Pro Se

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Deliberate Indifference Complaint and PI Motion Result in Treatment

Anthony Bushey came into DOCCS custody in March 2018. He was 58 years old and was being treated for a medical problem resulting from his body's failure to produce a hormone in sufficient amounts.[1] He arrived with a prescription for hormone medication, a form of treatment that he had been receiving for a decade. The medication helps control the symptoms of the disorder: mood swings, depression, joint pains, decreased muscle mass, decreased bone density and anemia. Without the medication, Mr. Bushey feels fatigued and weak, has difficulty staying awake, loses muscle mass, and is subject to mood swings.

In November 2018, Mr. Bushey was seen by an endocrinologist who requested lab tests and noted that she wanted to see him when the results were available. When Mr. Bushey's DOCCS medical care provider tried to set up the second appointment, Regional Medical Director David Dinello refused to make authorize the appointment, even though Mr. Bushey's hormone level had fallen from a low level of 300 to an even lower level of 117.6.

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Also Inside . . .

[1] The facts in this article are taken from the complaint and are the facts on which the Court relies to decide the defendants' motion to dismiss. As required in deciding a motion to dismiss, the Court views the facts in the light most favorable to the plaintiff. The Court has not determined that these facts are true; rather, the inquiry is: If the facts are true, do they satisfy the requirements for stating a claim.

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FINDING HOPE IN OUR TIME

A Message from the Executive Director, Karen L. Murtagh

It's been quite a year on so many fronts, with Covid at the forefront. Our individual responses to daily dramas vary: from "stiff upper lip", to sadness, to acting out. Whatever our individual responses, they exist within a seeming epidemic of public despair.

I'll admit that hope may be the last thing we are feeling right now, with ambivalent feelings heading into the new year. Even when we try to think positively, it seems forced and we don't really believe it.

So how do we navigate our way through the malaise in the healthiest way possible?

The answer, I think, lies within each of us and our ability to achieve a measure of hope. For our readership, this is particularly challenging but, I would submit, not out of reach.

The fields of neuroscience and psychology are instructive in our journey to increase our individual capacities for hope, and to find a thankful spirit in the face of great challenges.

The field of neuroscience tells us that little shifts can lead to big changes in our emotional capacities. At its core, neuroscience instructs us to look inward to plot a reasonable path forward (and to not take on more than we are capable of). By analogy, if we wanted to run our first marathon, we wouldn't start with 26.2 miles. We'd get off the couch and walk around the block. Neuroscience tells us that developing our emotional capacities must be done in the same way.

Psychology is similarly instructive. When something happens that threatens to leave you hopeless, it's important to take stock of your strength, resilience and ability to remain hopeful, recognizing that without hope, there is no next step.

Finding hope is different for each of us. Many find it in action (lifestyle changes); love (sharing with others and asking for help); education (knowledge is power; to get it, we must seek credible sources of information); giving (of yourself to others); gratitude (for the positives in your life and for our collective blessings from the times in which we live, like scientific breakthroughs, etc.)

Whatever your path to hope, know that with it comes improved health and better choices. As members of the "greatest generation" have often told me, we've been through worse times and have emerged all the better for it.

So, on that note, let's give thanks for what we have and find it within each of us to work toward a better tomorrow – making this a true season of hope.

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After a year in DOCCS custody, Mr. Bushey's hormone level had fallen to 108.8 and Mr. Bushey had joint pains, impaired walking and pain in his knees and feet. Dr. Dinello denied Mr. Bushey's requests for help.

In October 2019, Mr. Bushey was transferred to Marcy where he was placed under the care of Nurse Practitioner (NP) Corigliano. NP Corigliano denied Mr. Bushey's request to resume the hormone treatment and instead, gave Mr. Bushey a quad cane. When Mr. Bushey's attorney contacted John Morley, Deputy Commissioner and DOCCS Chief Medical Officer, Dr. Morley stated that Mr. Bushey's primary care provider was responsible for determining his medical treatment.

In the year following his move to Marcy, Mr. Bushey fell twice, breaking his right hand and foot. His hormone level dropped to 78.2. Drs. Dinello and Morley and NP Corigliano denied his requests for treatment. An endocrinologist hired by Mr. Bushey's attorney, Dr. Sloane, reviewed Mr. Bushey's medical records and examined him. The doctor advised that based on the lab tests, Mr. Bushey should be tested for cancer and if cancer was ruled out, should be treated with the hormone therapy.

In January 2021, Mr. Bushey filed an Eighth Amendment deliberate indifference complaint in the Northern District of New York seeking treatment and damages. The defendants moved to dismiss the complaint. Mr. Bushey opposed the motion to dismiss and moved for a preliminary injunction ordering treatment in accordance with the plaintiff's expert's recommendations.

The Defendants' Motion to Dismiss

In its decision, *Anthony Bushey v. John Morley*, 2021 WL 4134794 (N.D.N.Y Sept. 10, 2021), the Court first summarized what an incarcerated individual must plead to support a claim of deliberate indifference to a serious medical need. The plaintiff must allege:

1. A sufficiently serious deprivation of medical care; and

2. That the defendants were subjectively reckless in their denial of medical care.

The first requirement is objective. To be a sufficiently serious deprivation of care, the need for medical care must be urgent and the condition one that may produce death, degeneration or extreme pain.

Where medical treatment has been provided but is alleged to be objectively inadequate, the seriousness inquiry focuses on the delay or interruption in treatment rather than only on the urgency and seriousness of the individual's underlying medical condition.

The Court found that the plaintiff's allegations regarding the seriousness of his medical condition and his need for treatment satisfied the objective element of a deliberate indifference claim.

The second requirement is subjective, i.e., it relates to the defendant's state of mind. Each defendant must have acted (or failed to act) while actually aware of a substantial risk that serious harm will result.

The Court found that the plaintiff's allegations also satisfied the subjective component of his claim. Mr. Bushey alleged that the defendants

knew about his condition and his need for hormone treatment and that Defendants Corigliano and Morley either denied his requests or ignored them and that they did this despite his repeated complaints of pain. Despite his constant complaints of pain and despite the fact that an endocrinologist had recommended an oncology work up or hormone therapy, the plaintiff alleged, Defendant Dinello repeatedly denied follow-up appointments and referrals to see an endocrinologist.

