

Pro Se

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Requesting the Appointment of Counsel in Federal Court

A 2020 decision from the federal district court of the Western District of New York, *James Murray v. Todd Queeno*, Case No. 6:17-cv-06279, CJS-MWP, Document 53 (W.D.N.Y. March 2, 2020), provides a basis for reviewing the factors a district court considers when a *pro se* plaintiff – a plaintiff who is not represented by an attorney – requests that the court appoint counsel. In *Murray*, there were three claims pending before the Court: a claim that Defendant Queeno had failed to protect the plaintiff from a threatened attack by another incarcerated individual; a claim alleging violations of Plaintiff Murray's religious rights under the First Amendment and the Religious Land Use and Institutionalized Persons Act (RLUIPA); and a claim that Defendants Annucci's and McKoy's refusal to allow Plaintiff Murray to register as a Native American violated the equal protection clause of the Fourteenth Amendment.

At a video conference held on January 22, 2020, the Court ordered the defendants to provide a memorandum explaining their

position with respect to the claim that the defendants' policy with respect to incarcerated individuals who want to observe Native American beliefs violates their RLUIPA and First Amendment rights and invited the plaintiff

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Spotlight on Racial Disparities In Prison Disciplinary Hearings

A Message from the Executive Director, Karen L. Murtagh

“Sadly, as reflected by the six years of data in our Report, although racial disparities may not start at the prison gates, unfortunately they also do not end there. We are hopeful that shining a light on this continuing inequality will contribute to changes in policy and practice that prioritize equal justice and dignity to incarcerated New Yorkers.” New York State Inspector General Lucy Lang.

On December 1, the New York State Inspector General published the results of a long-term analysis of the administration of discipline in the State’s Department of Corrections and Community Supervision (DOCCS). It found that, despite policy changes within DOCCS intended to address the known problem of disparities in the administration of misbehavior reports for offenses committed while in custody, Black and Hispanic incarcerated people remain more likely than their White counterparts to face additional punishment behind bars.

These findings will not come as a surprise to much of our readership, and certainly not to the PLS workforce that routinely litigates such determinations. Indeed, while the overall NYS prison population has dramatically decreased over the last decade (now at approximately 31,500), as a result of the discriminatory impact of the disciplinary system, the disparate treatment of Black and Brown New Yorkers continues behind prison walls, reducing the opportunities of Black and Brown individuals for early parole release, programming, job assignments, etc.

Again, there should be little surprise here, as what happens behind bars is often a reflection of what is occurring outside prison walls. Indeed, prison justice is one component of a criminal justice system that has demonstrably been shown to have a devastatingly disproportionate impact on New Yorkers of color.

According to the report (linked below), the disparities in the administration of disciplinary action to White, Black and Hispanic incarcerated individuals during the period examined were significant. For example:

- A Black incarcerated individual was more than 22 percent more likely to be issued a misbehavior report than a White incarcerated individual;
- A Hispanic incarcerated individual was more than 12 percent more likely to be issued a misbehavior report than a White incarcerated individual; and

- Non-White incarcerated individuals were issued more misbehavior reports, per person, than white incarcerated individuals.

It is interesting to note that the overall or specific cause for the disparities could not be identified by the data alone. That said, the report did determine that these disparities persisted regardless of the severity of crimes leading to incarceration, how long an individual has been incarcerated, or the demographics of DOCCS' workforce.

Notably, it was also determined that despite multiple corrective efforts undertaken by DOCCS to address this issue, the disparities increased slightly between 2017 and 2019, before increasing significantly in 2020, when Black and Hispanic incarcerated individuals were, respectively, nearly 38 percent and 29 percent more likely than White incarcerated individuals to be issued a misbehavior report.

As part of the report, the Inspector General also issued multiple recommendations to DOCCS, including requiring annual anti-bias training for all staff, capturing and analyzing additional data about disciplinary processes, publication of data that can be cross-referenced with demographic data, expanding the use of centralized hearing officers, and the continuing execution of an ongoing capital project to expand the use of fixed camera systems within all correctional facilities across the State.

