

Pro Se

Vol. 32 No. 6 November 2022

Published by Prisoners' Legal Services of New York

TRANSFER FROM DOCCS CUSTODY WITHOUT NOTICE TO A LOCATION FROM WHICH GRIEVANCES COULD NOT BE FILED RENDERED ADMINISTRATIVE REMEDIES UNAVAILABLE

On September 15, 2022, the Second Circuit Court of Appeals issued its third decision finding that a motion to dismiss for failure to exhaust administrative remedies must be denied due to the unavailability of the grievance system during the period within which a grievance must be filed. *See, Anthony Romano v. Kevin Ulrich, et al.*, 2022 WL 4241361 (2d Cir. Sept. 15, 2022). In *Romano*, the plaintiff was transferred to CNYPC without notice before the period for filing a grievance had expired. However, at that time, individuals transferred from DOCCS custody to the custody of the Office of Mental Health (OMH) were not permitted to submit grievances to DOCCS about the conditions to which they were subjected before their transfer. (According to DOCCS, there is now a process for submitting such grievances.) To understand the full import of this decision, some background

on the exhaustion requirement is necessary. In 1996, Congress adopted the

Continued on Page 6 ...

Also Inside ...

	Page
PREP Spotlight.....	10
Challenge to Parole Denial is Moot Due to Subsequent Hearing	13
Court Finds petitioner Was Not In an RTF and Orders His Release	14
Court Upholds Decision to Withhold Years of Good Time.....	17

Combatting Violence In Prison: The Role Of “Restorative Justice”

A Message from the Executive Director, Karen L. Murtagh

Much has been written about “restorative justice” – an intervention strategy that, when used in the context of resolving criminal charges, seeks non-carceral responses to criminal acts. The idea behind restorative justice is that by bringing offenders, victims, the community and criminal justice professionals together, we can promote positive changes for all of the participants. Restorative justice programs focus on offender accountability through victim reconciliation, often reducing the need and desire for the imposition of punitive options.

Although restorative justice is frequently proposed as an alternative to the traditional criminal justice system, it is increasingly viewed as working in conjunction with it.

The way successful restorative justice programs work, is by engaging the parties in a dialogue, often via a victim/offender mediation process, that facilitates a consensus approach to repairing the harm caused by the crime and starting on a path toward reconciliation, victim healing, and offender rehabilitation and reintegration.

The strategy is used primarily outside of the prison setting, where participation of key actors is more readily available and results more easily measured. The results, while mixed, increasingly trend favorably for participating victims, offenders and the community-at-large.

The use of restorative justice principles in prisons occurs less frequently, though a number of states (and other countries) have green-lighted the process by developing programs that are based on some, but typically not all, of the underlying tenets of restorative justice. In-prison-restorative-justice-type programs are typically pilot programs.¹ Indeed, NYS DOCCS itself attempted to make inroads on this front. A few years back, DOCCS piloted a mediation program at Queensboro called “*Talking Circles, Communication and Collaboration Skills*.” Taught by the late former Assistant Attorney General, Richard Brewster, and his partner, Mary Austin, the goal of the program was to help people find a new approach to conflict, one based on listening, empathy and collaboration. The participants attended six sessions that lasted approximately two hours. At the end of each session, the participants wrote reflections on how they would use a key skill they had learned .

1

https://www.researchgate.net/profile/MandeepDhami3/publication/233032745_Restorative_justice_in_prisons/links/55f95e8508aeba1d9f1baab0/Restorative-justice-in-prisons.pdf?origin=publication_detail.

Several other DOCCS programs also rely on restorative justice concepts. Our readers are probably most familiar with DOCCS' Alternatives to Violence Project (AVP), a program that teaches incarcerated individuals methods and skills to manage and resolve conflicts in a positive way. AVP is currently offered at 17 DOCCS facilities. DOCCS also offers several lesser-known programs:

- **Cephas** – Group sessions and discussions to help incarcerated individuals address issues they are facing such as anger management, relationships, addiction, self-esteem, etc., in order to make positive changes in their lives and foster emotional growth, as well as to plan for their positive reintegration into society.
- **Yoga** – A program to enhance incarcerated individuals' wellness by increasing their physical activity and mobility while teaching them effective relaxation and meditation techniques.
- **Meditation** – A program to teach incarcerated individuals methods and exercises designed to reduce physical and emotional stress, while encouraging self-practice.
- **Season for Nonviolence: 64 Days of Peace** – This program commemorates the work of Rev. Dr. Martin Luther King Jr. and Mohandas Gandhi by encouraging people to adopt a nonviolent lifestyle for the 64 days between the anniversaries of the assassinations these two important figures. Incarcerated individuals are invited to sign a contract in which they agree to practice nonviolence for those 64 days. A series of videos and a booklet from the Gandhi Center for Nonviolence are used as teaching tools featuring daily themes that include words to live by, reflection and suggested actions for peaceful living. Opening and closing ceremonies are held featuring the grandson of Mohandas Gandhi and the founder of the Gandhi Center for Nonviolence, Arun Gandhi. Throughout the 64 days, incarcerated individuals are encouraged to express their concept of peace through art, essays, poetry and music. The works of art resulting from these efforts are presented during the closing ceremony.
- **Men's Focus Group** – A support group program where incarcerated individuals can openly discuss the issues they are facing, such as anger management,

relationships, addiction, self-esteem, plans for their release, etc. The program also serves as a forum where participants can exchange constructive feedback or advice concerning these issues.