Accepting the plaintiff's allegations as true – as the Court is required to do when considering a motion to dismiss – the Court found that Mr. Bushey has sufficiently pleaded an Eighth Amendment claim. For this reason, it denied the defendants' motion to dismiss.

The Plaintiff's Motion for a Preliminary Injunction

When the defendants moved to dismiss the complaint, the plaintiff moved for a preliminary injunction directing Defendant Morley to arrange for immediate treatment of the plaintiff in accordance with the "professional opinions and recommendations of Dr. Sloane until the plaintiff is released from DOCCS custody." The Court reserved decision on the issue of whether to conduct a hearing on the preliminary injunction motion until it decided the motion to dismiss. After the Court denied the defendants' motion to dismiss, the Court conducted a hearing with respect to the plaintiff's motion.

After the hearing, but before the Court issued a decision, DOCCS arranged for Mr. Bushey to be examined by an endocrinologist who recommended that the plaintiff be treated with hormone therapy. In the declaration attesting to this treatment given to Mr. Bushey, Dr. Morley stated that Mr. Bushey received his first hormone injection on October 19, 2021 and would continue to receive this treatment while he was in the DOCCS custody until the plaintiff's endocrinologist decides that Mr. Bushey does not need the treatment. While there are still unresolved treatment issues, the defendants have agreed that Mr. Bushey needs hormone therapy, thereby narrowing the issues in dispute. And while those issues are being litigated, Mr. Bushey is getting the treatment he asked the Court to order.

Amy Jane Agnew, Law Office of Amy Jane Agnew, P.C., represented Anthony Bushey in this Section 1983 case.

News and Notes

New Law Requires DOCCS to Offer MAT in Drug Treatment Programs

On October 7, 2021, Governor Hochul signed legislation requiring DOCCS to offer Medication Assisted Treatment (MAT) to incarcerated individuals with substance use disorders for which addiction medications approved by the Food and Drug Administration (FDA) exist. The forms of medically assisted treatment currently authorized for treatment by the FDA include buprenorphine, methadone and naltrexone. Medication Assisted Treatment is defined as the "treatment of chemical dependence or abuse with medications requiring a prescription or order from an authorized prescribing professional." This law is found in §626 of the Correction Law and is known as "Medication Assisted Treatment in Correctional Facilities." The law goes into effect on March 24, 2022 (120 days from October 7).

The law requires DOCCS to provide MAT to all qualified incarcerated individuals.[2] Incarcerated individuals may enter a MAT drug treatment program at any time during their incarceration. Individuals using MAT before their incarceration are eligible to continue their treatment in the MAT program for any period of time during their period of incarceration.

DOCCS cannot deny admission to the MAT program on the basis of a positive drug screening upon entering DOCCS custody or upon intake into the MAT program. Individuals enrolled in the MAT program cannot be disciplined for positive drug screening. No individual can be removed from, or denied participation in, the MAT program on the basis of having received any disciplinary infraction either while participating in the program or before entering the program.

The treatment offered to individuals who choose MAT will also include development of a re-reentry strategy. Such a strategy will require that DOCCS provide MAT participants with:

- assistance in enrolling in Medicaid prior to release;
- information on available treatment facilities in the area where they will be released; housing and employment resources; and
- any other information that will assist an individual in continued recovery when they are released.

In an effort to prevent relapse, upon the release of an individual enrolled in the MAT program, DOCCS will provide a one-week supply of any necessary medication so that individuals may continue MAT.

Westchester County Opens Conviction Review Unit

The Westchester County District Attorney's Office Conviction Review Unit ("CRU") examines credible, investigatable claims of actual innocence and wrongful conviction arising out of convictions in Westchester County, and presents findings and recommendations to the District Attorney. If a convicted person is currently being represented by an attorney, a request for review must be made by their attorney. If a convicted person is not currently represented by an attorney, they may make a written request for review. Requests for CRU review should be sent to:

Conviction Review Unit
Westchester County District Attorney's Office
111 Dr. Martin Luther King Jr. Blvd.
White Plains, NY 10601

Requests for review must present a non-frivolous, investigatable claim of actual innocence or wrongful conviction. Claims regarding convictions outside of Westchester County, or that raise only legal errors that could be raised on direct appeal will be not be considered. The CRU will also reject requests for review if it determines that no plausible or credible claim of actual innocence or wrongful conviction can be made or reasonably investigated. Note that the CRU is not an innocence project and that CRU attorneys report to the District Attorney. CRU attorneys cannot legally or ethically offer legal advice to applicants or their representatives, and the attorney-client privilege does not apply to any

[2] While the term "qualified individuals" is not defined in the legislation, the likely intended definition is incarcerated individuals who are determined to suffer from a substance use disorder for which FDA approved addiction medications exist. *See,* Correction Law §626(1)(A) which states, "After a medical screening, inmates who are determined to suffer from a substance use disorder for which FDA approved addiction medications exist, shall be offered placement in MAT." The use of the word "shall" requires that DOCCS offer individuals who are determined to suffer from a substance use disorder for which FDA approved addiction medications exist the opportunity to participate in an MAT program.

information included in an applicant's communications with the CRU.

PRO SE VICTORIES!

***Richard Timmons v. Superintendent Timothy McCarthy*, Index No. 2021-0034 (Sup. Ct. Cayuga Co. July 23, 2021). Court finds petitioner's removal from Auburn C.F.'s Earned Housing Unit (EHU) to be arbitrary and capricious.** Mr. Timmons is serving a sentence of life without parole. He entered the Auburn EHU in 2015 and was removed in 2020. When he was removed, Mr. Timmons was given a memo saying that his application for the EHU had been denied based on his sentence. When he filed a grievance protesting his removal from the EHU, the IGRC denied the grievance, stating that Directive 4023 gives the Superintendent the authority to restrict access to the EHU based on security concerns when an individual is serving life without parole. On appeal, the Superintendent and CORC upheld the denial.