The full report, including a response from DOCCS, can be found on the Office of the Inspector General's website at www.ig.ny.gov

Clearly, much work remains to be done to remediate the problems that have plagued NY's prison disciplinary process for so long. As always, we at PLS stand ready to work in partnership to address these concerns.

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to re-apply for appointment of counsel. The Court went on to discuss the plaintiff's application for appointment of counsel.

While prisoners and other indigent individuals filing civil actions have no right to counsel, the Court wrote, under 28 U.S.C.

§1915(e)(1) – the section of the law discussing proceedings *in forma pauperis* – the court may request that an attorney represent any person unable to afford one. The determination of whether such an appointment of counsel is necessary, the Court went on, is in the discretion of the court.

In *Hendricks v. Coughlin*, 114 F.3d 390, 392 (2d Cir. 1997), the Second Circuit adopted the following factors to guide a court's exercise of its discretion when the court is considering an application to appoint counsel:

- Whether the claims of the person requesting the appointment appear to have substance;
- Whether the person requesting the appointment is able to investigate the crucial facts concerning their claims;
- Whether conflicting evidence implicating the need for cross examination will be the major proof presented to the **fact finder** (jury or judge);
- Whether the legal issues involved are complex; and
- Whether there are any special reasons why appointment of counsel would be more likely to lead to a just determination.

Although not mentioned in *Murray*, in another recent decision, *William Belardo v. Anthony Annucci*, 2022 WL 16549135 (N.D.N.Y. Oct. 31, 2022), the Court discussed how to address these factors, writing, “[t]his is not to say that all, or indeed any of these factors are controlling in a particular case. Rather, each case must be decided on its own facts.” The *Belardo* Court went on to note, citing *Cooper v. A. Sargenti Co., Inc.*, 877 F.2d 170, 172 (2d Cir. 1989), that “[t]he Court must consider the issue of appointment carefully because every assignment of a volunteer lawyer to an undeserving client deprives society of a volunteer lawyer for a

deserving cause.” Further, the Court reminded, citing *Mallard v. United States District Court*, 490 U.S. 296, 298 (1989), the Court is authorized only to request an attorney to represent any person unable to afford counsel. Twenty-eight U.S.C. §1915(e)(1) does not permit a federal court to require an unwilling attorney to represent an indigent litigant in a civil case.

The *Murray* Court considered the facts and claims in Plaintiff Murray's complaint in light of the *Hendricks* factors. After its review of the brief and related materials that the defendants submitted with respect to Plaintiff Murray's First Amendment, RLUIPA and equal protection claims, the Court found that it would be helpful to have the assistance of counsel to research and argue the legal issues on the plaintiff's behalf. The Court therefore appointed counsel for the plaintiff.

In reaching this result, the Court cited to *McEachin v. McGuinness*, 357 F.3d 197, 205 (2d Circuit 2004), where the Second Circuit instructed the district court – which had denied the incarcerated plaintiff's request for appointment of counsel – to appoint counsel due to the complexity of the RLUIPA claims. In addition, the *Murray* Court wrote, given the potential for this case to go to trial, the Court finds that experienced trial counsel “will certainly be in a better position to assist the plaintiff and the Court than will the Court itself.”

James Murray represented himself in this action brought pursuant to Section 1983 and the Religious Land Use and Institutionalized Persons Act.

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 (parole) or SARA-compliant housing and are returning to one of the five (5) boroughs of New York City, or to 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*

In this issue of Pro Se, the PREP spotlight shines on **The Prison Books Project**. The Prison Books Project is an organization that provides books to incarcerated people throughout New York State. Most requests are filled through Binnacle Books in Beacon, NY.

To request books or book recommendations, individuals can write to The Prison Books Project at their P.O. Box. In this letter, write the name of the book you're requesting (or the genre of a book/request

for a recommendation) and your information (including your name, DIN, facility and address).

To request a book, mail your letter to:
Books Project
P.O. Box 132
Beacon, NY 12508

PRO SE VICTORIES!

