Pro Se

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Administrative Remedies Unavailable to Prisoner Hospitalized During the Grievance Filing Period

While Anthony Rucker was in pretrial detention in the Monroe County Jail, he became extremely ill. For ten days from the onset of symptoms, the doctors and nurses who were responsible for providing medical treatment at the jail failed to recognize the seriousness of his symptoms and provided no meaningful treatment. On about the tenth day following the onset of symptoms, Mr. Rucker was taken to the hospital where he was diagnosed with peritonitis, pneumobilia, and portal venus gas. He was given a 10% chance of survival. He underwent surgery to **resect** (remove a portion of) his small bowel, following which his pancreas became infected was removed. Prior to the surgeries, he was placed in a medical coma. He remained in the hospital for a month and two days. Mr. Rucker suffered permanent injuries as a result of the delayed medical treatment.*

A year after these events, Mr. Rucker filed a grievance relating to his treatment at the jail. The Monroe County Jail had a 5-day deadline for filing grievances with no late filing permitted. The jail denied the grievance, finding it was untimely.

Mr. Rucker filed a §1983 alleging that the failure to treat his medical condition constituted cruel and unusual punishment. The district court dismissed the case based on Mr. Rucker's failure to exhaust administrative remedies. Mr. Rucker appealed the order dismissing the action.

In *Rucker v. Giffen*, 997 F.3d 88 (2d Cir. 2021), the Second Circuit found that because the Monroe County Jail had no provisions for filing grievances beyond the 5-day deadline, and where Mr. Rucker was unable, due to his medical condition, to file a grievance before the deadline, the grievance system was unavailable to him. Thus, the Court held, the district court should not have dismissed his lawsuit for failure to exhaust his administrative remedies.

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Also Inside . . .

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Inside/out: Overcoming Vaccine Skepticism

A Message from the Executive Director, Karen L. Murtagh

First, a true story from outside prison walls.

My nephew was struggling to convince his 72-year-old mother to get the COVID-19 vaccine. This was particularly frustrating for him, as he is an excellent lawyer, litigator and well-known "shaper of opinion" – let's call him "the persuader."

Having won many cases in his career, including a PLS case before the US Supreme Court [*Haywood v. Drown*, 556 U.S. 729 (2009)], the persuader rightly considered this "easy pickins" – his mother is smart, the facts are clear, the need is there . . . how hard could this be?

Harder than he thought.

After almost a year of failed attempts, the persuader had given up. His mother's reasons were her own and all his shaming, cajoling, educating and guilt-tripping had produced bupkis.

Then, out of the blue, on June 11, she surprised the persuader (and all of us) with a text: a picture of her just-issued vaccination card. She had decided to get the Johnson and Johnson vaccine (the one requiring a single dose).

Which begs the question: "Why?"

In the end, there were two reasons: (1) she wanted to see her family, all of whom had gotten the vaccine and were hesitant to visit her for fear that they would jeopardize her health and her theirs, and (2) a sense of civic responsibility – she knew that her small North Carolina community would be better off if everyone there took a collective step back to normalcy.

So, in her case, it was a "hug" and "love of others" that carried the day.

We all know that everyone's different, but somewhere within each of us lies the key to overcoming vaccine skepticism. The trick is finding the trigger.

The story within prison walls is equally interesting, compelling and frustrating.

For communities of color, particularly within prison settings, the situation is more complicated. First, there is history: some medical institutions have abused incarcerated people and people of color. Then there is the discouraging fact that currently, many corrections officers are hesitant to take the vaccine. Overcoming such factors requires more evidence from trusted sources than was required for the persuader's mother to agree to get vaccinated. Indeed, peer pressure, among

keepers and kept, could make a huge difference in the percentage of incarcerated people willing to accept the vaccine. But how do we get there?

The imperative exists: in most states, the vaccination rate for incarcerated individuals lags far behind that of the general public. Unfortunately, the vaccination rate in New York State prisons is not an exception. That said, some states – California, Kansas, Rhode Island and North Dakota – have prison vaccination rates that far surpass those of the non-incarcerated population in these states.

How can that be?

Experts cite two important factors in those success stories: Town-hall styled meetings within the prison setting, conducted by respected medical professionals, and the involvement of formerly-incarcerated individuals in developing the vaccination plan.

In sum, education from knowledgeable, trusted sources seems to have been the key in those states. Equally clear is the literature and the science on COVID-19 that are available for all to read. Far be it for me to stray "from my lane" and attempt to synthesize the work of noted experts. I will, however, share links to a few such sources at the end of this message.

What is clear is that vaccine hesitancy often stems from a lack of reliable information and/or an overload of misinformation. What seems to matter most is how reliable information is best "messaged" to particular audiences, so that we are better able to separate the "wheat from the chaff." In an information-rich world – which the internet has surely made all of us – we need help, now more than ever, to tap into the motherlode.

Fear of infection, long-term effects and death – for ourselves, our loved ones, friends, colleagues and neighbors – should carry the day. In a cost/benefit world, it's not even close: getting the vaccine – any of them – safely paves the way back to normalcy.

And, for many of us, perhaps just the thought of getting that hug will get us there.

https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/covid-long-haulers-long-term-effects-of-covid19

https://fluvannareview.com/2021/02/doctors-answer-questions-about-vaccines/

https://www.wlwt.com/article/get-the-facts-on-the-vax-submit-your-vaccine-questions-for-a-doctor/36352623

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The Exhaustion Requirement

The exhaustion requirement that is central to the *Rucker* decision is found in §1997e(a) of the Prison Litigation Reform Act (PLRA), 42 U.S.C. §1997e(a). This section of the PLRA provides that "[n]o action shall be brought with respect to prison conditions under [42 USC §1983] . . . by a prisoner confined in any jail, prison or other correctional facility until such administrative remedies as are available are exhausted." In *Woodford v. Ngo*, 548 U.S. 81, 90 (2006), the U.S. Supreme Court held that exhaustion must be in compliance with an agency's deadlines and other critical procedural rules.