The Court noted that although prison administrators have wide latitude in managing prisons, their decisions must be rationally based. Mr. Timmons had been in the EHU for 16 months before the Directive giving the Superintendent the authority to exclude individuals serving life without parole from the EHU was adopted. Further, the Court stated, in spite of the statement in the memo that Mr. Timmons' application for the EHU had been denied, Mr. Timmons had not applied to the EHU; rather, he had been in the EHU for 16 months without any problems. The respondent did not allege that there was any incident that prompted the removal, nor did he provide any other rational basis for removing Mr. Timmons from the EHU. Neither the Superintendent nor CORC, the Court wrote, clarified why Mr. Timmons was allowed to remain in the EHU for 16 months after the adoption of the Directive or why he was denied admittance to the EHU based on an application that he did not make.

Based on this analysis, the Court found that the denial of the petitioner's grievance was arbitrary and capricious and without a rational basis, granted the grievance and ordered the petitioner reinstated to the EHU within 7 days of the Court's decision.

***Dana Gibson v. Nicole Heary, et al.*, Docket No. 17 CV 272 (W.D.N.Y. Sept. 23, 2021).** Alleging that she was assaulted by officers in violation of the Eighth Amendment and that depriving her of a menorah while she was in SHU violated the Religious Land Use and Institutionalized Persons Act, Plaintiff Gibson successfully settled her claims against the defendants.

STATE COURT DECISIONS

COVID-19 Issues

Third Department Rejects Habeas Petition of Individual Seeking Release from Sullivan C.F.

In July, 2020, Paulino Valenzuela filed a habeas action seeking release from Sullivan Correctional Facility (Sullivan), claiming that for health reasons, his continued confinement during the COVID-19 pandemic was unconstitutional. In support of his argument, Mr. Valenzuela cited the conditions inherent in a prison setting and the fact that he had contracted the virus. He argued that the respondent had been deliberately indifferent to the health risks posed to him at Sullivan and that the conditions of confinement at Sullivan exposed him to the risk of a second exposure.

The respondent moved to dismiss the petition **in lieu of** (instead of) submitting an answer. He

submitted an affidavit detailing the "preventative measures" in place at Sullivan in August 2020 to reduce the spread of the virus. The lower court dismissed the petition without a hearing.

In *People ex rel. Valenzuela v. Keyser*, 197 A.D.3d 1484 (3d Dep't 2021), the Court first noted that the petitioner was convicted in 2011 and is not eligible for parole until 2075. After reviewing the petitioner's allegations, and the fact that since the petition was submitted, DOCCS had offered the vaccine to all incarcerated individuals at Sullivan, the Court found that the petitioner had "failed to meet his burden of showing that his detention is illegal or unconstitutional under a due process or Eighth Amendment analysis."

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Paulino Valenzuela represented himself in this Article 78 proceeding.

Disciplinary and Administrative Segregation

Substantial Evidence of Intoxication May be Based on Observations

In two recent decisions, the Third Department ruled that in spite of the absence of drug or alcohol test results, DOCCS had produced substantial evidence of intoxication.

In the first case, *Matter of Meadows v. Rockwood*, 152 N.Y.S.3d 857 (3d Dep't 2021), the Misbehavior Report alleged that its author had seen Shaquan Meadows "glassy eye[d] and talking to the ceiling and walking aimlessly around the recreation room." Taken to the infirmary for evaluation, the report continued, the nurse noted that Mr. Meadows' speech was slurred, his heart rate and blood pressure elevated, and his eyes red and his pupils dilated and nonreactive to light. He was charged with being under the influence of alcohol or an intoxicant. At the related hearing, the hearing officer found Mr. Meadows guilty of the charge.

The *Meadows* Court rejected the argument that the determination of guilt was not supported by substantial evidence. The Court found that the Misbehavior Report and the attached Inmate Injury Report setting forth the nurse's assessment of the petitioner's physical condition, and the testimony of the officer who observed the petitioner in the recreation room and noted the petitioner's difficulty in steadying himself without leaning against the wall was substantial evidence.

The Court found that the absence of urinalysis or other scientific testing to confirm the presence of an intoxicant did not undermine the finding of guilt as the charge was based on petitioner's observable behavior at the time of the report.

In the second case, *Matter of Rodriguez v. Superintendent of Ulster Correctional Facility*, 197 A.D.3d 1494 (3d Dep't 2021), the Misbehavior Report stated that an officer had observed Mr. Rodriguez "stumbling to his cell with his eyes rolled back," appearing confused and mumbling incoherently. When spoken to by the author of the Misbehavior Report, the report alleges, Mr. Rodriguez failed to respond. The officer took Mr. Rodriguez to the infirmary where a nurse noted that he had dilated pupils, a high unlabored pulse and heart rate, and slow mumbled speech. Based on her observations and experience, the nurse concluded that Mr. Rodriguez was "under the influence of an intoxicant." The officer who observed Mr. Rodriguez's conduct wrote the Misbehavior Report which the nurse endorsed.

After a hearing at which he was found guilty and the denial of his administrative appeal, Mr.

Rodriguez filed an Article 78 challenge which, because it raised an issue of whether the determination of guilt was supported by substantial evidence, was transferred to the Appellate Division.

The Court confirmed the respondent's determination of guilt. The Court concluded that the detailed Misbehavior Report, endorsed by the nurse who had examined the petitioner and concluded that he was under the influence of an intoxicant, in combination with the hearing testimony, provided substantial evidence of guilt. The Court also commented, *citing among other decisions, Matter of Vargus v. Annucci*, 147 A.D.3d 1124 (3d Dep't 2017) that "the absence of positive urinalysis test results is not dispositive here." In *Vargus*, the determination of guilt was based on a nurse's observations of the petitioner's condition. In spite of a negative urinalysis test, the *Vargus* Court found that the nurse's observations were substantial evidence of guilt.

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Shaquan Meadows and Michael Rodriguez represented themselves in their respective Article 78 proceedings.