- **Network Support Services** – A therapeutic residential unit in which incarcerated individuals work on their own rehabilitation. The unit includes a behavior modification program to help individuals succeed in establishing a stable productive life by re-establishing their attachment to and bond with society.
- **Spiritus Christi** – Group sessions and discussions to help incarcerated individuals address various issues they are facing, such as anger management, relationships, addiction, self-esteem, etc. in order to make positive changes in their lives and foster emotional growth, as well as to plan for their positive reintegration into society. (In spite of its name, the program’s organizers describe it as non-religious.)
- **Siddha Yoga Meditation Program** – A program to help people gain a better understanding of the philosophy and practice of yoga meditation. The goal of the program is to instill personal, physical, and spiritual discipline so that participants can channel negative energy, manage anger and disappointment, and better cope with life in a correctional setting and upon return to the community.
- **Peace Education Program** – A series of 10 workshops which encourage incarcerated individuals to reflect on their own inner resources, such as hope, strength, understanding and inner peace. The goal of the program is to help incarcerated individuals reflect on their lives and grow in a positive direction.
- **The Apology Letter Bank** – Established by Directive #0510, the Apology Letter Bank allows incarcerated individuals to submit a letter of apology to the NYS DOCCS Office of Victim Assistance (OVA) which, upon review and acceptance, will hold the letter and share the fact that an apology letter exists with the victim, if the victim is registered with OVA. Allowing an incarcerated individual

the opportunity to acknowledge fault and take responsibility for the pain and harm inflicted on the victim of their crimes is one of the major doctrines of restorative justice.

While several of the underlying principles of restorative justice are present in all of these programs, what is missing is the actual presence of the victims and the community. Without these key players, it is difficult, if not impossible, to attain the primary goals of restorative justice – accountability, reconciliation and healing.

Understandably, due to the very nature of prison, having the victims and the community present may not be possible. But injustices and crimes also occur in prison, and the offender, the victim and the community are all present. Whether it is an altercation between two incarcerated people or between an incarcerated person and a DOCCS staff person, violence occurs, harm is done and lives are impacted. In those situations, it would be possible to employ true restorative justice practices with the goal of reducing prison violence.

There is a growing body of evidence that suggests that restorative justice practices, when correctly employed in the prison setting, result in an increase in victims' and incarcerated individuals' perceptions of being treated fairly, reductions in victims' fear of crime, higher rates of, and compliance with, restitution agreements by incarcerated people, and reductions in reoffending rates and seriousness.

Where restorative justice has worked – both inside and outside of prison walls – it has followed a similar pattern: a top-down approach (with full managerial “buy in”) accompanied by voluntary participation by the incarcerated population.

It comes as no surprise that the introduction of the strategy in the prison setting is often met with an abundance of skepticism – skepticism grounded in the very nature of the prison setting itself – a hostile environment for keeper and kept alike, with confrontational interactions often a daily occurrence. Disputes abound over who truly is the “victim” and what constitutes the “community” that necessitate agreement on the terms, conditions and “next steps” toward remediation and conflict resolution.

Admittedly, this is tough stuff and the skepticism is understandable; “pollyannish” suggestions are non-starters. However, what is beyond dispute is that for such a strategy to work in prison, it will take creativity, adaptation, forethought and courage to achieve any degree of success.

I'm in the camp that believes that incorporating restorative justice concepts into the resolution of prison conflicts is worth a serious shot, given the levels of violence currently plaguing our prison system – both between incarcerated individuals and between incarcerated individuals and corrections staff. It's time for a new paradigm: clearly, what we're doing now isn't working to promote safety for staff, for incarcerated individuals and the community-at-large. Count me among those willing to seek new solutions to the age-old problem of violence in our prisons. Together, using our collective experience and creativity, we can pave a more promising road for all involved that also results in more successful re-entry efforts. Afterall, we are New Yorkers – often asked to be on the cutting edge of programs that truly make a difference. It's time we once again accept the challenge and lead the way.

Continued from Page 1 . . .

Prison Litigation Reform Act (PLRA). The PLRA was intended to:

- reduce the number of frivolous lawsuits brought in the federal courts by incarcerated individuals;
- allow correction officials to remedy problems before litigation is necessary; and
- lighten the caseloads of the courts that handle litigation filed by incarcerated individuals.

Prison Litigation Reform Act, Findlaw, available at:

<https://www.findlaw.com/criminal/criminal-rights/prison-litigation-reform-act.html>.

One of the PLRA requirements is that before filing a federal action concerning prison conditions (actions concerning prison conditions include actions alleging the use of excessive force), incarcerated individuals must fully and properly exhaust “such administrative remedies as are available...” *See, 42 United States Code §1997e(a)*. With the exception of proceedings that have their own appeal processes, such as prison disciplinary hearings in New York State, the Incarcerated Grievance Program – formerly known as the Inmate Grievance Program – is the mechanism by which incarcerated individuals exhaust their administrative remedies with respect to claims involving prison conditions.

After the passage of the PLRA, incarcerated individuals continued to file lawsuits concerning prison conditions. In these lawsuits, it was not unusual for the plaintiffs to ask the courts, for various reasons, to excuse their failure to exhaust their administrative remedies. These cases

gave rise to a body of law in the Second Circuit finding that the plaintiffs' lawsuits should not be dismissed because, due to various "special circumstances exceptions," the plaintiffs were excused from the exhaustion requirement.

This changed in 2016 when the United States Supreme Court, in *Ross v. Blake*, 578 U.S. 632 (2016), **clarified** (made clear) the exhaustion requirement, holding that incarcerated plaintiffs must exhaust their administrative remedies except when the remedies are not actually available. In the *Ross* decision, the Court rejected the Second Circuit's "special circumstances" exceptions to the exhaustion requirement.

The *Ross* decision did however, set out three circumstances where an administrative remedy, although on the books, is not capable of being used to obtain relief. In such cases, the administrative remedies are not actually available as that term is used in the statute. The three circumstances are:

- When the administrative procedure operates as a simple dead end – with officers unable or consistently unwilling to provide any relief to aggrieved individuals;
- When an administrative scheme is so opaque that it becomes incapable of use, that is, when the rules are so confusing that no reasonable incarcerated individual can use them; or

- When prison administrators thwart incarcerated individuals from taking advantage of a grievance process through **machination** (plotting), misrepresentation, or intimidation.

After the *Ross* decision was issued, the Second Circuit reworked its analysis for determining whether administrative remedies were available to the incarcerated plaintiffs with respect to lawsuits in which DOCCS argued that claims should be dismissed due to the plaintiff's failure to fully and properly exhaust available administrative remedies. First, in *Williams v. Priatno*, 829 F.3d 118 (2d Cir. 2016), the Court considered the arguments of an incarcerated New Yorker who was in SHU during the period of time for filing a grievance. The plaintiff in *Williams* followed the IGP rules for filing a grievance from SHU; he gave the grievance to an officer to submit for him. The officer failed to submit the grievance and the plaintiff, who was transferred to another DOCCS prison, took no further steps.