In *Ross v. Blake*, 136 S. Ct. 1850, 1859-60 (2016), the Supreme Court held that prisoners are exempt from the exhaustion requirement only when a department of corrections' grievance procedures are unavailable. The *Ross* Court gave three situations where although an administrative remedy is officially on the books, it is not capable of use to obtain relief:

1. The grievance process operated as a simple dead end – officers were unable or consistently unwilling to provide relief to aggrieved inmates;
2. The process is so opaque that it becomes, practically speaking, incapable of use; or
3. Prison administrators **thwart** [stop] inmates from taking advantage of the grievance process through **machination** [plotting], manipulation or intimidation.

In *Rucker*, the Second Circuit was called upon to decide whether a medical condition which prevents an incarcerated individual from filing a grievance before the deadline for doing so passes, **renders** [makes] the grievance system unavailable. The Court found that "because Rucker's severe medical condition precluded timely filing of his grievance and the prison unequivocally stated that it would not process his grievance because it was filed after the grievance filing period had closed, the grievance procedures, 'although officially on the books [were] not capable of use to obtain relief." For this reason, the Court concluded, the Monroe County grievance procedures were unavailable to Mr. Rucker.

Further, the Court held, it was of no consequence that Mr. Rucker did not even try to file a grievance until a year after the conduct about which he was complaining had taken place. With respect to this, the Court wrote, "The letter from the prison to Rucker was clear – any failure to file a grievance within five days of the incident giving rise to the grievance would render it untimely." *Rucker, at* 94.

Although the *Rucker* case arose in the context of a county jail where the deadline for filing a grievance was 5 days, the principle announced in the *Rucker* decision applies to the DOCCS Inmate Grievance Program which has deadlines of twenty-one and forty-five days, beyond which a grievance cannot be filed. The deadline for filing a grievance in DOCCS is twenty-one days. However, there is a provision for asking for permission to file a late grievance. Individuals who missed the twenty-one-day deadline may, within forty-five days of the incident, request permission to file a late grievance. An incarcerated individual who does not file a grievance within 21 days and does not within forty-five days of the conduct about which they are complaining request permission to file a late grievance cannot file a grievance, regardless of the reason that they failed to ask permission to file the late grievance within forty-five days. Thus, the DOCCS grievance system is unavailable to anyone who is medically unable to file a grievance for more than forty-five days from the date on which the conduct about which he wishes to file a grievance occurred.

*The facts set forth in this paragraph are taken from the allegations in Mr. Rucker's Complaint.

Anthony Rucker represented himself in this §1983 appeal.

News & Notes

DOCCS ANTICIPATES RESUMPTION OF FAMILY REUNION PROGRAM

On June 14, DOCCS issued a memo stating that due to the increase in the percentage of incarcerated individuals and community members who have been vaccinated and the decline in the COVID-19 positivity rate, on September 8, it plans to resume the Family Reunion Program (FRP). The details of the re-opening are as follows:

- Individuals whose previously scheduled FRP visits were cancelled due to COVID-19 and who continue to meet the eligibility requirements will be given priority with respect to scheduling.
- Participating incarcerated individuals must be fully vaccinated against COVID-19. This means 2 weeks must have passed since the incarcerated individual's most recent vaccination.
- All approved FRP participants over the age of 12 must be fully vaccinated and ***2 weeks prior to the scheduled visit*** must provide a copy of their COVID-19 Vaccination Record Card.
- Arrival times for visits will be staggered to allow for social distancing.
- All FRP participants will be screened using a temperature check and a health questionnaire.
- ***Visitors under 12 must have a negative COVID-19 test obtained within the 3-day period immediately preceding the scheduled visit date and present proof of test results at the health screening.***
- If a person is denied participation for any reason, and that person is a guardian for any of the children who are scheduled to participate in the FRP visit, those children will not be permitted to participate in the FRP visit.
- Masks must be worn when FRP participants are outside of the assigned FRP unit and/or when in close proximity to other visitors, including during processing and transportation to and from the FRP unit.
- Facilities will supply disinfectant cleaning products to use during the visit.
- All small appliances will be sanitized prior to and immediately following each use, including all hard surfaces, floors, chairs and tabletops, per CDC guidance.
- Units will be sanitized prior to and immediately following each use, including all hard surfaces, floors, chairs and tabletops per CDC guidelines.
- It is recommended that all participants wash their hands with soap and water and/or use hand sanitizer routinely.

If you are interested in participating in FRP but have not yet been vaccinated against COVID-19, DOCCS asks that you inform medical personnel or the executive staff at your prison so that you can be scheduled for the next available clinic. DOCCS also asks that you share this information with your family members and encourage them to take advantage of the many opportunities to receive the COVID-19 vaccination in their communities.

Barring any adverse changes that require DOCCS to reassess the safety of resuming the FRP, the incarcerated population can expect additional communication on this topic prior to the September 8 re-opening date.

CALL FOR SUBMISSIONS

COPING WITH COVID: EXPERIENCING A PANDEMIC BEHIND PRISON WALLS

National Pro Bono Week is a time to celebrate and recognize the work of our dedicated *pro bono* volunteers as well as to educate the community about the many legal and other issues faced by PLS's clients. This year, PLS will host a virtual Pro Bono event highlighting the impact of the COVID-19 pandemic on incarcerated individuals and their families. We are seeking submissions about the impact that the pandemic had on you and your loved ones.

Submissions can include COVID-19 related stories, letters, poems, artwork, or even scenes with characters and dialogue. What was it like to be incarcerated during the worst part of the COVID-19 pandemic? Were you able to communicate with your family and friends on the outside? If not, how did you cope during the periods when you were unable to see or speak with them? Did you or someone close to you – a family member or friend – become infected with the virus? If so, what was that experience like? Did you lose a close friend or relative to COVID-19? What was it like to see your loved ones in person again after being separated for so long?

If you have family members or friends who would like to share their stories of coping with the anxieties and uncertainties of having a loved one behind bars during the peak of the pandemic, please encourage them to send us submissions as well.

Because our event this year will be virtual, we are *particularly* interested in receiving artwork. We will use the artwork to create a collage depicting the impact of the virus from an artistic standpoint. So, if you have been waiting to share your artistic talent – now's the time!

If you speak or write in a language other than English, please feel free to send us a submission in your primary language, that is, the language in which you are most comfortable expressing yourself.

We will compile selected submissions, and the finished product will be presented by professional actors during a live virtual performance at our November 2021 *pro bono* celebration. We will also display artwork selected from the submissions throughout the event.