Tier III Determination Leads to Ad Seg Recommendation

In *Matter of Sorrentino v. Annucci*, 197 A.D.3d 1486 (3d Dep't 2021), the Court considered two hearings. The first was a disciplinary hearing finding the petitioner guilty of making threats when, after asking a correction officer if another officer was married, he replied, "I would like to marry her . . . just so I could kill her!" In confirming the determination of guilt, the Court rejected the petitioner's argument that he was not guilty of threats because the statement at issue was not made to the officer about whom he made the statement. The Court found that this fact was of "no consequence" because the rule prohibits "any threats" made "under any circumstances." The Court also found that the petitioner's defense – that he was not threatening but only joking by referencing the factual circumstances of the crime that he'd been convicted of committing – presented only a credibility issue which the hearing officer resolved against him. That is, the hearing officer found that he was threatening the officer as opposed to making a joke, as the petitioner claimed.

Following the determination of guilt at the Tier III, a sergeant recommended that Mr. Sorrentino be placed in administrative segregation for the safety of the staff. After a hearing on the issue, the hearing officer found the facts presented supported the recommendation. In its review of the hearing, the Court first noted, citing 7 NYCRR 301.4(a), a determination that administrative segregation is warranted will be upheld if it is supported by substantial evidence that an incarcerated individual's continued presence in general population would pose an unreasonable and demonstrable risk to the safety and security of staff, incarcerated individuals, the facility or would present an unreasonable risk of escape.

The Court went on to hold that the separation order between the petitioner and the officer against whom the threat was made and the testimony of the sergeant who wrote the administrative segregation recommendation, was substantial evidence showing that the petitioner posed a threat to the safety of the general prison population and that administrative segregation was required.

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Bernard Sorrentino represented himself in this Article 78 proceeding.

Preservation Issues Doom Challenge to Arson Charge

In *Matter of Lightner v. Venettozzi*, 197 A.D.3d 1448 (3d Dep't 2021), the petitioner was found guilty of arson, using flammable material and property damage based on evidence that he had

lit a slow burning wick that caused his cell to catch fire while he was in the visiting room. Testimony at the hearing established that the wick could have burned for an hour before igniting the fire. Confidential testimony supported the allegation that petitioner, as opposed to someone else, started the fire.

Based on the petitioner's failure to preserve the issue by making an objection at the hearing or in his administrative appeal, the Court refused to consider the claim that the hearing officer had failed to independently assess the reliability and credibility of the confidential information on which the hearing officer relied.

The Court also refused to consider the petitioner's claims that he was wrongfully denied witnesses and documentary evidence for the same reason. At the start of the hearing, the Court noted, the hearing officer reviewed the assistant form which listed the witnesses and documentary evidence requested by the petitioner. During the hearing, however, the Court continued, the petitioner did not renew his request for the witnesses or the evidence, even when the hearing officer asked if he had anything further before the hearing closed. Under these circumstances, the Court concluded, the petitioner had not preserved the issue for the **judicial** (court) review.

For more information about preservation of issues, you can write the PLS office which provides legal assistance to the incarcerated individuals at the prison where you are confined and ask for the memo, "Preserving Your Right to Judicial Review, Exhaustion of Administrative Remedies and the Effect of Pleading Guilty."

Abdul Latif Lightner represented himself in this Article 78 proceeding.

Parole

Court Confirms Revocation But Reduces Time Assessment

David Coleman was subject to a parole revocation hearing. He was found to have violated parole and the penalty imposed was to remain in DOCCS custody until the expiration of his term of post release supervision. After exhausting his administrative remedies, Mr. Coleman filed an Article 78 challenge to the hearing.

In *Matter of Coleman v. Annucci*, 2021 WL 5182858 (1st Dep't Nov. 9, 2021), the Court found that there was substantial evidence to support the determination that the petitioner had violated the conditions of parole by possessing a smartphone without his parole officer's permission and using the phone to visit social media sites without this parole officer's permission. There was also substantial evidence, the Court found, that the petitioner possessed sexually explicit photos at a time when his conditions of parole prohibited their possession.

Nonetheless, the Court held that the respondent abused its discretion when it imposed a time assessment that amounted to the balance of the time owed on post-release supervision. This amount of time, the Court noted, was more than two times greater than the petitioner's underlying term of incarceration. For this reason, the Court held that "the maximum penalty for petitioner's parole violation that can be sustained on this record is reincarceration for a period no greater

than 30 months. The Court remitted the matter to the respondent for imposition of a new penalty consistent with this decision.

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Naila Saddiqui of the Legal Aid Society represented David Coleman in this Article 78 proceeding.

Sentence and Jail Time

Article 78 Filing Leads to Certification of Additional JTC

Kwame McDermott knew that the Division of Parole had incorrectly determined the date on which he had violated parole and that as a result, he was entitled to additional jail time credit. He filed an Article 78 against the Sheriff of Dutchess County and the DOCCS Commissioner challenging his parole violation date and seeking recalculation of his jail time credit.

In its answer, the Dutchess County Sheriff agreed that Mr. McDermott was entitled to 375 days of jail time credit, directed DOCCS to accept certification of jail time credit in that amount and moved to dismiss the petition. In response, Mr. McDermott asked to amend his complaint to add some additional claims. The Court denied his motion to amend then granted the respondents' motion to dismiss.

In *Matter of McDermott v. Annucci*, 196 A.D.3d 986 (3d Dep't 2021), the Court held that because the petitioner had received all of the relief to which he was entitled, the Court had properly dismissed the petition.

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Kwame McDermott represented himself in this Article 78 proceeding.

Court of Claims

Appellate Court Agrees with Claimant and Increases Damages For Wrongful Confinement

Taliyah Taylor was accused of fighting, violent conduct and creating a disturbance. The hearing officer found her guilty of the charges and imposed a sanction of 20 days keeplock. Upon administrative appeal, the hearing was reversed because the hearing officer had denied Ms. Taylor's request for documents relating to the hearing.

Ms. Taylor then filed a claim in the Court of Claims, seeking damages for the time that she was wrongfully confined to keeplock. After trial, the Court found in her favor and awarded $10.00 a day for each day that Ms. Taylor had been in keeplock. Ms. Taylor appealed, arguing that the amount of damages was insufficient.

In *Taylor v. State of New York*, 191 A.D.3d 915 (2d Dep't 2021), the Court, citing *Estate of Loughlin v. State of New York*, 146 A.D.3d 863, 864 (2d Dep't 2017), first noted that the standard of review for a damages award is whether it "deviates materially from what would be reasonable compensation."