The *Williams* Court found that there are grievance procedures that are technically available to incarcerated plaintiffs who were in SHU during the period for filing a grievance and the officers to whom they gave the grievances did not submit them. However, the Court found that these procedures were so opaque and confusing that they were incapable of use. Thus, when an individual in SHU gives their grievance to an officer to submit for them and the officer fails to do so, the individual has fully and properly exhausted all available administrative remedies.

Four years after the Court issued the *Williams* decision, the Court issued a decision in *Hayes v. Dahlke*, 976 F.3d 259 (2d Cir. 2020). In *Hayes*, the Court held that where an incarcerated individual properly appeals a grievance denial to the Central Office Review Committee (CORC) but CORC does not issue a decision within 30 days of receiving an appeal from a grievance denial – the mandatory deadline for deciding CORC appeals – an incarcerated individual has fully and properly exhausted their administrative remedies.

And in *Rucker v. Giffen*, 997 F.3d 88 (2d Cir. 2021), the Court considered whether an incarcerated individual who was experiencing extreme medical distress and was hospitalized had failed to exhaust his administrative remedies when, due to being in a critical medical condition, he was unable to submit a grievance during the period allowed for doing so. In *Rucker*, there were only five days between the conduct about which the plaintiff was complaining and when his medical condition became critical to file a grievance against the medical staff who failed to take him to the hospital. He remained in the hospital for a month, almost died, and was placed in a medically induced coma. When he attempted to file his grievance a year after the alleged misconduct, DOCCS refused to accept the grievance because he had failed to file it during the five days between the incident and becoming critically ill.

The Court held that administrative remedies are unavailable when 1) an incarcerated individual's failure to file a grievance within the time allowed results

from a medical condition, and 2) the grievance system does not accommodate the condition by allowing a reasonable opportunity to file for administrative relief.

In *Romano*, the case decided in September 2022, the Court considered the situation where an incarcerated individual fails to file the grievance during the final eight days of the period for doing so because he was transferred without notice to Central New York Psychiatric Center (CNYPC), a location from which DOCCS, at the time, did not accept grievances even if they are timely submitted. By the time Plaintiff Romano returned to DOCCS custody, the period for submitting a grievance had expired.

The defendants argued that even though Mr. Romano lost eight days of the period that he should have had to file his grievance, he had 13 days, and that was a reasonable opportunity for doing so. The Court disagreed, holding that Plaintiff Romano's transfer out of DOCCS custody cut short his time to file a grievance which rendered the remedy unavailable to him.

The Court went on to detail when an administrative remedy is unavailable: "An administrative remedy is unavailable when it operates as a simple dead end." As an example, the *Ross* Court pointed to a prison rule book that directs incarcerated individuals to submit their grievances to a particular office which responds that it has no capacity to consider the grievances. This procedure, the *Ross* Court stated, is not "capable of use" for its purpose.

According to the *Romano* decision, this was exactly Plaintiff Romano's experience. His transfer to CNYPC caused him to be unable to file a grievance even though he was well within the 21-day time limit. Thus, his transfer was a dead end, because, after DOCCS transferred him, his administrative remedy became incapable of use for its intended purpose.

Finally, even if, as the defendants argued, that the plaintiff had 13 days to file a grievance before he was transferred (a fact which the Court found was not undisputed), because the plaintiff had no way of knowing that he was to be transferred from DOCCS to OMH custody, the Court found that he cannot be penalized for failing to file a grievance at the earliest possible moment, well before DOCCS cut short the expiration of the grievance filing period. Thus, it was DOCCS' conduct – transferring him before the grievance filing period had expired to a location from which it did not accept grievances – that prevented Plaintiff Romano from exhausting his administrative remedies.

To summarize, the Second Circuit has found that in three situations the grievance process is unavailable to incarcerated individuals:

- When the individual is medically incapacitated during the time period for filing a grievance and does not return to DOCCS until after the period for filing has expired (*Rucker*);

- When the individual properly pursues their grievance through appealing to CORC but CORC fails to issue a decision within 30 days of receiving the appeal (*Hayes*); and
- When the individual is transferred without notice to a location from which DOCCS does not accept grievances during the period for filing a grievance and does not return to DOCCS until after the period for filing has expired (*Romano*).

In addition, the Second Circuit has found when an individual in SHU submits their grievance by giving it to an officer but the officer fails to submit the grievance, the process for appealing an unfiled grievance are “prohibitively opaque,” such that no incarcerated individual could actually make use of it. (*Williams*).

Prisoners' Legal Services represented Anthony Romano in this appeal to the Second Circuit.

PREP SPOTLIGHT

Jill Marie Nolan

PLS' PREP program is a holistic program staffed by licensed Social Workers who help incarcerated persons serving their maximum sentence develop skills necessary for successful re-entry into their communities. We also help connect clients to services that meet their re-entry needs and work with clients for three years post-release. You are eligible to apply for the PREP Program if you are within 6-18 months of your maximum release date, do not require post-release supervision or SARA-compliant housing and are returning to the five (5) boroughs of New York City, Dutchess or Orange County. If you meet these requirements and did not receive an application, you can request one by writing to:

*Jill Marie Nolan, LCSW
PREP Coordinator
Prisoners' Legal Services of New York
10 Little Britain Road, Suite 204
Newburgh, NY 12550*

The PREP spotlight shines on **finEQUITY**. finEQUITY is a Brooklyn-based non-profit whose goal is to support currently and formerly incarcerated people in learning more about credit and establishing good credit. finEQUITY has programs both inside NY state prisons and for those released from NY state prisons.

For formerly incarcerated individuals without a credit score (or no credit), finEQUITY's credit-building loan program helps establish credit. A credit score is needed to purchase a home or car or take out a loan. finEQUITY also offers a free tool for justice-impacted people to check their credit scores.

finEQUITY's In-Prison Education Program is a mail-based course of eight modules in which participants learn how to navigate credit barriers, access credit reports and information, and establish credit history. **To enroll in this course, you can write directly to finEQUITY at: 41 Schermerhorn Street, Suite 1002, Brooklyn, NY 11201.** Alternatively, you can ask a family member or friend to enroll you online by visiting finequity.org/education.