Nicholas Hansen v. James Johnson, No. 22-241, Document 30, slip op. (2d Cir. Sept. 20, 2022). Following a state court conviction for among other offenses, attempted murder in the second degree, Nicholas Hansen pursued a state court appeal in which he raised the issue of ineffectiveness of counsel. When the Appellate Division denied his appeal and the Court of Appeals denied his request for review, Mr. Hansen filed a Criminal Procedure Law (CPL) §440.10 motion in state court, again arguing that his criminal defense counsel had been ineffective. This motion was denied by the trial court. The denial was affirmed by the Appellate Division.

Mr. Hansen then filed a federal habeas corpus action in the Eastern District of New York, arguing that he had received ineffective assistance of counsel. Specifically, Petitioner Hansen argued that he was denied effective assistance when his defense attorney failed to advise him that the decision as to whether a criminal defendant testifies at their criminal trial is entirely the defendant's decision. The

district court denied the petition, ruling that any appeal from its order would not be taken in good faith and therefore denied *in forma pauperis* (poor person's) status for any appeal brought by Petitioner Hansen.

Petitioner Hansen moved for a certificate of appealability in the Second Circuit Court of Appeals. The Court granted the motion and remanded the habeas action to the district court to determine whether the state court's application of CPL §440.10-3(a) to Petitioner Hansen's ineffective assistance claim was "exorbitant" and thus inadequate to preclude federal habeas review (see discussion of *Pierotti*, below), and if so:

- whether the state court's merits analysis was "a contrary to fact construction" and thus not entitled to Anti-Effective Death Penalty Act (AEDPA) deference; and
- whether Petitioner Hansen was entitled to habeas relief on his claim that counsel was ineffective by allegedly 1) failing to properly advise him of his right to testify or 2) coercing him into not testifying.

To fully understand the significance of this decision, some background on federal habeas actions is helpful. In many situations, federal courts will not review a question of federal law decided by a state court if the state court decision rests on a state law ground that is independent of the federal question and adequate to support the judgment. See, *Pierotti v. Walsh*, 834 F.3d 171 (2d Cir. 2016). In *Hansen*, as in *Pierotti*, the district court held that it could not reach the merits of the petitioner's ineffective assistance of counsel

claim because the state court's rejection of that claim rested on an independent and adequate state ground. In Petitioner Hansen's case, the state court found that the claim was procedurally barred under CPL §440.10(3)(a). This subsection provides that a claim is procedurally barred where, with due diligence, the defendant could readily have made the facts supporting the claim appear in the record so that they would provide for an adequate review of the issue, but the defendant had unjustifiably failed to present the matter prior to the sentence and the ground or issue in question was not subsequently determined upon appeal.

A petitioner may oppose the respondent's motion to dismiss a federal habeas petition on the basis of the adequacy of a state procedural bar by arguing that either 1) the procedural bar was not firmly established and regularly followed by the state, or 2) the state court's application of the rule was "exorbitant," making the state ground inadequate to stop consideration of a federal question.

Briefly, an exorbitant application of the state court rule involved in a petitioner's habeas challenge occurs when the essential facts of the petitioner's claim are dependent on evidence that is not in the trial record. Thus, because New York law does not require ineffective assistance claims to be raised on direct appeal when the evidence of counsel's ineffectiveness is not in the record, a state judge's reliance on that procedural bar – the failure to raise a claim that is not supported by evidence in the record – is "an exorbitant application of the state rule" and is an inadequate basis for **precluding** (barring)

federal habeas relief with respect to the ineffectiveness claim. For a detailed discussion of when a state court's application of a state rule is exorbitant, *see, Pierotti*, 834 F.3d 171, 176-180.

Petitioner Hansen's habeas petition is now again before the district court where he is required to show that the state court's application of the procedural rule at issue is exorbitant.