The Court then recounted the numerous ways in which the hearing officer had violated his duty to provide a fair hearing:

- Disregarded the claimant's witnesses before they testified;

- Decided that the claimant was guilty before hearing any testimony;

- Threatened the claimant with a harsher penalty if the testimony of a correction officer that she requested as a witness did not **coincide** (match) with her testimony;

- Imposed a harsher penalty when the officer's testimony did not coincide with the claimant's testimony;

- Denied without explanation the claimant's request for a videotape that should have captured the underlying incident;

- Denied claimant's request for the To/From memorandum about the underlying incident; and

- Improperly served as the hearing officer even though he responded to the underlying incident.

Under the circumstances, the Court agreed with the claimant's contention that the lower court should have awarded her damages in the amount of $50.00 a day for each day she was confined to keeplock.

Taliyah Taylor represented herself in this Court of Claims action.

Appellate Court Reverses Dismissal of Incarcerated Individual's Negligence Claim

The decision in *McDevitt v. State of New York*, 197 A.D.3d 852 (4th Dep't 2021), reverses a trial court judgment dismissing after trial the claimant's negligence claim. According to the Appellate Court, the record of the trial shows that the claimant cooperated with a DOCCS investigation of a correction officer who was alleged to have been sexually involved with several incarcerated individuals, including a gang leader. An investigator unintentionally allowed a porter to see documents that revealed the claimant's role in the investigation. The porter shared the information with the gang leader. The gang leader collaborated with other incarcerated individuals to brutally assault the claimant. At the time of the assault, the officer who was being investigated was the only member of the security staff present at the site where the assault took place.

In spite of the claimant's involvement in the investigation, DOCCS did not move the claimant to protective custody or to another prison. Despite the fact that DOCCS admitted that the officer had, prior to the assault, retaliated against the claimant by filing a false misbehavior report against him, DOCCS did not bar the officer who was the subject of the investigation from guarding or interacting with the claimant.

The victim of the assault filed a claim against the state alleging that the defendant was negligent in failing to protect him from the attack. After trial, the lower court rendered judgment in the defendant's favor. The claimant appealed the trial court's decision.

The Appellate Court began its analysis with two observations about the legal context in which its review was rooted. First, the Court noted, following a non-jury trial – all trials in the Court of Claims are non-jury trials – the Appellate Division has the authority to render the judgment it finds warranted by the facts. *See*, *Sweetman v. Suhr*, 159 A.D.3d 1614, 1615 (4th Dep't 2018), *citing Northern Westchester Professional Park Association v. Town of Bedford*, 60 N.Y.2d 492 (1983).

Second, the Court set forth the State's duty to protect incarcerated individuals. "Having assumed physical custody of inmates who cannot defend themselves in the same way as those at liberty can," the Court wrote, "the State owes a duty of care to safeguard inmates even from attacks by fellow inmates." This duty, the Court noted, citing *Sanchez v. State*, 99 N.Y.2d 247, 252-253 (2002), is limited to risks of harm that are reasonably foreseeable. A risk of harm, the Court continued, referencing the *Sanchez* decision, can be reasonably foreseeable even without a specific threat against the victim.

In *McDevitt*, the Appellate Court rejected the defendant's argument that the conduct of the officer who was under investigation and the incarcerated individuals who assaulted the claimant excused or **superseded** (were more significant than) the defendant's failure to take any steps to protect the claimant from the reasonably foreseeable beating. Rather, the Court found, the claimant's assault was occasioned by the **confluence of** (combination of) the defendant's negligent acts and the intentional conduct of the officer and the other incarcerated individuals."

The Court also rejected the defendant's argument that the fact that the claimant did not seek protective custody eliminates the defendant's duty to protect him. First, when the claimant agreed to return to his dormitory, he did not know that the porter had viewed the investigatory file. Second, the Court stated that "an inmate's **braggadocio** [cockiness] about his or her safety at a state prison simply cannot be the barometer of the defendant's duty to protect him or her while confined." DOCCS's duty to safeguard an incarcerated individual, the Court concluded, "must be evaluated by reference to what a reasonable person in DOCCS's position would foresee about the danger to the individual, not what the individual – for whatever reason – believes or claims to believe about his or her own safety."

Finally, the Court rejected the defendant's argument that it had satisfied its duty to protect the claimant by transferring the individuals who had the sexual relations with the officer to another prison. This was done to protect the transferred individuals from the predatory officer, not to prevent them from retaliating against the claimant.

Based on this analysis, the Court reversed the judgment, reinstated the claim, granted judgment in favor of the claimant and **remitted** (sent back) the matter to the Court of Claims to award damages based on the proof submitted at trial.

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Julie Ann Niciolo, of counsel to E. Stewart Jones Hacker Murphy LLC, represented Peter McDevitt in this Court of Claims action.

Miscellaneous

Delayed CORC Decisions and Exhaustion of Administrative Remedies

A grievance about pay reductions as a penalty for refusing to participate in certain programming set the stage for judicial review of the Central Office Review Committee's (CORC) failure to make a timely decision with respect to grievance appeals filed by incarcerated individuals.

In *Matter of McMillian v. Krygier*, 197 A.D.3d 800 (3d Dep't 2021), the Court considered the respondent's application to dismiss an Article 78 petition on the grounds that the incarcerated individual had failed to exhaust his administrative

remedies. Exhaustion is not required, the Court noted, where, among other things, "an administrative challenge would be futile or where the issue to be determined is purely a question of law."[3] Given the lengthy delay in CORC's decision of the appeal, the Court reasoned, it would be **futile** (ineffective or useless) for the petitioner to continue to press for administrative relief using the grievance process.

In coming to its conclusion, the Court considered the three-step grievance process:

1) Decision by the Inmate Grievance Review Committee;
2) Appeal to the facility Superintendent; and
3) Appeal to CORC.

Title 7 NYCRR 701.5(d)(3)(ii) provides, the Court noted, that CORC "shall…render a decision on the grievance…within 30 calendar days from the time the appeal was received." In this case, the petitioner "waited more than eight months without having received a decision" and then commenced an Article 78 action challenging the Superintendent's denial of his grievance.