PRO SE VICTORIES!

DeJesus v. Corrections Officer R. Malloy, 582 F.Supp.3d 82 (W.D.N.Y. 2022). Denny DeJesus filed a federal lawsuit alleging that Officer Malloy had sexually assaulted him during a pat frisk. The defendant moved for summary judgment. Disputing the defendant's statement of undisputed facts, Plaintiff DeJesus opposed the motion for summary judgment, and 6 months later, relying on his own statement of undisputed facts, declaration and deposition testimony, moved for summary judgment. The defendant opposed the plaintiff's motion but did not submit a statement contesting any of the facts that the plaintiff alleged were undisputed. Instead, the defendant submitted only a three-page brief in opposition to the plaintiff's motion.

Because the plaintiff properly contested the defendant's statement of uncontested facts, the Court found that with respect to the defendant's motion for summary judgment there were disputed issues of fact and denied the defendant's motion for summary judgment. And, because the defendant failed to dispute any of the facts which the plaintiff, in support of his motion, asserted were undisputed, and those facts, if accepted as true, stated a claim for relief, the Court

granted the plaintiff's motion for summary judgment with respect to his Eighth Amendment claim and appointed pro bono counsel for the plaintiff. The parties then stipulated to a judgment and the case was closed.

The decision referenced above is to the court's denial of the defendant's motion to reconsider the court's decision to grant plaintiff's motion for summary judgment. The facts in this summary were taken from the court's unpublished decision and order denying the defendant's motion for summary judgment and granting the plaintiff's motion for summary judgment, *see, Denny DeJesus v. Corrections Officer R. Malloy*, 6:16-cv-06470-EAW-MWP, Document 119, filed 3/31/21, W.D.N.Y.

Stanny Vargas v. Donald Venettozzi, Index No. 9446-21 (Sup.Ct. Albany Co. June 6, 2022). Stanny Vargas filed an Article 78 challenge to a Tier III hearing, claiming that the hearing officer had wrongfully interfered with his right to call witnesses by refusing to produce a list of the officers responsible for cuffing individuals on Mr. Vargas's gallery prior to going to rec. He wanted to use the list to identify the two officers who were also present during the incident. The Employee Assistant form reflected that the hearing officer denied the request for the document, concluding it was not relevant. At the hearing, the hearing officer said that he would "get to" the production of the list "in a minute," but then made no further reference to it.

In determining whether the hearing officer's failure to produce the list violated Mr. Vargas's right to call witnesses, the Court "was unable to conclude that the petitioner's defense was not prejudiced by the failure to

permit the petitioner the opportunity to review the list of officers assigned to his gallery during incident." In the absence of the opportunity to review the list of officers assigned to the gallery, Mr. Vargas was unable to confirm the identities of the officers who handcuffed him and who were present on his gallery during the incident. Given that the petitioner "repeatedly and adamantly" denied any wrongdoing, testimony from the officers who were present during the incident would be critical to the petitioner's defense. Also problematic, the Court found, was the hearing officer's failure to give the petitioner a reason for denying him access to the list.

Based on the importance of the document to identifying witnesses and the failure of the hearing officer to give a reason for refusing to produce the list, the Court ordered the hearing annulled and the disciplinary hearing expunged.

***Pro Se Victories!** features descriptions of successful pro se administrative advocacy and unreported pro se litigation. In this way, we recognize the contribution of pro se jailhouse litigants. We hope that this feature will encourage our readers to look to the courts for assistance in resolving their conflicts with DOCCS. The editors choose which unreported decisions to feature from the decisions that our readers send us. Where the number of successes submitted exceeds the amount of available space, the editors make the difficult decisions as to which to report. Please submit copies of your decisions as Pro Se does not have the staff to return your submissions.*

STATE COURT DECISIONS

Disciplinary and Administrative Segregation

Production of Wrong UIR Results in Annulment

According to the correction officer who authored the misbehavior report, the officer observed two individuals “exchanging closed fist punches,” and one individual – the petitioner – making “stabbing-type motions.” The report goes on to say that the officer then observed the petitioner drop an object from his hand which the individual with whom the petitioner was fighting later picked up and placed in a toilet. The officer later recovered the object and photographed it. The officer charged the petitioner with disorderly conduct, violent conduct, possession of a weapon, possession of contraband and refusing a direct order.

At his hearing, the petitioner advised the hearing officer that his employee assistant had given him only part of the Unusual Incident Report (UIR). The hearing officer gave the petitioner the to/from forms relevant to the incident. Prior to the close of the hearing, the petitioner objected that the UIR he had been given related to an incident that had occurred several months before the incident that was the subject of the misbehavior report. The hearing officer did not remedy the problem and found the petitioner guilty of the charges.

In *Matter of Saunders v. Annucci*, 207 A.D.3d 1014 (3d Dep’t 2022), the Court found that the failure to provide the petitioner with a copy of the UIR relating to the incident that was the

basis for charges against the petitioner warranted annulment of the hearing. The correct UIR, the Court wrote, “is relevant to formulating petitioner’s defense and effectuating his questioning of witnesses.” The Court dismissed the charge of refusing a direct order because, as the respondent conceded, the determination of guilt was not supported by substantial evidence. It remitted the remaining charges for a new hearing.

Tori Saunders represented himself in this Article 78 proceeding.

Date Investigation Concluded Is Proper Incident Date for Ongoing Misconduct

Darryl Shelton was found guilty of violating Rules 113.33 (drug possession), 113.34 (conspiring to introduce narcotics or marijuana into the facility), 114.10 (smuggling) and 180.11 (facility correspondence). Following an unsuccessful administrative appeal, Mr. Shelton filed an Article 78 petition asserting that the misbehavior report had not given him sufficient notice of the charges. That is, because the report did not state on what dates he had engaged in specific acts of misbehavior, the petitioner was unable to present a defense to the charges.