Poems should be no more than one (1) page. Stories or short plays should be no more than five (5) pages in length and mailed, with the letter below to: Pro Bono Director, Prisoners' Legal Services of NY, 41 State Street, Suite M112, Albany, New York 12207, **no later than August 15, 2021.**

By sharing your first-hand accounts, we hope to educate the public about the issues you face, and recruit attorneys to take cases *pro bono,* thus increasing access to justice for indigent incarcerated persons across the State. While we cannot guarantee that each piece will be read or displayed, we encourage all submissions and will do our best to integrate as many as possible into the event. PLS reserves the right to make editorial changes to submissions.

On the next page is a sample letter for you to enclose with your submission. If you do not submit this letter, PLS will not be able to use your submission at the 2021 PLS Pro Bono event.

When you send your submission, please include this cover letter with your submission:

[DATE]

Dear Pro Bono Partnership,

Enclosed is a submission for the 2021 PLS Pro Bono Event. I authorize PLS to use my submission and my name at the event and in the event materials. I also authorize PLS to post my submission on its website and any other PLS social media platform such as Facebook, Twitter, Instagram, etc. and include it in *Pro Se*. I also authorize the use of my submission and my name in PLS informational and promotional materials.

Sincerely,

[Your Name]

IF YOU DO NOT SUBMIT THIS LETTER, PLS WILL NOT BE ABLE TO USE YOUR SUBMISSION AT THE 2021 PLS PRO BONO EVENT

Child Support: Frequently Asked Questions

Did my child support obligation automatically stop when I became incarcerated?

No, your child support obligation did not automatically stop when you were incarcerated. In order for the support obligation to be modified or suspended, you must submit a child support modification petition to the family court.

Can I modify my child support order?

In order to modify a child support order, you must be able to show:

- there has either been:
    - a substantial change in circumstances since the order was entered or last modified; or
    - three years have passed since the order was entered or last modified; or
- there has been a change in either party's income by more than 15% since the order was entered or last modified.

Is incarceration considered a change in circumstances?

On October 13, 2010, amendments to the New York Family Court Act and the Domestic Relations Law went into effect allowing for modification of child support orders based on incarceration as a change in circumstances. In most cases, if you were incarcerated after your child support order was entered or last modified, your incarceration will constitute a change in circumstances. Unfortunately, if your child support order was entered or last modified **before October 13, 2010**, incarceration may not be considered a change in circumstances because the amendments were not made to apply retroactively to orders entered or modified before October 13, 2010.

Is there anything I can do to modify my child support order if it was entered or last modified before October 13, 2010?

A modification petition may be successful even if your order was entered or last modified before October 13, 2010, if the child support is owed to New York City's Department of Social Services (NYC DSS). We do not know of any other county department of social services that has consented to modification of a child support order based on incarceration as a change in circumstances if the order was entered or modified prior to October 13, 2010.

Can the mother of my child(ren) consent to modifying the child support order?

If you owe your child support directly to the mother of your child(ren), she can consent to modifying the child support order whether or not the child support order was entered or last modified before October 13, 2010. The mother of your child(ren) cannot, however, consent to a modification if your child support is owed to the Department of Social Services (DSS).

My child is over 21 and I am still receiving bills for child support arrears. What can I do?

In New York State, unless extenuating circumstances exist, child support obligations end once a child turns 21. Though child support obligations typically end at age 21, any arrears that have accrued do not automatically go away. It is our understanding that a family court will not order a reduction of the arrears owed. If you owe any arrears to New York City DSS, however, you may be eligible for a reduction of those arrears by participating in New York City's Arrears Cap Program. PLS can provide you with an application for the Arrears Cap Program upon request. Additionally, the party to whom you owe the child support arrears can consent to a reduction of arrears owed to them.

Can PLS assist me with modifying my child support order?

PLS' Family Matters Unit may be able to assist you by drafting a child support modification petition for you to file on your own in family court. We determine whether we can offer assistance based on the facts of each case. Please note, PLS' Family Matters Unit (FMU) is funded to assist individuals with family matters that are connected to one or more of the following counties: Albany, Bronx, Erie, Kings, Nassau, New York, Queens or Richmond. A matter is connected to a county if you were convicted in the county, or your child currently lives in the county. If you would like assistance from the FMU and believe your circumstances qualify you for assistance, please write to the Family Matters Unit, Prisoners' Legal Services, 41 State Street, Suite M112, Albany, NY 12207.

Need Assistance from PLS? Write, Don't Call!

<u>Legal Mail is Privileged Mail</u>
Letters sent to PLS from incarcerated individuals are privileged mail. Privileged mail is confidential. Prison staff are prohibited from reading privileged mail. This means that generally speaking, letters to attorneys cannot be used as evidence at disciplinary hearings or in criminal proceedings.

<u>Phone Calls from Prison Tablets or Rec Yard Phones Are Not Privileged</u>
With one exception, phone calls from prison are recorded. Phone calls that are recorded by DOCCS or which take place in the presence of DOCCS employees, are not privileged. DOCCS can use any information in a recorded

call as a basis for discipline or criminal charges. If you call PLS from your tablet or from a DOCCS phone intended for use by incarcerated individuals, the only message you should leave is your name, DIN and prison and a message that you would like assistance.

Three-Way Calls Violate DOCCS Rules and Are Not Privileged
Sometimes people in custody call PLS using the three-way call function of a non-incarcerated person's cell phone. These calls are recorded, are not privileged and violate DOCCS rules. PLS staff cannot participate in three-way calls.

Writing to PLS is the Fastest and Most Reliable Method for Getting in Touch with PLS
Write us a letter describing your problem and the relief you would like and we will respond by mail. If it's an emergency, we can arrange a confidential call with you.

If you call and leave only non-confidential information – your name, DIN and the prison you are writing from – we will have to write you to find out the reason for your call. This means we will not have the information we need to assess your request for a week or two. You can cut the time in half by just writing us.

PRO SE VICTORIES!

***People v. Renato Albanese*, Ind. No. 2008-01677 (Co. Ct. Westchester Co. Dec. 22, 2020).** Defendant's motion for a violent felony override resulted in the production of evidence required by DOCCS to prove that an incarcerated individual was convicted of one of the subsections of burglary in the second degree which do not involve a deadly weapon or dangerous instrument or the infliction of physical injury.