But use of the word "shall," the Court said, does not mean what it means in ordinary usage. While "shall" typically suggests a "mandatory requirement," here "shall" means something less than must; it is more like a recommendation than an absolute requirement. Prior decisions cited by the Court, not immediately relevant here, support this interpretation of "shall" within the context of this case.

In any event, lack of clarity in the regulations makes it difficult for a person filing a grievance to know how to proceed when CORC fails to make a timely decision. "To the extent that the regulations are unclear regarding whether CORC's failure to decide an appeal within 30 days constitutes a **constructive denial** [a denial resulting from an agency's failure to act], a grievant is placed in **a catch-22 situation** [a situation that cannot logically be resolved]…."

The Court then identified the dilemma facing the grievant. "[I]f he or she files a CPLR Article 78 proceeding before receiving a decision from CORC, DOCCS may seek dismissal based on the defense of failure to exhaust administrative remedies, but, if the grievant does not commence a court proceeding within four months after the 30-day decision period, he or she risks the possibility of DOCCS seeking dismissal based on a statute of limitations defense." *See* CPLR 217(1) (setting the four-month statute of limitations in Article 78 cases). Note that in this case, DOCCS did not seek dismissal based on the statute of limitations.

This **"untenable"** (unworkable) position in which the grievant is thus placed causes that individual to suffer "substantial prejudice." Under these circumstances, and relying on the futility exception, the Court excused Mr. McMillian from the exhaustion requirement. Thus, the *McMillian* case comes to the aid of Article 78 petitioners faced with the dilemma of choosing between timely filing of their petition in court under CPLR 217(1) and the need to exhaust administrative remedies as prescribed in 7 NYCRR 701.5. Yet this procedural win for Mr. McMillian did not result in an order giving him the relief he sought.

Upon reaching the merits of the petitioner's appeal, the Court found that DOCCS had "acted within its authority" when establishing rules encouraging "inmates to participate in

[3] The Court first addressed whether exhaustion was not required because the issue to be determined was purely a question of law. The Court found that the issue was purely a question of law and therefore exhaustion was not required. Nonetheless, the Court went on to consider whether exhaustion would be futile.

recommended programming" by reducing their rate of pay as a penalty for non-compliance.

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Frederick McMillian represented himself in this Article 78 proceeding.

Court Requires Strict Compliance With Service and Filing Rules

Two recent cases highlight the need for *pro se* litigants to observe the deadlines for the filing and service of legal papers. "Filing" refers to the submission of papers to a court while "service" involves the delivery of papers to another party.

As the Court of Appeals pointed out in *Matter of Miller v. Annucci*, 37 N.Y.3d 996 (2021), different requirements apply to each situation.

In *Miller*, the *pro se* appellant delivered to a prison employee the notice of appeal in an envelope addressed to the clerk's office and a copy of the notice of appeal in an envelope addressed to respondent (DOCCS), as well as records **purporting to show** (presented to show but not having been proven to actually show) that he requested a deduction of the cost of postage from his inmate account on that day. *See* CPLR 5515, governing the taking of an appeal. Without explanation, the Appellate Division granted the motion to dismiss made by DOCCS.

At issue here is whether Mr. Miller satisfied the filing requirements of CPLR 5515(1) – the statute governing the taking of appeals – when he delivered the Notice of Appeal to a prison employee for mailing. The Court rejected appellant's argument that his papers could be regarded as "filed" as of the time that he gave them to a prison employee. "… [B]y its express terms," the Court wrote, "the CPLR indicates that filing occurs when the clerk's office receives the notice of appeal. Indeed, 'filing' has long been understood to occur only upon actual receipt by the appropriate court clerk." Thus, the Court rejected what is known as the "Mailbox Rule" with respect to state court filings. Legal papers relating to state court actions are not considered filed when an incarcerated individual delivers them to DOCCS for mailing; they are considered filed when they reach the entity responsible for filing them under the CPLR.

The Court of Appeals distinguished the requirements for "filing" and "service." Quoting from CPLR 2103[b][2], the Court stated that "**service by mail** shall be complete upon mailing." (emphasis added). Note that CPLR 2103 applies to the *service* of papers while CPLR 2102 governs the procedure for the *filing* of papers. "We are not free," the Court held, "to disregard the statutory [here the CPLR] text defining when filing and service occurs…."

Although the Court ruled against Mr. Miller with respect to the timeliness of his filing of the Notice of Appeal, it gave him another opportunity to continue his appeal. To its credit, DOCCS pointed out to the Court that CPLR 5520[a] allows an extension of time granted by the "court from or to which the appeal is taken…." Untimely filing may be permitted when the appellant "neglects through mistake or excusable neglect" to satisfy timeliness requirements. Thus, the Court of Appeals sent the case back to the Appellate Division to determine whether it would exercise its discretion to "excuse the untimely filing" by the appellant.

The second case, this one decided by the Appellate Division, also relates to the timeliness of papers submitted by an incarcerated *pro se* litigant. In *Matter of Stevens v. Bell*, 197 A.D.3d 1474 (3d Dep't 2021), DOCCS affirmed the decision of the hearing officer on July 19, 2019. The petitioner received this determination on July 24, 2019. On November 13, 2019, the petitioner "**purportedly** [according to the petitioner's unproven assertion] mailed to the Clinton County Clerk's office a letter stating that he enclosed the petition and other supporting

papers but did not include a filing fee. After applying for poor person status, the petitioner again filed his papers, this time on December 2, 2019.

The problem for the petitioner is that he did not comply with the four-month filing deadline imposed by CPLR 217(1), or at least was unable to show that he complied. "Unless a shorter time period is provided…, a proceeding against a (governmental) body or officer must be commenced within four months after the determination to be reviewed becomes final and binding…."

Recognizing that his papers were filed after the four-month deadline, the petitioner asked the Third Department to declare that the petition was timely filed on November 14, 2019, a date that would have put him safely within the deadline. Lawyers call this kind of looking backward to correct an error or injustice as a *nunc pro tunc* declaration, a Latin term meaning "now for then."

But the Appellate Court rejected the petitioner's application for a *nunc pro tunc* declaration noting that "the petition was not filed until December 2, 2019." Accordingly, the Court held that the "Supreme Court properly dismissed the petition as untimely."