In *Matter of Shelton v. Annucci*, 207 A.D.3d 1076 (4th Dep’t 2022), the Fourth Department rejected the petitioner’s arguments. The Court wrote that because the misconduct was a “continuing violation,” it was not improper for the officer who wrote the report to use the date that his investigation concluded as the date of the incident. In support of this reasoning, the Court cited to *Matter of Moore v. Venettozzi*, 138 A.D.3d 1288 (3d Dep’t 2016)

and *Matter of Jackson v. Smith*, 13 A.D.3d 685 (3d Dep't 2004).

In *Jackson*, the Third Department expanded on the basis for its decision, noting that even though the misbehavior report gave the date that the investigation ended as the date of the incident and did not set forth the specific dates of each rule violation, the report provided details of the investigation and gave the petitioner sufficient information to prepare a defense.

Wyoming County-Attica Legal Aid Bureau represented Darryl Shelton in this Article 78 proceeding.

Parole

Challenge to Parole Denial is Moot Due to Subsequent Hearing

In two recent decisions, the Third Department dismissed challenges to parole denials as moot because subsequent to the challenged denials, the petitioners went to parole hearings and in one case the petitioner was again denied parole, and in the other, he was granted parole.

In *Matter of Thomas Ryhal v. Anthony J. Annucci*, 2022 WL 3952450 (3d Dep't 2022), the petitioner challenged two parole denials and a determination of guilt made at a disciplinary hearing. In its decision, the Third Department noted that public records indicated that in March 2022, while the appeal was pending, the petitioner was conditionally released to parole supervision.

“Accordingly,” the Court wrote, “petitioner’s challenge to the Board’s prior decisions has been rendered moot.”

In *Matter of Salvatore Letizia v. Tina Stanford*, 2022 WL 3952739 (3d Dep't 2022), the Board of Parole denied parole release to Salvatore Letizia and ordered that his application be considered again in 24 months. After Mr. Letizia’s administrative appeal was denied, he filed an Article 78 challenge to the denial. Rather than file an answer, the respondent moved to dismiss the petition, arguing that the petitioner had failed to serve her as the court directed in its order to show cause. The petitioner moved for an extension of time to correct the service error pursuant to Civil Practice Law and Rules 2001 and 2004. The court denied the petitioner’s motion, granted the respondent’s motion and dismissed the petition. The court also denied petitioner’s subsequent motion to reconsider its decision and his motion to extend the time to serve the respondent pursuant to Civil Practice Law and Rules 306-b. The petitioner appealed to the Third Department of the Appellate Division.

Like the court below, the Third Department did not reach the merits of the Petitioner-Appellant Letizia’s appeal. Instead, in response to the Respondent-Appellee’s notice that petitioner had reappeared before the Board and the Board had again denied parole release, as in Petitioner-Appellant Ryhal’s case, the Court ruled that the challenge to the previous hearing was moot.

A finding of mootness means that the court has determined that there is no actual case or controversy for the court to decide. In the context of a parole release denial, an appeal typically becomes moot when the individual to whom the Board denied release gets a

decision following a subsequent parole release hearing. If the Board of Parole again denies parole release, the previous denial is no longer the reason that the individual has not been released to parole supervision; they remain in prison because of the subsequent decision denying release. In addition, the only remedy for errors made at a parole release hearing is a new hearing. Thus, when the petitioner goes before the Board while his Article 78 challenge to an earlier parole denial is still pending, he has received the only relief that the court could have ordered: a second hearing. And, if the petitioner is released to parole supervision at the later hearing, they can no longer benefit from the only relief the court has the authority to grant: a new hearing.

In both of these cases, the Court, having found that the appeals were moot, dismissed the appeals.

For a more detailed discussion of the mootness doctrine, see the article on *People ex rel. Jones v. Collado*, in the article immediately following this article.

Salvatore Letizia represented himself in this Article 78 proceeding.

Thomas Ryhal represented himself in this Article 78 proceeding.

Miscellaneous

Court Finds Petitioner Was Not In an RTF and Orders His Release

The petitioner in *People ex rel. Jones v. Collado*, 207 A.D.3d 1005 (3d Dep't 2022), brought this action on behalf Incarcerated Individual Gorostiza, a level 3 sex offender who was unable to locate approved housing and therefore was not released to post-release supervision (PRS) on his conditional release date. As a result, DOCCS assigned him to the Residential Treatment Facility (RTF) at Fishkill C.F. However, because Mr. Gorostiza uses a wheelchair and the Fishkill RTF was not wheelchair accessible, he was housed at Shawangunk C.F.

When his determinate term expired, the petitioner brought an Article 70 habeas petition arguing that because Mr. Gorostiza was in prison and not in an RTF, he was unlawfully confined. The County Court, Ulster County, dismissed the petition because it was not supported by an affidavit from Mr. Gorostiza or someone else with first-hand knowledge of his situation. The petitioner appealed.

By the time the matter came before the Appellate Division, Mr. Gorostiza had been released from DOCCS custody. Although the Court found that the matter was moot – there was no longer a need for the relief requested – it nonetheless decided it would decide the issue presented by the case.

There are several requirements that must be met before a court may override the rule that it must dismiss a petition or complaint which is moot, including:

- A likelihood of repetition, either between the parties or among other members of the public;
- A phenomenon typically evading review; and
- A showing of significant or important questions not previously passed on, i.e., substantial and novel issues.

See, *Matter of Hearst Corp. v. Clyne*, 50 N.Y.2d 707 (1980); *Matter of Gonzalez v. Annucci*, 32 N.Y.3d 461 (2018).

The reason the Court gave for hearing the appeal in spite of the fact that as between the parties, the issue was moot, was that the circumstances – retaining Mr. Gorostiza at a maximum security prison past his maximum expiration date solely due to his physical condition – presented an issue which was significant, would typically evade appellate review and was likely to **recur** (happen again). That is, the Court found that the exception to the mootness doctrine applied.

The Court also found that the lower court erred when it dismissed the petition because it was not supported by an affidavit from Mr. Gorostiza or someone else with first-hand knowledge of the petitioner's circumstances. Civil Practice Law and Rules (CPLR) 7002, the section setting forth the requirements for a state habeas petition, authorizes an unlawfully confined individual *or anyone acting on their behalf*, to petition a court for relief. While the petition must be verified, or

the petitioner may state the substance of their claim in an affidavit, there is no requirement, the Court held, that the petition be accompanied by an affidavit by the incarcerated individual. Here the Court found, because the alleged circumstances of the incarcerated individual's conditions of confinement were set forth in the verified petition, the pleading requirements of CPLR 7002 were met.