Seven NYCRR 1900.4 sets forth the procedures for Temporary Release Committees when considering temporary release applications. Subsection (c)(1)(iii) provides that individuals convicted of certain **enumerated** (a numbered list) violent felony offenses are not eligible for temporary release unless the individual can prove that the crime did not involve:

- being armed with, the use of, the threatened use of, or the possession with intent to use unlawfully against another, a deadly weapon or a dangerous instrument; or

- the infliction of serious physical injury.

Burglary in the second degree, (Penal Law §140.25), is among the enumerated violent felony offenses in 7 NYCRR 1900.4(c)(1)(iii).

An individual convicted of one of the enumerated offenses who can provide the Temporary Release Committee with "a court generated document or a document generated by the Office of the District Attorney which establishes that his/her current commitment is for a subdivision of one of the listed violent crimes that does not involve being armed with, the use of or threatened use of, or the possession with intent to use unlawfully against another of, a deadly weapon or dangerous instrument or the infliction of a serious physical injury" will be otherwise eligible for Temporary Release.

To get such a document, Mr. Albanese made a motion in the County Court for a violent felony override. In response, the District Attorney submitted an affirmation stating that the defendant's commitment is for the violent felony offense of burglary in the second degree which did not involve a deadly weapon, a dangerous instrument or the infliction of serious bodily harm.

The court, finding that there is no right of action to compel production of a violent felony override, noted that the documents submitted by the District Attorney gave the defendant the means to apply to DOCCS for a violent felony override. Thus, the court granted the application to the extent that it was conceded by the People.

***Joseph Woods v. Tyson Reucker*, Civil Action No. 8:18-CV-0145 (N.D.N.Y. Mar. 25, 2021).** Joseph Woods brought a §1983 action for excessive force against the officers who arrested him. The officers moved for summary judgment arguing that there were no material facts in dispute and that based on the uncontested facts the defendants were entitled to judgment in their favor. In their moving papers, the defendants argued that there was no evidence showing that the plaintiff's injuries were other than "*de minimus*" (trivial). The district court disagreed.

De minimis injuries include short term pain, swelling and bruising, brief numbness from tight handcuffing and claims of minor discomfort. In this case, the court found, the only evidence of injury submitted by the defendants were the affidavits of the arresting officers, each of whom wrote that to the best of his knowledge, the plaintiff did not sustain or complain of any pain or injuries during his arrest.

The plaintiff submitted interrogatory answers stating that he suffered physical pain in his back, ribs and shoulder, that he continues to experience right shoulder pain and that he does not know if the injuries will be permanent. The plaintiff's answers also state that he underwent surgery to repair his right biceps tendon and it took over a year to heal. A witness to the arrest submitted an affidavit stating that the officers roughed up the plaintiff.

The court found that the evidence submitted by the plaintiff constitutes sufficient evidence of injury to defeat summary judgment on the excessive force claim.

***Dana Gibson v. Nicole Heary*, 2020 WL 1244653 (W.D.N.Y. Mar. 16, 2020).** The court awarded Plaintiff Dana Gibson $25.00 in costs for her motion to compel. The costs related mostly to duplication and postage. When the plaintiff moved to compel answers to interrogatories, the defendants responded by serving and filing responses to the interrogatories and asked the court to deny the motion as moot. The defendants did not argue that the plaintiff had failed to make efforts to obtain compliance prior to filing the motion to compel. After reviewing the parties' submissions and the law, the court found that because the defendants had not stated that production was underway at the time that the plaintiff moved to compel, the eventual production appeared to have been related to the plaintiff's motion. As a result, the court ruled that pursuant to Rule 37(a)(5)(A) of the Federal Rules of Civil Procedure, the plaintiff was entitled to $25.00 in costs, commenting, "[d]efendants do not object to the amount claimed, and in most circumstances that amount is *de minimus* (trivial). To plaintiff with an inmate account, this amount is a treasure."

COVID-19 Decisions

Court Affirms Denial of Habeas Relief Based on Conditions at Sullivan C.F.

In the Spring of 2020, 12 incarcerated individuals at Sullivan C.F. (SCF) filed individual habeas corpus actions seeking release from DOCCS custody because their health conditions, and in some cases, age, placed them at increased risk if they were to be infected with COVID-19. The Supreme Court, Sullivan County dismissed the petitions, citing *People ex rel. Carroll v. Keyser*, 184 A.D.3d 189 (3rd Dep't 2020). On April 1, 2021, the Second Department issued its decision in one of the appeals from the dismissed petitions. In *People ex rel. Figueroa v. Keyser*, 193 A.D.3d 1148 (3rd Dep't 2021), the court affirmed the decision of the lower court, finding that the petitioner had failed to meet his burden of demonstrating that his detention at SCF was illegal.

Petitioner Figueroa had alleged that his continued confinement at SCF violated the Eighth Amendment prohibition against cruel and unusual punishment. He submitted affidavits which stated that inadequate preventative measures were being taken at SCF to stop the spread of COVID-19, that SCF's medical facilities were incapable of caring for COVID-19 patients, and that the close conditions of incarceration, combined with his medical conditions,

posed a grave risk to him should he become infected. Thus, he argued, his immediate release was required.

While the court noted that Petitioner Figueroa "may have arguably established that objectively he was incarcerated under conditions imposing a substantial risk of harm based on the spread of COVID-19 among SCF staff and incarcerated individuals and his claimed medical conditions," the court did not reach that issue. Rather, the court found that to demonstrate the subjective element of an Eighth Amendment claim, the petitioner had to show that prison officials had failed to protect him and thereby showed deliberate indifference to that risk.

The respondent's affidavit, the court wrote, detailed the extensive protocols and preparedness measures adopted to stop the spread of COVID-19 in SCF and stated that all 23 incarcerated individuals at SCF who had tested positive for the virus had recovered. This, the court held, was sufficient (enough) to show that prison officials had not disregarded the risks posed by the virus.

Further, the court went on, if petitioner was arguing that his sentence had become "so grossly disproportionate" to the offense he had committed, as to amount to an Eighth Amendment violation, he had not produced enough evidence to support this claim.