Pro Se Victories! features descriptions of successful *pro se* administrative advocacy and unreported *pro se* litigation. In this way, we recognize the contribution of jail house 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 decisions submitted exceeds the amount of available space, the editors make the difficult decisions as to which decisions to mention. 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

Court Affirms Order Requiring Change of Classification from Tier III to Tier II

In *Matter of Jermaine Davis v. Annucci*, 2022 WL 16640483 (3d Dep't Nov. 3, 2022), the Third Department addressed the issue of what DOCCS must do when a court reverses and expunges only the charges that would permit a hearing to be designated as a Tier III and the remaining charges can only be designated as Tier II offenses. The Third Department held that in this situation, DOCCS must delete all references to the Tier III hearing and amend its records to indicate that the hearing was a Tier II.

In *Davis*, the petitioner was charged with possessing contraband, drug possession, drug distribution and possessing an altered item – a hot pot. The respondent acknowledged that the drug related charges were not supported by substantial evidence. Because the petitioner had already served the penalty imposed and no loss of good time was recommended, the Court found that remittal of the matter for a re-determination of the penalty was not necessary. However, the decision continued, possessing an altered item constitutes at most a Tier II offense (*see*, 7 NYCRR 270.2(B)(14)(ii)). For this reason, the Court, citing *Matter of Dagnone v. Annucci*, 149 A.D.3d 1461, 1462

(3d Dep't 2017) and *Matter of Howard v. Coughlin*, 212 A.D.2d 853, 853 (3d Dep't 1995), ordered the respondent to expunge all references to the annulled charges from petitioner's institutional record, "including reference to the Tier III designation."

In *Dagnone*, after the petitioner filed an Article 78 challenge to the Tier III hearing at which he had been found guilty of possessing an altered item and possessing contraband, the respondent administratively reversed the contraband charge because the misbehavior report failed to support the charge. Although the respondent asserted that all references to the charge that was dismissed had been expunged, the petitioner argued that one reference to the charge remained: the hearing was still designated as a Tier III even though possession of an altered item, the only remaining charge, was designated as a Tier II offense.

The *Dagnone* Court found that while there was no error in the original designation of the hearing as a Tier III, "once that charge of possession of contraband was dismissed, there was no basis for the continued reference of the misbehavior as a tier III violation as it is reflected in the petitioner's institutional record." As the Third Department said in *Matter of Davidson v. Coughlin*, 154 A.D.2d 806, 806-807 (3d Dep't 1989), "[i]t is beyond argument that allowing references to charges that have been dismissed and other mischievously equivocal information that might be unfairly construed to remain in prisoners' records leaves inmates in jeopardy of having these references unfairly used against them." The Court, citing *Matter of Howard v.*

Coughlin, 212 A.D.2d 853, 853 (3d Dep't 1995), ordered the reference to the Tier III designation "eradicated."

Prisoners' Legal Services of New York, Roseanne Trabocchi, of counsel, represented Jermaine Davis in this Article 78 proceeding.

Court Finds Insufficient Evidence That Petitioner Created a Disturbance

After Gregory Ramos argued with a correction officer in the prison commissary, the officer charged him with refusing a direct order, refusing to produce his facility identification, and creating a disturbance in the prison commissary bullpen. The charges stemmed from Mr. Ramos's interaction with another incarcerated individual, in the midst of which, the officer wrote, Mr. Ramos refused an order to stop talking and to produce his identification card. The Court in *Matter of Ramos v. Annucci*, 208 A.D.3d 1531 (3d Dep't 2022), rejected the petitioner's claims that the charges of refusing a direct order and failing to produce his identification were not supported by substantial evidence, finding that the misbehavior report – standing alone – was substantial evidence that he violated these rules.

The Court reached a different result with respect to the charge of creating a disturbance. As relevant here, Rule 104.13 provides that "[a]n incarcerated individual shall not engage in conduct which disturbs the order of any part of the facility ... [which] includes ... loud talking in a mess hall, program area or corridor ..." Apart from alleging that the petitioner, when ordered

to do so, refused to stop talking and failed to produce his identification, the misbehavior report alleges only that “the other 38 incarcerated individuals began to take notice.” According to the Court, a video of the incident neither reflected that the petitioner’s conduct disturbed the order of the commissary bullpen area nor demonstrated that he was engaging in loud talk or other misconduct indicative of a disruption. For this reason, the Court found that the respondent’s determination that petitioner created a disturbance was not supported by substantial evidence.