In opposing the petition, the DOCCS respondents did not deny that 1) Mr. Gorostiza had passed his maximum expiration date and 2) he was not in an RTF. In support of their conduct, the DOCCS respondents asserted that they placed Mr. Gorostiza in "RTF status" but did not move him to the Fishkill RTF because it was not wheelchair accessible or to the Green Haven RTF, which is wheelchair accessible, because he had been involved in an altercation with staff there. They further argued that because Mr. Gorostiza was given an RTF workbook and access to the Shawangunk resource room which has materials to help incarcerated individuals find employment and housing, and because he was assigned a parole officer, he was in RTF at Shawangunk.

The Court found that the respondents had not provided convincing authority for their decision not to release Mr. Gorostiza to an RTF and that the Court could not **discern** (see) any in the record before it. In addition, the Court found that the argument that the accommodations provided – the workbook, resource room access and a parole officer – sufficiently placed the petitioner in RTF status was "unpersuasive." As a result, the Court concluded, Mr. Gorostiza was confined at a maximum security facility for eight months beyond the expiration of his determinate term. In confining Gorostiza

beyond his maximum expiration date, the Court wrote, the respondents violated the Court's prior decisions holding that when a level 3 sex offender reaches their maximum expiration date, DOCCS must either release the individual to an approved residence or to an RTF. *See, e.g., People ex rel. Green v. Superintendent of Sullivan Correctional Facility*, 137 A.D.3d 56 (3d Dep't 2016).

Lauren E. Jones of The Legal Aid Society represented the Mr. Gorostiza in this Article 70 proceeding.

Court Holds Father's Consent To Adoption Was Not Required

In *Matter of Statini v. Reed*, 207 A.D.3d 471 (2d Dep't 2022), the Court addressed the question of when the law requires a biological father's consent to adopt where the biological father was not married to the child's mother when the child was born. The child who was the subject of the adoption petition was born in 2012. In 2013, while the biological father was incarcerated, the Family Court issued an order granting sole custody to the mother and denying the biological father any contact with the child but authorizing him to petition for a modification of the order when he was released from prison.

The biological father was released from prison in February 2017, reincarcerated on a parole violate between January 2018 and January 2019, and was arrested on a new charge in September 2019. While still incarcerated, in July 2020, the biological father filed a petition for parental access. The child's mother and stepfather filed a petition to adopt the child, arguing that the biological father's consent to the adoption was not required. The biological father also filed a

petition to modify the 2013 order and award him parental access.

After a hearing, the Family Court found that the biological father had not abandoned the child, ruled that the biological father's consent was required, and dismissed the adoption petition. The mother and the stepfather appealed.

The Second Department began its analysis by noting that where a child is born to parents who are not married, and adoption of the child is sought when the child is over six months old, Domestic Relations Law (DRL) §111(1)(d) provides that the biological father's consent is required when the biological father has "maintained substantial and continuous or repeated contact with the child." To show that he has maintained substantial and continuous contact with the child, a biological father must have:

- Made fair and reasonable support payments;
- Visited the child at least monthly when the biological father was physically and financially able to do so and when he was not prevented from doing so by the person or agency who/which had custody of the child; or
- Communicated regularly with the child or with the person or agency who/which has custody of the child, when the biological father was physically and financially able to do so and when he was not prevented from doing so by the person or agency who/which had custody of the child.

Pursuant to DRL §111(2)(a), the Court reminds us, a “consent father” – that is, a father who is not married to his child’s mother but who either formally or constructively –by his actions – acknowledges paternity, may forfeit his parental rights by failing to visit or communicate with his child or the person having legal custody of the child, although able to do so, for a period of six months preceding the filing of the adoption petition.

Here, the Court wrote, the biological father had the burden of establishing that he was a consent father. With respect to this point, the Court found that the biological father had not paid any support and had not produced any evidence that he lacked the means to so. That the biological father was incarcerated, the Court wrote, did not **absolve** (excuse) him from the obligation to support the child.

In addition, the Court found, there were substantial periods of time when the father was not in prison and could have petitioned for contact with the child. The order of protection which was in effect until 2018 specifically provided that it could be modified in a parental access proceeding. There was also a “substantial” period of time in 2019 when the biological father was out of prison but failed to seek contact with the child through the Family Court.

Thus, the Court concluded, the biological father failed to establish that his consent to the adoption by the stepfather was required. In light of this finding, the Court ordered the reinstatement of the adoption petition.

Thomas T. Keating, of Dobbs Ferry, represented the biological father in this Article 78 proceeding.

Court Upholds Decision To Withhold Years of Good Time

Echo Westly Dixon is serving a sentence of 20¹/₄ to 23¹/₂ years. When he went before the Time Allowance Committee (TAC) in 2020, Mr. Dixon had accrued 3 years and two months of good time credit eligibility. Because hearing officers had recommended that more than 12 years of good time credits be withheld, the TAC determined that all of Mr. Dixon’s good time credit should be withheld. After his administrative appeal of the decision was denied, Mr. Dixon filed an Article 78 petition alleging that procedural defects at his time allowance hearing violated his constitutional rights. The Supreme Court, Albany County dismissed the petition.

In *Matter of Dixon v. Annucci*, 207 A.D.3d 1012 (3d Dep’t 2022), the Court, citing *Matter of Worthy v. Selsky*, 6 A.D.3d 840 (3d Dep’t 2004), first noted that “[a] determination to withhold an incarcerated individual’s good time allowance shall be final and shall not be reviewable if made in accordance with law.” Second, the Court noted, the TAC may properly consider an incarcerated individual’s institutional record when determining how much good time to grant the individual, as good time may be canceled for the violation of institutional rules. Significantly, the Court wrote, citing 7 NYCRR part 261.4(a), an incarcerated individual who loses good time credit as the result of prior disciplinary hearings is not entitled to a TAC hearing under DOCCS’ regulations. Because the petitioner was not even entitled to a hearing, his arguments with respect to the procedures used at that hearing are “**unavailing**” (useless). Thus,

the Court affirmed the lower court's judgment dismissing the petition.