Finally, the petitioner claimed that his conditions of confinement violated his substantive due process rights under the Fifth and Fourteenth Amendments. The court wrote that these amendments bar "certain arbitrary, wrongful government actions regardless of the procedures used to implement them." These amendments can only be relied upon, the court noted, when no other specific constitutional provision, such as the Eighth Amendment's prohibition on cruel and unusual punishment, covers the claim. Here, the court ruled, the Eighth Amendment analysis provides the appropriate standard. Having not met that standard, the substantive due process claims also fail.

Based on this analysis the court affirmed the lower court's dismissal of Mr. Figueroa's petition.

Relying on its analysis in *Figueroa,* the Second Department reached the same result in 10 of the other cases. The court did not reach the merits of the 11th case, finding that the habeas action was rendered moot because the petitioner had been transferred from SCF to Wende C.F.

William Figueroa represented himself in this Article 78 proceeding.

Petitioner's Death Moots Appeal of Dismissed Habeas

On May 1, 2020, the Supreme Court, Oneida County, dismissed a CPLR Article 70 habeas action seeking the release of Ira Goldberg, a New Yorker incarcerated at Marcy C.F. The Center for Appellate Litigation filed the petition on Mr. Goldberg's behalf, alleging that due to Mr. Goldberg's age and pre-existing medical conditions, incarceration placed him at a higher risk of serious illness or death from COVID-19. The lower court found that the petitioner failed to state a claim upon which relief could be granted and dismissed the petition. The petitioner appealed the dismissal.

The petitioner's attorney perfected the appeal and orally argued the case in the Appellate Division. After the argument, but before the court issued a decision, Mr. Goldberg died. According to DOCCS records, Mr. Goldberg died at Woodbourne C.F a month before his 73rd birthday.

On February 11, 2021, the Fourth Department in *People ex rel. Dean v. Reardon*, 191 A.D.3d 1490 (4th Dep't 2021), dismissed the appeal, ruling that because the relief the petitioner was seeking was release from incarceration, his death rendered the petition moot.

Alexandra Mitter of the Center for Appellate Advocacy represented Ira Goldberg in this Article 70 proceeding.

Court Denies IFP Status Due to Absence of Imminent Harm

Under the Prison Litigation Reform Act (PLRA), an incarcerated individual's application to proceed in a federal court action as a person without funds, known

as *in forma pauperis* (IFP), can be denied where that individual has previously filed three federal actions or appeals that were found to be frivolous, malicious, or failed to state a claim for relief. 28 U.S.C. §1915(g). This provision is known as the "three strikes rule." An incarcerated individual can overcome this provision where they are in imminent danger of serious physical injury.

In *Reginald McFadden v. John Morley*, 2021 WL 775832 (W.D.N.Y. Feb. 5, 2021), the plaintiff requested IFP status with respect to a claim that Attica C.F. had not taken adequate preventative measures or enforced the ones in place to protect the plaintiff from contracting COVID-19. In deciding whether to grant the motion, the court first noted that the plaintiff was barred from proceeding IFP because he had had at least three prior cases or appeals dismissed on the basis that they were frivolous, malicious or failed to state a claim upon which relief may be granted. Thus, the court wrote, unless the plaintiff alleged that he was in imminent danger of serious physical harm, he could not proceed IFP.

To meet the imminent danger exception, the court wrote, the danger must exist at the time that the complaint is filed and must be "fairly traceable" to the conduct complained of in the complaint. *See, Malik v. McGinnis*, 293 F.3d 559, 562-63 (2d Cir. 2002); *Pettus v. Morgenthau*, 554 F.3d 293, 299 (2d Cir. 2009). A conclusory allegation of imminent danger is not sufficient. *See Chavis v. Chappius*, 618 F.3d 162, 170 (2d Cir. 2010).

In the complaint, the plaintiff alleged that the defendants – two members of DOCCS Executive Team and two members of the Attica C.F. Executive Team – failed to provide adequate protection against contracting COVID-19 and had not enforced the safety measures that they did adopt. The plaintiff specifically alleged that corrections officers did not always wear masks when they were in close contact with incarcerated people, the supply of cleaning supplies was inadequate, corrections staff did not maintain 6 feet between the staff and incarcerated people and some incarcerated individuals did not have masks. The plaintiff also alleged that he has comorbidities: he is 68 years old, suffers from chronic obstructive pulmonary disease, high blood pressure and chronic heart disease. Finally, he noted that the kitchen block and the law library staff at Attica C.F. are under quarantine and that the Western New York region was in the orange zone of COVID-19 restrictions, and, the court noted, there were 55 COVID-19 positive incarcerated individuals at Attica C. F.

While the court concluded that the question of whether the plaintiff was in imminent danger based on his potential exposure to COVID-19 was a close one, it found that the plaintiff's allegations, "while not to be diminished in any way, are simply too speculative and conclusory."

Based on this analysis, the court denied the plaintiff's motion to proceed IFP, finding that he had **garnered** (gotten) three strikes under the PLRA and had not sufficiently alleged that he was in imminent danger of serious physical injury due to the possibility of contracting COVID-19 at Attica C.F. and the potential for increased symptoms caused by his underlying conditions.

Reginald McFadden represented himself in this §1983 action.

STATE COURT DECISIONS

Disciplinary & Administrative Segregation

Fourth Department Rules that Petitioner was Properly Excluded

"Although inmates have a fundamental right to be present during their prison disciplinary hearings, a petitioner may be properly removed from the remainder of a hearing where, upon receiving adequate warning, he or she continues to be unduly disruptive." So wrote the Fourth Department of the Appellate Division, in *Matter of Nova v. Annucci*, 194 A.D.3d 1404 (4th Dep't 2021). In *Nova*, the issue before the court was the petitioner's behavior while

he and the hearing officer viewed a video of the incident. According to the court, the record showed that petitioner argued with the hearing officer about what was shown on the video, "at times spoke over the Hearing Officer, accused both the Hearing Officer and 'everybody' of being 'a racist' began making hostile hand and body gestures, and failed to heed two warnings by the Hearing Officer that petitioner would be removed from the hearing if he did not stop his disruptive behavior."

Based on the facts in the record of Petitioner Nova's hearing, the court, citing *Matter of Rupnarine v. Prack*, 118 AD3d 1062, 1063 (3d Dep't 2014), held that the hearing officer did not act improperly in removing the petitioner from the hearing.