Gregory Ramos represented himself in this Article 78 proceeding.

Substantial Evidence Does Not Support Charge of Creating a Disturbance but Supports Charge of Refusing an Order

When Edward Mackenzie entered the mess hall, a correction officer ordered him to put on a mask. When he left the mess hall, Mr. Mackenzie was not wearing a mask and the officer again ordered him to do so. When he refused, the officer charged Mr. Mackenzie with refusing a direct order and creating a disturbance. After exhausting his administrative remedies by filing an administrative appeal and receiving the denial of the appeal, Mr. Mackenzie filed an Article 78 challenge to the determination of guilt.

In *Matter of Mackenzie v. Tedford*, 208 A.D.3d 1526 (3d Dep’t 2022), the Third Department found, and the respondent conceded, that the determination that the petitioner had created a disturbance was not supported

by substantial evidence and ordered the determination annulled. Because Mr. Mackenzie had finished serving the penalty imposed at the hearing and the hearing officer had not recommended a loss of good time, the Court did not remit the case for a re-determination of the sanctions.

With respect to the claim that the charge of refusing a direct order was not supported by substantial evidence, the Court reached a different conclusion. The petitioner admitted that he did not put on the mask, but argued that he was not required to do so under the Center for Disease Control guidelines. The Court ruled that his admission to not putting on the mask was substantial evidence that he refused a direct order, noting that an incarcerated individual is not free to disobey an order even if they believe it to be wrong.

The petitioner also argued that the officer had not given him an order; rather, he asserted, the two were just having a conversation. The Court found that this created a credibility issue. That is, the hearing officer had to decide who was more **credible** (believable), the petitioner, who said the officer and he were having a conversation, or the officer, who said that he ordered the petitioner to put on a mask. Hearing officers have the authority to decide who is telling the truth. In this case, the hearing officer found the officer’s version of the incident was more believable.

Finally, because the petitioner had not raised the argument at the hearing, the Court refused to consider the petitioner’s argument that the misbehavior report was

not properly endorsed. The Court ruled that this argument was unpreserved.

Edward Mackenzie represented himself in this Article 78 proceeding.

Substantial Evidence Did Not Support Three of Eight Charges

During an incident that began when the petitioner was being escorted from the yard to his cell block and from there to a mental health evaluation, and ended with the petitioner being placed in SHU and then admitted to mental health observation, the petitioner was forcibly extracted from his cell and underwent a forcible strip frisk.

Following the incident, the petitioner was charged with refusing multiple direct orders, violent conduct, interference, threats, demonstration, harassment, creating a disturbance and violating frisk procedures. He was found guilty of these charges. The determination of guilt was affirmed on administrative appeal.

Having exhausted his administrative remedies, the petitioner filed an Article 78 challenge to the hearing. In *Matter of Jackson v. Annucci*, 209 A.D.3d 1086 (3d Dep't 2022), the Court found that five of the eight charges were supported by substantial evidence in the form of the testimony of two officers, the unusual incident reports, the video recordings and other documentary evidence. Specifically, the petitioner refused direct orders to put his hands through the cell bars in the SHU so he could be cuffed, refused orders to comply with strip frisk procedures, and struggled violently when staff attempted to conduct an approved

forcible frisk, thereby interfering with the employees' performance of their duties.

The Court found that three of the charges – creating a disturbance, demonstration, and threats – were not supported by substantial evidence. Specifically, the Court found that the record:

- **Did not establish** that petitioner participated or led a demonstration as he neither engaged in conduct that was detrimental to the order of the facility nor did he encourage others to engage in such conduct. (These are elements of the rule prohibiting participation in a demonstration or encouraging others to demonstrate);
- **Did not establish** that petitioner created a disturbance because his conduct neither took place in the presence of other incarcerated individuals nor triggered any response from other incarcerated individuals; and
- **Did not establish** that petitioner made any threats.