Echo Wesley Dixon represented himself in this Article 78 proceeding.

IMMIGRATION MATTERS
Nicholas Phillips

This month's column focuses on *Martinez Roman v. Garland*, 49 F.4th 157, No. 20-3476, 2022 WL 4241573 (2d Cir. Sept. 15, 2022), a recent precedential decision by the Second Circuit Court of Appeals which affirms that an Immigration Judge ("IJ") commits serious legal error when the IJ prevents a noncitizen from offering critical live testimony in support of his or her application for relief from deportation.

Martinez Roman concerns the immigration court case of Marco Antonio Martinez Roman ("Martinez"), a Mexican citizen who in September 2019 was taken into immigration detention by the Department of Homeland Security ("DHS") and placed into removal proceedings (commonly known as deportation proceedings). In proceedings, Martinez appeared by videoconference before an IJ in the New York City Immigration Court, and as relief from removal, applied for cancellation of removal for nonpermanent residents. Cancellation of removal allows a noncitizen to adjust their status to lawful permanent resident (or "green card" holder) if the noncitizen:

1. has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of the application;
2. has been a person of good moral character during that period;
3. has not been convicted of certain serious offenses; and
4. establishes that removal would result in "exceptional and extremely unusual hardship" to a U.S. citizen or lawful permanent resident spouse, parent, or child.

8 U.S.C. § 1229b(b)(1).

In his cancellation application, Martinez argued that his deportation to Mexico would cause exceptional and extremely unusual hardship to his three U.S. citizen children—Emely, then age 13, Jaden, then age 8, and Jaliyah, then age 6—because his children were suffering from serious physical and mental health problems following his detention, and because their mother Ochoa was unable to financially support them and lacked health insurance. On January 16, 2020, an IJ accepted Martinez' application and scheduled an individual merits hearing (the immigration court version of a trial) for March 9, 2020. On February 14, however, Martinez's attorney filed a motion to adjourn the March 9 hearing because Martinez had not been able to find

a psychologist who could evaluate his children, prepare a written report prior to the court deadline for submitting evidence, and testify at the March 9 hearing. On February 18, an IJ denied Martinez's motion but stated that he could renew the motion at the March 9 merits hearing.

At the March 9 hearing, Martinez appeared with his attorney before IJ Charles Conroy in the New York City Immigration Court. A few days prior to the hearing, Martinez filed a psychological evaluation of his children prepared by a psychologist named Dr. Joseph Giardano, along with a motion to allow Dr. Giardano to testify by telephone because he was unable to appear in person on March 9. IJ Conroy denied the motion to allow Dr. Giardano to testify via telephone, stating that "[y]ou have a detailed affidavit from [Dr. Giardano] that I can review and that I assume would cover all the issues." Slip op. at 7. Martinez's attorney then renewed the motion to adjourn the hearing, stating that three witnesses who could provide evidence of hardship were unavailable to testify that day. The IJ denied that motion on the grounds that, since all three witnesses had submitted written statements to the court, the IJ could review their statements without the need for live testimony.

Martinez then testified in support of his application, and explained that in his absence, his children had been forced to move into a cramped two-bedroom apartment shared by ten family members.

He recounted that his 13-year-old daughter Emely was struggling with depression and experiencing oral pain from deformed braces, which her mother lacked the funds or insurance to repair. He further described how his 8-year-old son Jaden was suffering from depression and doing very poorly at school, and how his 6-year-old daughter Jaliyah cried constantly after his detention by DHS. Finally, he explained that Ochoa, the children's mother, lacked the ability to economically support them. After the IJ cut Martinez's testimony short because the hearing had only been scheduled to last one hour, both sides made closing arguments and the IJ adjourned to prepare a decision.

On April 13, the IJ issued a written decision denying Martinez's application. With respect to hardship, the IJ stated that while he "sympathizes with the children's mental health diagnoses and related symptoms," Martinez failed to "sufficiently show that their quality of life would be negatively affected as a result of [his] removal in a way that would rise to the level of exceptional and extremely unusual hardship." *Id.* at 13. Martinez appealed the IJ's decision to the Board of Immigration Appeals, which found no clear error in the IJ's decision.

On petition for review, the Second Circuit vacated the immigration agency's decision and remanded for additional proceedings. The Court first explained that an IJ's denial of a motion for an adjournment is reviewed under the "abuse of discretion"

standard, under which an IJ’s decision will not be reversed unless the decision:

1. rests on a clearly erroneous factual finding or an error of law; or
2. “cannot be located within the range of permissible decisions.”

Id. at 17 (quoting *Rajah v. Mukasey*, 544 F.3d 449, 453 (2d Cir. 2008)).

Applying that standard, the Court concluded that the IJ’s denial of Martinez’s motion for an adjournment could not be located within the range of permissible decisions and was therefore an abuse of discretion. The Court cited several reasons for this conclusion. First, while the IJ purportedly denied the motion because the witnesses had already submitted written statements, the Court noted that the IJ appeared not to have actually read those statements. For example, the IJ referred to 13-year-old Emely’s statement as being “very detailed” when in fact she had submitted a one-page handwritten note which did not mention the medical issues she was experiencing. *Id.* at 17-18.

Second, the IJ faulted Martinez for failing to supply evidence of Ochoa’s inability to take care of the children, but the Court noted that two of Martinez’s proposed witnesses—Ochoa’s sister and a close family friend—would likely have supplied additional information about Ochoa had they been allowed to testify, information which may have satisfied the IJ’s concerns. Similarly, while the IJ faulted Dr. Giardano’s report for failing to adequately

detail what would happen to Martinez’s children if he were deported to Mexico, the Court observed that Dr. Giardano could have supplied that missing information with live testimony. In conclusion, the Court strongly affirmed the importance of live testimony in immigration court proceedings, and held that while live testimony is not *always* required, “denials of such requests must be carefully considered and testimonial proffers reviewed closely before disallowing an opportunity for live testimony, particularly where an adverse ruling on the very topic of the proposed testimony seems likely.” *Id.* at 22.