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Julio Nova represented himself in this Article 78 action.

Denial of Employee Assistance Leads to Re-hearing

Following a Tier II hearing, the hearing officer found Rohan Campbell guilty of harassing prison staff. Mr. Campbell filed an Article 78 challenge to the hearing, arguing that his hearing should be reversed because although he was confined to administrative segregation, he had not been provided with employee assistance to help him prepare for the hearing and, [based on the lower court's transfer of the matter to the Appellate Division], that the determination of guilt was not supported by substantial evidence.

In *Matter of Campbell v. Lorde-Gray*, 181 A.D.3d 858 (2d Dep't 2020), the court found that in violation of 7 NYCRR 251-4.1(a)(4), the petitioner had been wrongfully denied an employee assistant to help him prepare his defense. Quoting from the NYS Court of Appeals decision in *Matter of Laureano v. Kuhlman*, 75 N.Y.2d 141, 146 (1990), the court wrote, "A prisoner charged with violating a prison regulation which could result in the loss of good time credit is entitled to minimal due process protections." Here, where the incarcerated individual was confined to administrative segregation he was unable to prepare his defense, he was entitled to assistance in connection with his disciplinary proceedings pursuant to both the Due Process Clause of the Fourteenth Amendment and state administrative regulations.

In so finding, the court rejected the respondent's argument that only incarcerated individuals charged with Tier III violations are entitled to employee assistance. With respect to this argument, the court held that 7 NYCRR 251-4.1(a)(4) "makes no distinction between a tier II and a tier III disciplinary hearing with regard to an inmate's right to employee assistance."

Based on this analysis, the court ordered the hearing officer's determination annulled and remitted the matter for a re-hearing.

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Rohan Campbell represented himself in this Article 78 action.

Court of Claims

Officer's Conduct Was Within the Scope of His Employment

Antoine Galloway submitted a complaint under the Prison Rape Elimination Act (PREA) alleging that an officer at Clinton squeezed Mr. Galloways testicles during a pat frisk. The officer's supervisor investigated the claim and the officer submitted a memo about the pat frisk. According to a claim that Mr. Galloway filed in the Court of Claims, after the officer had received notice of the complaint, and when Mr. Galloway was summoned to a pat frisk which was a required before he could be interviewed about his PREA violation complaint, the officer, in concert with several of his fellow officers, intentionally and maliciously assaulted him.

After discovery had concluded, the Court of Claims conducted a bench trial on the issue of liability only. That is, the court was addressing only the issue of whether the State should be held responsible for Mr. Galloway's injuries. Mr. Galloway had finished presenting his case, the court dismissed the claim, finding that the claimant had not proven that the

officers were not acting within the scope of their employment. The claimant appealed.

On appellate review, the Third Department, in *Galloway v. State of New York*, 194 A.D.3d 1151 (3d Dep't 2021), first noted that in dismissing the claim, the trial court had applied the standard set forth in CPLR (Civil Practice Law and Rules) 4401 for a judgment as a matter of law. Application of this standard, the court noted, requires dismissal of a claim if upon viewing the evidence in the light most favorable to the non-moving party, and giving the non-moving party the benefit of every favorable inference, there is no rational process by which the trier of fact could base a finding in favor of the non-moving party. Here, the court found, that by not making any factual findings or credibility determinations, and dismissing the claim based on a legal conclusion reached after viewing the evidence in the light most favorable to the claimant, the trial court in effect granted defendant's motion for dismissal of the claim as a matter of law.

The Appellate Division ruled that in granting judgment as a matter of law, the trial court had applied the wrong standard. Applying the appropriate standard, the Third Department wrote, "we do not agree . . . that according to claimant's version of the facts and his asserted theory of liability, [the defendant] cannot be held liable for the acts of its employees under the doctrine of *respondeat superior*." Under this doctrine, the court continued, citing *Rivera v. State of New York*, 34 N.Y.3d 383 (2019), an employer may be held vicariously liable for the tortious acts of an employee if the acts were committed in furtherance of the employer's business and the employee was acting within the scope of his or her employment.

Turning to the issue of whether the employee had acted within the scope of employment, courts consider, among other factors:

- the connection between the time, place and occasion of the act;
- the history of the relationship between the employer and the employee;
- whether the act is one commonly done by such an employee;
- the extent of the departure from normal methods of performance; and
- whether the specific act was one that the employer could reasonably have anticipated (i.e., whether it was foreseeable).

Applying the correct standard to the facts before it, the Appellate Division concluded that the plaintiff satisfied the time, place and occasion factor. The undisputed evidence demonstrated that the incident took place at Clinton C.F., that the correction officers involved were on duty and that Mr. Galloway's encounter with the officer whom he had reported for a PREA violation was occasioned by Mr. Galloway having been summoned for an interview with the officer's supervisor. As for the remaining factors, testimony from the *defendant's witnesses* showed that pat frisks were routine prior to interviews and the officer who was the subject of the PREA investigation had been instructed to pat-frisk Mr. Galloway prior to the officer's supervisor's interview of Mr. Galloway about his PREA violation report.

Accepting Mr. Galloway's testimony as true, the court went on, the officer who was then subject of the report struck Mr. Galloway during the employer sanctioned pat frisk, after which other officers got involved. The court concluded that the officer's intentional tortious act of striking Mr. Galloway in the head "was not so divorced from the performance of his pat-frisk duties so as to preclude a finding that he was acting within the scope of his employment." Nor could it conclude as a matter of law, the court wrote, that the use of force was wholly outside the scope of the additional officers' duties.

Finally, the appellate court wrote, there was evidence demonstrating that the officer was aware of the PREA complaint that Mr. Galloway had filed against him. Thus, his alleged actions could have reasonably been anticipated and he should not have been the officer directed to conduct the pat frisk of Mr. Galloway.

Based on this analysis, the court concluded that the Court of Claims should not have dismissed Mr. Galloway's claim and should have instead rendered a verdict in its capacity as the trier of fact. The court

reversed the judgment and remitted the matter to the trial court to render a verdict based on the evidence produced at trial.

Brian Dratch of Franzblau Dratch, PC, represented Mr. Galloway in this Court of Claims action.

