOCCS officials about the danger, including the names of the individuals who present a threat.*

Miscellaneous

Court Finds CORC Decision Prohibiting Flavored Cigars Arbitrary and Capricious

A package addressed to Mark Adams was received by the package room at Great Meadow C.F. Determining that the package contained flavored cigars, the package room staff refused to allow Mr. Adams to have the package. Mr. Adams filed a grievance asserting that the refusal violated Directive 4911. The grievance was ultimately denied by CORC. Petitioner challenged the decision in an Article 78 proceeding.

In Matter of James v. Fischer, 102 A.D.3d 1019, __ N.Y.S.2d __, 2013 WL 173958 (3d Dep't Jan. 17, 2013), the court first noted that correction officers have wide latitude in taking measures to ensure the safety and security of correctional facilities, which extends to determining the property permitted in such facilities. The court went on to observe that Directive 4911 provides that an inmate may receive up to a maximum of fifty cigars per month. CORC denied petitioner's grievance on the basis of the directive and because it had denied similar grievances in the past. However, the court noted, the directive does not contain a prohibition for cigars that are flavored. Nor did CORC **articulate** (specify) a safety or security justification for drawing a distinction between flavored cigars – prohibited − and unflavored cigars – permitted.

Accordingly, the court held, under the circumstances presented, the denial of petitioner's grievance was arbitrary and capricious.

Mark James represented himself in this Article 78 proceeding.

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Damages Claim for Injuries Resulting From Uneven Basketball Court Rejected

In Judge v. City of N.Y, 957 N.Y.S.2d 39 (1st Dep't 2012), the court affirmed a lower court decision granting summary judgment to the defendant. In this case, the plaintiff, then an inmate at Rikers Island, sought damages for injuries that he received while playing basketball. The plaintiff alleged that due to a defect in the pavement, which created a significant unevenness in the playing surface, when he jumped, he landed on the defect and fractured his ankle. Plaintiff admitted that he had discovered the problem with the pavement the day before he had the accident.

In granting summary judgment, the court held that the plaintiff, by voluntarily playing basketball, had assumed the risk inherent in playing that sport. The plaintiff argued that the assumption of risk doctrine should not apply to his case because he did not "freely and knowingly consent" to the risks of playing basketball on the outdoor court, as that was the only recreational activity available to him. The court rejected this argument, finding that the contention (claim) that outdoor basketball was the only recreational activity available to him was undercut by his testimony at a prior hearing.

Federal Court Decisions

Supreme Court Rules that Principle of Law Announced in Padilla is Not Retroactive

In 2010, in Padilla v. Kentucky, 130 S.Ct. 1473 (2010), the United States Supreme Court ruled that criminal defense attorneys are constitutionally required to inform non-citizen clients of the immigration consequences of a plea of guilty. In February 2013, in Chaidez v. United States, 133 S.Ct. 1103 (2013), the court held that this rule was not retroactive to people whose convictions were final before the 2010 decision.

To determine whether a case decision is retroactive, the Court applied the test adopted in Teague v. Lane, 489 U.S. 288 (1989). The Teague decision instructs that if a decision announces a new rule, the rule will not be applied retroactively. The definition of new rule is a rule that was not dictated by precedent existing at the time that a defendant's conviction became final. On the other hand, a case does not announce a new rule when the decision is simply an application of the principle that governed a prior decision to a different set of facts.

The rule announced in Padilla is connected to a defendant's 6th Amendment right to counsel. The question in Padilla was whether, where defense counsel had failed to inform the defendant that if

she pled guilty she would be deported, the defendant's right to effective assistance of counsel had been violated.

The Padilla decision applied the criteria set forth in Strickland v. Washington, 466 U.S. 668 (1984) for determining whether an attorney's performance had deprived a defendant of his right to effective assistance of counsel. To satisfy Strickland, the Padilla Court wrote, counsel's representation 1) must fall "below an objective standard of reasonableness," and 2) there must be "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." It was the first of these prongs to which the Padilla decision was addressed: Does defense counsel's failure to advise a defendant that the pending criminal charges may have immigration consequences, and in cases where a plea of guilty will result in deportation, to advise the defendant of this fact, fall below the objective standard of what reasonable counsel would do? The answer to this question, the court wrote, is necessarily linked to the legal community's practice and expectations. In Padilla, the Court found that the weight of prevailing professional norms supports the view that counsel must advise her client regarding the deportation risk.

Generally speaking, Justice Elena Kagan wrote for the majority opinion in Chaidez, application of the Strickland test for ineffective assistance of counsel claims does not lead to new rules. But in Padilla, before the court could apply Strickland, it had to decide whether advice about deportation was removed from the scope of the Sixth Amendment right to counsel because it involved only a collateral consequence of a conviction as opposed to a component of a criminal sentence. That is, prior to asking what result would be obtained when Strickland was applied, the court had to ask whether Strickland applied.

It was this question that the Chaidez Court decided was unsettled prior to the decision in Padilla. Prior to the Court's decision in Padilla, the state and lower federal courts had almost unanimously held that the Sixth Amendment did not require attorneys to inform their clients of a conviction's collateral consequences, including the consequence of deportation. Padilla's contrary ruling thus answered an open question about the Sixth Amendment's reach, in a way that altered the law of most jurisdictions. The Chaidez Court therefore decided that the Padilla decision announced a new rule and for that reason, under Teague, the decision's holding was not retroactive.

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