The Court ordered the determinations of guilt with respect to the three charges annulled. However, because the petitioner had already served the penalty and the hearing officer had not recommended any loss of good time, the Court did not order remittal for reconsideration of the penalty.

Petitioner Jackson represented himself in this Article 78 proceeding.

Substantial Evidence Supported Multiple Charges; Petitioner Was Not Wrongfully Excluded; Misbehavior Report Provided Adequate Notice

In *Matter of Alfonzo Rizzuto v. T. Melville*, 2022 WL 16640485 (3d Dep't Nov. 3, 2022), the petitioner argued that substantial evidence did not support the charges of refusing direct orders, harassment and violating mess hall procedures. The Third Department disagreed. The Court found that the misbehavior report and hearing testimony from officers established that the petitioner, in a loud and boisterous manner, cursed and yelled at, and was extremely argumentative with, the head cook and thereby caused congestion in the mess hall food line. In addition, an incarcerated individual testified that he observed the petitioner refuse repeated orders to be quiet and keep moving.

The petitioner also argued that the misbehavior report did not provide him with adequate notice of the charge that he violated mess hall rules. The Court found that the mess hall rules, which the petitioner entered into evidence at the hearing, plainly prohibited yelling or loud talking in the mess hall. The Court held that petitioner's entry into evidence of these rules belied the petitioner's claim that the misbehavior report failed to provide him with sufficient information to determine the basis for the rule violation.

Finally, the petitioner argued that he had been wrongfully excluded from the hearing. The Court disagreed, holding that the record reflected that the petitioner continued to interrupt the hearing officer and was argumentative, despite warnings that he would be removed from the hearing if his conduct continued.

Alfonso Rizzuto represented himself in this Article 78 proceeding.

Miscellaneous

Defendant Was Wrongfully Shackled Before Grand Jury

While he was incarcerated in a facility in Washington County, William Cain was charged by indictment with promoting prison contraband in the first degree. After his attorney unsuccessfully moved to dismiss the charges, Mr. Cain pled guilty to attempted promotion of prison contraband in the first degree and was sentenced to 1½ to 3 years to be served consecutively to the sentence that he was serving at the time that he engaged in the most recent offense. On appeal, the defendant argued that "the integrity of the grand jury proceeding was impaired by the shackling of his hands in the presence of the grand jury" and thus, the County Court erred in denying his motion to dismiss.

Relying on caselaw dealing with shackling of defendants at trial, the Court in *People v. Cain*, 209 A.D.3d 124 (3d Dep't Sept. 22, 2022), noted that "courts must closely scrutinize whether the use of physical restraints visible to the finder of fact is 'justified by an essential state interest ... specific to the defendant on trial.'" The Court went on to say that "judicial hostility" to shackling comes from three fundamental legal principles:

- Preserving the presumption of innocence to which every criminal defendant is entitled;
- Ensuring that the defendant is able to participate meaningfully in their defense; and
- Maintaining the dignity of the judicial process.

Characterizing these principles as "essential pillars of a fair and civilized criminal justice system," the Court, citing *People v. Best*, 19 N.Y.3d 739, 743-744 (2012), wrote that "the routine and unexplained use of visible restraints does violence to each of these principles." The *Cain* Court, citing *People v. Richardson*, 143 A.D.3d 1252, 1253 (4th Dep't 2016), *lv denied*, 28 N.Y.3d 1150 (2017), found that "an actual justification for the use of physical restraints, specific to the defendant, is no less necessary when a defendant testified before a grand jury; in such context, the People are required to put forth a reasonable basis on the record for their use." The threshold finding as to whether there is an actual justification for the use of restraints, the Court wrote, must be made on the record at the start of the proceeding, out of the presence of the grand jury.

In Mr. Cain's appeal, the Court found that the People had failed to meet the minimal obligations set forth in the preceding paragraphs. The People had not presented any relevant information to support the use of restraints. This, the Court wrote, cannot be **countenanced** (allowed). Citing *People v. Clyde*, 18 N.Y.3d 145, 152-153 (2011), the Court noted that should the People's conduct be **condoned** (approved), "it would violate the rights of defendants under both the federal and state constitutions."