Key to the Court's ruling was the petitioner's failure to come forward with proof that the County Clerk had "initially rejected his filing" and then sent a letter "advising him to file a poor person application." That rejected filing could have marked the legal filing date of the petitioner's papers and saved him from dismissal based on the four-month deadline. "However," the Court observed, "the record fails to support petitioner's contention; there is no record evidence or documentation revealing that the petition was received within the statute of limitation period."

The moral of this case is that *pro se* petitioners must document every factual assertion presented to the court. Claims without documentation run the risk of being rejected by courts.

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Daniel Miller and Sterling Stevens represented themselves in these Article 78 proceeding.

Immigration Matters
By Nicholas Phillips, Esq.

This month's column focuses on two immigration cases, *Johnson v. Arteaga-Martinez* and *Garland v. Gonzalez*, which are currently pending before the Supreme Court, with oral argument scheduled for January 11, 2022. Collectively, *Arteaga-Martinez* and *Gonzalez* are the latest in a long line of Supreme Court cases which grapple with the limits of the federal government's ability to detain noncitizens during removal proceedings and while the government attempts to effectuate deportation after the entry of an order of removal.

To understand this complex area of the law, some statutory background is required. The Immigration and Nationality Act ("INA")—the federal statute which governs the immigration system—vests the federal government with authority to detain noncitizens in several different circumstances. First, under 8 U.S.C. § 1226(a), the Department of Homeland Security ("DHS") has the discretionary authority to detain any noncitizen "pending a decision on whether the [noncitizen] is to be removed from the United States." Persons detained under this provision have the right to request a bond hearing before an Immigration Judge ("IJ"), at which the

noncitizen has the burden of proving that he or she is not a danger to the community or a flight risk. *See Matter of Guerra*, 24 I. & N. Dec. 37, 40 (BIA 2006). The IJ may order the noncitizen's release subject to certain conditions, such as the payment of a bond, or may order that the noncitizen continue to be detained by DHS without bond.

A separate provision of the INA, 8 U.S.C. §1226(c), governs the mandatory detention of certain noncitizens convicted of criminal offenses. Under that provision, noncitizens with convictions enumerated by 8 U.S.C. §1226(c)(1) must be detained by DHS "when the [noncitizen] is released [from criminal custody.]" Persons detained under this provision are *not* provided with a bond hearing and must be detained while their removal proceedings continue.

A third statute, 8 U.S.C. §1231 governs the detention of persons who have been ordered removed from the United States at the conclusion of their removal proceedings. Under this provision, the federal government has 90 days—referred to as the "removal period"— to effectuate the deportation of the noncitizen. During the removal period, the noncitizen must be detained. If the federal government cannot secure the noncitizen's deportation during the removal period, the noncitizen "may be detained beyond the removal period and, if released, shall be subject to [certain] terms of supervision[.]" 8 U.S.C. §1231(a)(6).

Two key Supreme Court cases analyze the limits of the federal government's power to detain noncitizens under these statutory provisions. First, in *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Supreme Court considered whether the post-order detention statute of 8 U.S.C. §1231 authorizes the indefinite detention of noncitizens. In that case, the government argued that, since the statute places no limit on the post-order detention process, the federal government may detain noncitizens for as long as it deems necessary. Justice Breyer, writing for a five Justice majority, rejected that position and concluded that "[a] statute permitting indefinite detention of [a noncitizen] would raise a serious constitutional problem." *Id.* at 690. To avoid this constitutional problem, the Court interpreted the statute to contain an implicit "reasonable time" limitation, under which detention is presumed to be lawful for a period of six months. After six months, however, if the noncitizen "provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing" or else the noncitizen must be released. *Id.* at 701.

A second case issued two years later, *Demore v. Kim*, 538 U.S. 510 (2003), considered the mandatory detention provisions of 8 U.S.C. §1226(c). In *Demore*, the Supreme Court reviewed a decision of the Ninth Circuit, which relied on *Zadvydas* to strike down 8 U.S.C. §1226(c) as an unconstitutional Congressional enactment because it allowed the indefinite detention of noncitizens, including lawful permanent residents with significant ties to the United States. Chief Justice Rehnquist, again writing for a five Justice majority, reversed the Ninth Circuit's decision and found the statute constitutional. Chief Justice Rehnquist distinguished *Zadvydas* on two grounds: first, because that case dealt with people who had been ordered removed, while §1226(c) deals with people with *pending* proceedings; and second, because the government's statistics showed that §1226(c) proceedings are generally short, with 85% of cases taking in an average time of 47 days. The Court thus held that "[d]etention during removal proceedings is a constitutionally permissible part of that process." *Id.* at 531.

Subsequent lower court decisions have struggled to reconcile these two decisions with respect to other challenges brought by noncitizens subject to prolonged detention. For example, in *Lora v. Shanahan*, 804 F.3d 601, 605 (2d Cir. 2015), the

Second Circuit Court of Appeals observed that the immigration system has changed significantly since *Zadvydas*, and as a result mandatory detention now often lasted "many months and sometimes years due to the enormous backlog in immigration proceedings." The Second Circuit thus found that, to avoid the constitutional problems implicated by prolonged mandatory detention, noncitizens must be provided with a bond hearing once detention reaches the six-month mark, at which DHS must bear the burden of proving that continued detention is warranted.

Lora, however, was subsequently vacated by the Supreme Court after its decision in *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018). In *Jennings*, the Supreme Court reviewed a Ninth Circuit decision analyzing 8 U.S.C. §1225, which sets forth "expedited removal" procedures for noncitizens arriving at the border. The Ninth Circuit had found that, to avoid the constitutional problems associated with prolonged detention, the statute must be interpreted to allow for bond hearings at the six-month mark. But the *Jennings* Court reversed. Writing for the majority, Justice Alito observed that "[s]potting a constitutional issue does not give a court the authority to rewrite a statute as it pleases." *Id.* at 843. On the contrary, Justice Alito noted that the plain text of the statute mandates detention subject to very limited exceptions and concluded that "[e]ven if courts were permitted to fashion 6–month time limits out of statutory silence, they certainly may not transmute existing statutory language into its polar opposite. The constitutional-avoidance canon does not countenance such textual alchemy." *Id.* at 846.