Sentencing & Jail Time

Petitioner is Not Entitled to Additional Jail Time Credit

In 2014, Petitioner Jackie Hillard was sentenced to a two-year determinate term and two years post release supervision (PRS). He was released to PRS in 2015, and arrested in March 2017 for committing a new offense. At the time of his arrest, he owed 121 days of PRS. The Division of Parole did not file a declaration of delinquency. The petitioner remained in jail on the new charges between the date of his arrest and his conviction, sentencing and transfer to DOCCS on the new charges.

When the petitioner went into DOCCS custody, the county jail issued a jail time certificate crediting him with the period between his arrest and his commitment to DOCCS and DOCCS accordingly computed his parole eligibility, conditional release and maximum expiration dates. Later, the county jail issued an amended jail time certificate, crediting petitioner with 121 fewer days. The petitioner filed an Article 78 petition against the DOCCS, seeking restoration of the 121 days of jail time credit.

In *Matter of Hillard v. Annucci*, 190 A.D.3d 1183 (3d Dep't 2021), the Third Department affirmed the lower court's dismissal of the petition. The court found that although the 121 days had originally been credited toward the sentence the petitioner was now serving, that period of time had already been credited to the period of time remaining on his 2014 PRS term.

To reach this result, the court relied on Penal Law (PL) §70.30(3), the law governing the calculation of jail time credit. PL §70.30(3) provides that jail time credit "shall not include any time that is credited against the term or maximum term of any previously imposed sentence or period of [PRS]." Here, the court wrote, at the time of the petitioner's arrest and placement in jail on the 2017 charges, he was still serving the term of PRS included in his 2014 sentence and continued to serve that sentence, uninterrupted, until the term of PRS ended 121 days later. Thus, the time at issue, the court found, was credited to a previously imposed sentence. As the 121 days had been credited to a previously imposed sentence, the court ruled that the lower court had correctly concluded that it could not also be credited to the petitioner's 2018 sentence. For this reason, the Appellate Division affirmed the lower court's dismissal of the petition.

Jackie Hillard represented himself in this Article 78 proceeding.

Miscellaneous

Removal From ASAT Had Rational Basis

Following his removal from the Alcohol and Substance Abuse Treatment (ASAT) program, Darrell Graham filed a grievance contesting the removal. The grievance was denied and on appeal, the Central Office Review Committee (CORC) affirmed the denial.

In *Matter of Graham v. Annucci*, 193 A.D.3d 279 (4th Dep't 2021), the petitioner challenged DOCCS' decision to remove him from ASAT, arguing that the removal lacked a rational basis and was arbitrary and capricious and an abuse of discretion. The respondent submitted proof that the petitioner was removed because 1) in violation of the rules set forth in the ASAT operations manual, the petitioner had refused to sign his "substance abuse treatment continuing recovery plan," and 2) the petitioner's inability to identify his treatment plan goals.

Based on the above described evidence, the court found that the removal from the ASAT program was supported by a rational basis and was neither arbitrary and capricious nor an abuse of discretion.

Darrell Graham represented himself in this Article 78 proceeding.

Immigration Matters

This month's column will focus on *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021), a Supreme Court decision from April 2021 which vacated a deportation order against a Guatemalan noncitizen because the federal government failed to include necessary information when filing its deportation case in immigration court. *Niz-Chavez* builds upon a prior Supreme Court decision, *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), which also vacated a deportation order after the federal government omitted information from its immigration charging document. Together, *Niz-Chavez* and *Pereira* strongly affirm that the federal government may not simply bypass procedural requirements for the sake of expediency.

Both *Niz-Chavez* and *Pereira* deal with a document called a "Notice to Appear" or "NTA." Like an indictment in criminal court, an NTA sets forth the government's legal theory for seeking to deport the noncitizen from the United States. An NTA operates as the fundamental document in a deportation case: to initiate deportation proceedings against a noncitizen, the Department of Homeland Security ("DHS") must file an NTA with the appropriate the immigration court after serving a copy on the noncitizen. 8 C.F.R. §1003.14(a); U.S.C. §1229(a). Once the NTA is filed in immigration court, an immigration judge will conduct hearings to determine whether DHS has met its burden of proving deportability and whether the noncitizen is entitled to relief from deportation.

Under the Immigration and Nationality Act ("INA") an NTA must contain specific information so that the noncitizen is adequately apprised of the government's case. One such piece of information is "[t]he time and place at which the proceedings will be held" – that is, the time and place of the immigration court hearing. 8 U.S.C. §1229(a)(1)(G)(i). This requirement posed a quandary to the government: since DHS and the Department of Justice – the agency which runs the immigration courts – are different agencies, how would DHS know the court date *before* issuing the NTA and filing it with court? The government initially solved this problem by building a scheduling system which allowed DHS to access the immigration court calendar to ascertain the hearing date and put that information on the NTA.

At some point, however, this scheduling system apparently became unusable, so DHS came up with a workaround: DHS would simply state on the NTA that the hearing would take place at a time and place "to be determined," and only after the NTA was filed with immigration court, would the immigration court send a hearing notice to the noncitizen informing them of the actual time and place of the next court date. Thus, the information required by the INA would be split into two documents, some supplied by the NTA, and some by the hearing notice issued by the immigration court.

In *Pereira*, the Supreme Court considered the effect of this two-document policy on an application for cancellation of removal, which allows certain undocumented noncitizens to apply for lawful permanent resident status in deportation proceedings. To be eligible for cancellation of removal, a noncitizen must have been physically present in the United States for a continuous period of not less than 10 years immediately preceding the application for cancellation. 8 U.S.C. §1229(b)(1)(A). But under the INA's "stop-time" rule, the 10-year period of time is "deemed to end . . . when the alien is served" with an NTA. 8 U.S.C. §1229(d)(1)(A). In the deportation case of petitioner Wescley Fonseca Pereira, the immigration judge found that Pereira did not have the necessary 10-year presence because DHS served him with an NTA in 2006, six years after he entered the United States. Pereira argued that the stop-time rule did not apply since the NTA did not contain the time and place of the hearing, but the immigration judge disagreed and ordered him deported to his home country of Brazil.