WHAT DID YOU LEARN?

Brad Rudin

1. **In the case of *Anthony Romano v. Kevin Ulrich, et al.*, the Second Circuit ruled that a defendant state official’s motion to dismiss for failure to exhaust administrative remedies must be denied if the incarcerated individual:**
 - a. filed a lawsuit but did not file and appeal a grievance about the challenged living conditions.
 - b. used the time allowed for filing a grievance to negotiate directly with the superintendent of the facility.

- c. was confined in a special housing unit.
- d. was transferred without notice during the grievance filing period to a location from which grievances could not be filed.

2. In the *Romano* case, the Second Circuit excused the failure of an incarcerated individual to timely file a grievance where the delay was caused by a state official's failure to provide the incarcerated individual with:

- a. legal counsel.
- b. the entire period of time allowed for filing a grievance without notifying the individual that the time for filing the grievance would expire sooner than the procedures provided.
- c. the legal research materials needed for filing a complaint in state or federal court.
- d. written notice that the individual's constitutional rights were violated.

3. The exhaustion requirement imposed by the Prisoners Litigation Reform Act (PLRA) may be excused for all of the following reasons *except* when the grievance procedure:

- a. requires an incarcerated person to satisfy time-consuming but clearly spelled out administrative procedures.
- b. operates as a dead end offering no practical avenue for relief to an aggrieved individual.
- c. presents rules so confusing that no reasonable incarcerated person could use them.
- d. fails in its purpose because state officials misrepresent the rules or otherwise attempt to prevent incarcerated individuals from using the grievance system.

4. According to the ruling in *DeJesus v. Corrections Officer R. Malloy*, a defendant's motion for summary judgment will be denied when the plaintiff:

- a. presents a sworn response contesting material facts set forth in the defendant's statement of undisputed facts and the court finds that there are material facts in dispute.
- b. submits their own motion for summary judgment.
- c. submits a brief stating the plaintiff's interpretation of the law.

- d. submits an affidavit identifying those facts about which the parties agree.

5. As a result of the *pro se* plaintiff's legal work in the *DeJesus* case, the Court

- a. issued a preliminary injunction ordering the defendant to apologize to the plaintiff.
- b. dismissed with prejudice the case brought by the plaintiff.
- c. granted the plaintiff's motion for summary judgment.
- d. ordered the defendant to come forward with facts establishing his counterclaims.

6. In *Matter of Stanny Vargas v. Donald Venettozzi*, the Court found that the hearing officer's refusal to disclose a list of correction officer witnesses to the charged Mr. Vargas:

- a. constituted harmless error not requiring reversal of the disciplinary determination.
- b. violated the Eighth Amendment prohibition against cruel and unusual punishment.
- c. required annulment of the hearing and expungement of the disciplinary action.

- d. demonstrated a valid exception to the rule requiring hearing officers to allow charged persons to present a defense.

7. *Matter of Saunders v. Annucci* and *Matter of Stanny Vargas v. Donald Venettozzi* both stand for the principle requiring hearing officers at prison disciplinary hearings to:

- a. allow the charged person to present a defense using relevant facility documents.
- b. assign legal counsel to charged persons who are subject to confinement in special housing.
- c. confine accused individuals to SHU between when they are given a misbehavior report and when the hearing ends.
- d. disclose all DOCCS paperwork relating to the disciplinary history of the author of a misbehavior report.

8. *Matter of Shelton v. Annucci* and *Matter of Jackson v. Smith* require the author of a misbehavior report to provide the charged individual with information:

- a. specifying the exact time, date and place of the alleged offense even if the charge involves a "continuing violation."

- b. establishing the start and end dates of the investigation conducted by prison officials.
- c. fixing the date of the start of the disciplinary hearing.
- d. enabling the charged person to present a defense with respect to the time frame of a “continuing violation.”

9. *Matter of Thomas Ryhal v. Anthony J. Annucci* and *Matter of Salvatore Letizia v. Tina Stanford* stand for the proposition that a court will find challenges to parole determinations moot when the applicant for parole:

- a. exhausts their administrative remedies.
- b. subsequently appears before the Board of Parole and is either granted or denied parole.
- c. files multiple applications for parole.
- d. neglects to present the parole board with sufficient facts warranting the granting of parole.

10. When a matter before the court is moot, the court may consider the moot issues raised in the case for all of the following reasons except:

- a. a likelihood of repetition, either between the parties or among other members of the public.
- b. a phenomenon typically evading review.
- c. the exceptionally high quality of the appellant’s brief on the substantive issue.
- d. a showing of significant or important questions not previously passed on, i.e., substantial and novel issues.

Answers

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

**Pro Se
114 Prospect Street
Ithaca, NY 14850**

PLS OFFICES

Requests for assistance should be sent to the PLS 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.

PLS ALBANY OFFICE: 41 State Street, Suite M112, Albany, NY 12207

Adirondack • Altona • Bare Hill • Clinton • CNYPC • Coxsackie • Eastern • Edgecombe • Franklin
Gouverneur • Great Meadow • Greene • Hale Creek • Hudson • Marcy • Mid-State • Mohawk
Otisville • Queensboro • Riverview • Shawangunk • Sullivan • Ulster • Upstate • Wallkill • Walsh
Washington • Woodbourne

PLS BUFFALO OFFICE: 14 Lafayette Square, Suite 510, Buffalo, NY 14203

Albion • Attica • Collins • Groveland • Lakeview • Orleans • Wende • Wyoming

PLS ITHACA OFFICE: 114 Prospect Street, Ithaca, NY 14850

Auburn • Cape Vincent • Cayuga • Elmira • Five Points

PLS NEWBURGH OFFICE: 10 Little Britain Road, Suite 204, Newburgh, NY 12550

Bedford Hills • Fishkill • Green Haven • Sing Sing • Taconic

Pro Se Staff

EDITORS: BETSY HUTCHINGS, ESQ., KAREN L. MURTAGH, ESQ.

WRITERS: BRAD RUDIN, ESQ., NICHOLAS PHILLIPS, ESQ.

JILL MARIE NOLAN, LCSW

COPY EDITING AND PRODUCTION: ALETA ALBERT