The consolidated cases of *Johnson v. Arteaga-Martinez*, No. 19-896, and *Garland v. Gonzalez*, No. 20-322, present a very similar legal question. The underlying decisions in these cases, which were issued by the Third and Ninth Circuits respectively, concluded that the post-order removal statute of 8 U.S.C. §1231 (the same statute at issue in *Zadvydas*) must be interpreted to require bond hearings at the six-month mark. The government appealed both decisions to the Supreme Court, which granted certiorari, and a decision should be issued before the end of the Court's term in June 2022. We can therefore expect the Court to soon add one more chapter to the long and tortuous legal history examining the federal government's ability to detain noncitizens during and after deportation proceedings.

What Did You Learn?

By Brad Rudin

1. The legislation known as Medication Assisted Treatment in Correctional Facilities signed by the Governor on October 7, 2021 requires DOCCS to provide medication to incarcerated individuals who:
   a. suffer from COVID and other infectious diseases.
   b. are at medical risk because of obesity or diabetes.
   c. suffer from a substance use disorder for which FDA approved addiction medications exist.
   d. experience serious psychiatric episodes on a regular basis.

2. An incarcerated individual may be denied entry in the Medication Assisted Treatment program unless he or she:
   a. establishes entitlement to Medicaid upon release from prison.
   b. has no disciplinary charges pending.
   c. receives approval for release to parole.
   d. none of the above.

3. Substantial evidence of intoxication may be established by proof showing:
   a. a positive urine test and behavioral symptoms.
   b. a positive urine test or other scientific testing showing intoxication.
   c. The observation of behavioral symptoms associated with intoxication.
   d. any of the above.

4. When an incarcerated individual is charged with being under the influence of alcohol, substantial evidence may be found:
   a. based on the individual's conduct even if the urinalysis test is negative.
   b. only if a laboratory technician testifies in person to the accuracy of the urine test.
   c. in the absence of a scientific test and any assessment of the individual's behavior.
   d. based on the disciplinary history of the incarcerated person.

5. Which factor concerning an incarcerated individual would be the *least* significant when a court considers a challenge to administrative segregation?
   a. a history of drug abuse.
   b. a plot to escape.
   c. threats to commit violent acts.
   d. violent acts against the prison staff.

6. Which of the following steps is *most* likely to preserve an issue for judicial review when an incarcerated individual challenge a disciplinary determination on the grounds that certain evidence was not considered?
   a. presenting a grievance to the Central Office Review Committee.
   b. making a request for the evidence while the hearing is in progress.
   c. requesting the evidence no later than 30 days after the end of the hearing.
   d. raising the issue for the first time in the Article 78 petition.

7. Monetary damages awarded for wrongful confinement in keeplock may be based on the:
   a. disciplinary history of the incarcerated individual.
   b. disciplinary history of the author of the misbehavior report.
   c. errors committed by the hearing officer during the hearing.
   d. conduct of the incarcerated individual during the hearing.

8. A failure to protect claim may be based on the failure of prison officials to safeguard an incarcerated individual when the risk of harm:
   a. is certain to occur at a foreseeable time and place.
   b. is brought to the attention of the prison staff through a grievance presented to the Central Office Review Committee.
   c. involves death or a crippling injury.
   d. is reasonably foreseeable even in the absence of a specific threat.

9. When Article 78 petitioners challenging the denial of grievances are faced with the choice between timely filing their petition in court and exhausting their administrative remedies, the petitioner may seek to resolve the conflict by filing a petition asking the court to:
   a. excuse the exhaustion requirement when delays by prison officials in addressing the grievance suggest that pursuit of an administrative remedy would be futile.
   b. nullify the Statute of Limitations so that the petitioner is excused from the obligation under CPLR 217(1) to file papers within a specified period.

c. issue an Order directing DOCCS to address the grievance within 30 days or face being held in contempt of court.

d. bar DOCCS from filing papers in opposition to the Article 78 petition and granting the relief sought by the petitioner.

10. Under the New York State Civil Practice Law and Rules (CPLR), a Notice of Appeal is considered filed when:
    a. the party taking the appeal mails the Notice of Appeal to the court and the opposing party.
    b. the appropriate court clerk actually receives the Notice of Appeal.
    c. requirements of the "Mailbox Rule" have been satisfied.
    d. the party taking the appeal provides the court with a sworn statement stating that the Notice of Appeal has been received by the opposing party.

ANSWER KEY

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

Notices

Your Right to a Education

- If you have a learning disability and are under 22 years old, or
- If you are an adult and have a learning disability, or
- If you need a GED, or
- If you have questions about access to academic or vocational programs, please write for more information to:

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

Pro Se
114 Prospect Street
Ithaca, NY 14850

PLS OFFICES

Requests for legal representation and all other problems should be sent to the local office that provides legal assistance to the incarcerated individuals at the prison where you are in custody. Below is a list of PLS Offices and the prisons from which each office accepts requests for assistance.

ALBANY, 41 State Street, Suite M112, Albany, NY 12207
Bedford Hills, CNYPC, Coxsackie, Eastern, Edgecombe, Great Meadow, Greene, Hale Creek, Hudson, Marcy, Mid-State, Mohawk, Otisville, Queensboro, Shawangunk, Sing Sing, Sullivan, Taconic, Ulster, Wallkill, Walsh, Washington, Woodbourne.

BUFFALO, 14 Lafayette Square, Suite 510, Buffalo, NY 14203
Albion, Attica, Collins, Groveland, Lakeview, Orleans, Rochester, Wende, Wyoming.

ITHACA, 114 Prospect Street, Ithaca, NY 14850
Auburn, Cape Vincent, Cayuga, Elmira, Five Points, Southport, Willard.

NEWBURGH, 10 Little Britain Road, Suite 204, Newburgh, NY 12550
Downstate, Fishkill, Green Haven.

PLATTSBURGH
Please send your requests for assistance to: 41 State Street, Suite M112, Albany, NY 12207
Adirondack, Altona, Bare Hill, Clinton, Franklin, Gouverneur, Moriah Shock, Ogdensburg, Riverview, Upstate.

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