In an 8-1 decision written by Justice Sotomayor, the Supreme Court agreed with Pereira, vacated the deportation order, and remanded the case so that he could apply for cancellation of removal. As Justice Sotomayor explained:

> If the Government serves a noncitizen with a document that is labeled "notice to appear," but the document fails to specify either the time or place of the removal proceedings, does it trigger the stop-time rule? The answer is as obvious as it seems: No. A notice that does not inform a noncitizen when and where to appear for removal proceedings is not a "notice to appear under section 1229(a)" and therefore does not trigger the stop-time rule.

Pereira, 138 S. Ct. at 2110.

While *Pereira* ostensibly dealt only with the stop-time rule for cancellation of removal, the decision raised an immediate question: if an NTA is a fundamental charging document, does a defective NTA mean that the immigration court never had jurisdiction to conduct removal proceedings in the first place? Much litigation on this question followed, leading to the Board of Immigration Appeals ("BIA") decision called *Matter of Bermudez-Cota*, 27 I. & N. Dec. 441 (BIA 2018). In that case, the BIA found that a defective NTA does *not* deprive an immigration court of jurisdiction so long as that the noncitizen is eventually served with a notice setting forth the specific time and place of the hearing – in essence, finding the DHS two-document policy sufficient to establish jurisdiction in the immigration court.

In *Niz-Chavez*, the Supreme Court rejected the reasoning of *Bermudez-Cota* and affirmed that the information required in an NTA cannot be issued by installment in multiple documents. In the underlying removal case, the BIA found that even though petitioner was initially served with a defective NTA, he ultimately received a hearing notice, and those two documents collectively satisfied the stop-time rule. Writing for a 6-3 majority, Justice Gorsuch rejected this reasoning and found that two-document notice did not satisfy the plain terms of the INA. As Justice Gorsuch explained:

> the law's terms ensure that, when the federal government seeks a procedural advantage against an individual, it will at least supply him with a single and reasonably comprehensive statement of the nature of the proceedings against him. If men must turn square corners when they deal with the government, it cannot be too much to expect the government to turn square corners when it deals with them.

Niz-Chavez v, 141 S. Ct. at 1486 (2021). *Niz-Chavez* thus stands as a strong statement that the Executive branch cannot circumvent Congress' statutory requirements simply for convenience's sake. In the long term, the decision will almost certainly give rise to more litigation on the subject of defective NTAs, and we may well see the Supreme Court revisit this issue in a future case.

What Did You Learn?

1. **Unless permission to file a late grievance is granted, the deadline for filing a grievance in NYS DOCCS is:**
   a. 5 days.
   b. 10 days.
   c. 21 days.
   d. 45 days.

2. **In federal civil rights litigation, an incarcerated person is required to exhaust remedies established by:**
   a. The Federal Rules of Civil Procedure.
   b. The DOCCS grievance system
   c. The New York Rules of Civil Practice Law and Rules (CPLR).
   d. Case law on deliberate indifference.

3. **In *Rucker v. Giffen*, the Second Circuit held that the plaintiff:**
   a. Could not proceed with his case because he failed to exhaust his administrative remedies.
   b. Had no legitimate reason for not filing a grievance within the specified period.

c. Could proceed with his case because, due his medical condition, administrative remedies were unavailable.
d. Failed to demonstrate the unavailability of administrative remedies.

4. An incarcerated individual's child support obligation:
a. Automatically ends when he or she enters DOCCS custody.
b. May be modified if the individual files a motion showing there has been a substantial change of circumstances, including the incarceration of the parent required to pay support since the child support order was entered or last modified.
c. May be modified if he or she files a motion showing that a year has passed since the child support order was entered or last modified.
d. Upon the consent of the beneficiary of the child support order if the child support funds are owed to DSS.

5. An incarcerated person convicted of a violent felony offense may be eligible for temporary release if he or she shows that the offense did not involve:
a. The infliction of any physical injury.
b. The taking of property.
c. The operation of a motor vehicle while intoxicated or impaired by illegal drugs resulting in physical injury to any person.
d. The use or threatened use of a deadly weapon or dangerous instrument.

6. An incarcerated individual seeking to obtain a violent felony override must obtain the necessary proof from:
a. The District Attorney of, or the County/Supreme Court in, the county where the individual was convicted.
b. The Temporary Release Committee.
c. The Division of Criminal Justice Services (DCJS).
d. The assigned counsel program or the office of the public defender.

7. In *People v. Renato Albanese*, the defendant obtained the information needed for a violent felony override by:
a. Writing directly to the District Attorney.
b. Filing a motion with the court where he was convicted.
c. Writing directly to DOCCS.
d. Obtaining a copy of his criminal history.

8. The Court's ruling in *Joseph Woods v. Tyson Reucker, et al.*, found that that the defendants were not entitled to summary judgment because they failed to show that there was undisputed evidence that the plaintiff's injuries:
a. Were *de minimus*.
b. Were life-threatening.
c. Were permanent.
d. Required only two days of hospitalization.

9. In *People ex rel. Figueroa v. Keyser*, the Third Department found that a prisoner complaining about the risk of COVID-19 was not entitled to release because:
a. The COVID-19 pandemic did not in fact threaten the lives of state prisoners.
b. DOCCS had policies intended to eliminate the threat presented by the COVID-19 pandemic.
c. The threat from COVID-19 would never entitle a prisoner to release.
d. The policies adopted and measures taken by DOCCS showed it was not deliberately indifferent to the risks presented by COVID-19.

10. In *Matter of Campbell v. Lorde-Gray*, the Second Department ruled that an individual in administrative segregation is entitled to an employee assistant when he contests disciplinary charges in:
a. Any hearing that may result in more than 30 days of segregated confinement.
b. A Tier II or Tier III hearing involving charges of violent conduct.
c. A hearing that may result in suspension of visits.

d. Any hearing where the hearing officer finds that an employee assistant is needed to assure due process to the charged prisoner.

ANSWERS

1.	c	6.	a
2.	b	7.	b
3.	c	8.	a
4.	b	9.	d
5.	d	10.	a

Notices

Your Right to an Education

If you have a learning disability, need a high school diploma, or have questions about access to academic or vocational programs, for more information please write to:

Maria E. Pagano
Education Unit
Prisoners' Legal Services of New York
14 Lafayette Square, Suite 510
Buffalo, New York 14203
(716) 854-1007

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