The Court also rejected the People's arguments that because the grand jurors' view of the defendant's hands was blocked by a table, he suffered no prejudice from the shackling. First, the Court wrote, this fact is disputed – that is, the defendant did not concede that the shackles were not visible to the grand jurors. Second, the Court continued, even if the shackles were not visible, "it bears noting that it is customary for many people to use hand gestures in the course of describing events; for this reason, the inability to show one's hands may connote or communicate that one is not trustworthy. Put another way, hiding one's hands may be interpreted as withholding, may communicate in body language, that one has 'something to hide.'"

Based on this analysis, the Court held that the indictment must be dismissed but allowed the People to re-present any appropriate charges to another grand jury.

Theresa Souza, Esq., Saratoga Springs, represented William Cain in the appeal from his conviction for attempted promotion of prison contraband in the first degree.

Court Dismisses Challenge to Refusal to Remove Petitioner From a Medical Diet

When a facility physician refused to remove Johnathan Johnson from a special meal plan for individuals with allergies, Mr. Johnson filed a grievance asking that he be put on the regular meal plan. The grievance was denied and the Central Office Review Committee (CORC), to which Mr. Johnson had appealed the denial, affirmed the denial and instructed Mr. Johnson to address his concerns through sick call procedures. Mr. Johnson then filed an Article 78 petition seeking a writ of mandamus to compel the respondents to remove him from the special meal plan. The Supreme Court, Albany County, dismissed the petition and the petitioner appealed to the Third Department of the Appellate Division.

In *Matter of Johnson v. Annucci*, 208 A.D.3d 1403 (3d Dep't 2022), the Court began its discussion by describing special proceedings for writs of mandamus. "The writ of mandamus is an extraordinary remedy that lies only to compel the performance of acts which are mandatory, not discretionary, and only when there is a clear right to the relief sought," the Court wrote. "While the petitioner has a right to adequate food and nutrition," the Court continued, "the selection of a meal plan to address and accommodate his specific dietary needs or restriction necessarily involves the exercise of discretion and judgment." Accordingly, the Court ruled, the remedy of mandamus to compel was not available to the petitioner.

The Court then turned to the question of whether there were grounds for challenging the substance of the CORC decision. With respect to that issue, the Court noted that its review is limited to whether the CORC determination was arbitrary and capricious, irrational or affected by error of law. With respect to this issue, the Court found that petitioner's entire argument centered on his belief that the facility's food service department had received a form from the facility's medical staff instructing the food service staff to remove petitioner from the special meal plan and the staff refused to do so.

The problem with this argument, the Court found, was that the record did not support it. The record makes clear that any changes to petitioner's meal plan or diet have to first be approved by the facility's medical staff. With respect to that issue, the Court wrote, petitioner had admitted that the facility doctor had denied his request to modify his meal plan. In the absence of any explanation for why the denial of the request to restore petitioner to the regular meal plan was arbitrary and capricious, irrational or affected by an error of law, the Court held that the lower court properly rejected any challenge to the denial of the grievance.

Finally, the Court was "not persuaded" that petitioner had been deprived of an adequate diet or reasonable medical care, or that the facility staff had been deliberately indifferent to his health. To establish such an Eighth Amendment violation, the Court wrote, the petitioner must allege that "(1) objectively, the deprivation was sufficiently serious that he was denied the minimal civilized measure of life's necessities, and (2)

subjectively, the facility acted with a sufficiently culpable state of mind, such as deliberate indifference to his health or safety.” With respect to this issue, the Court noted that petitioner had not stated why he wanted to be removed from the diet or how the diet failed to address his nutritional needs, nor had he established that the food with which he was provided constituted a sufficiently serious deprivation of one of life’s necessities. Thus, the petitioner had failed to satisfy the objective element of the Eighth Amendment test.

Johnathan Johnson represented himself in this Article 78 proceeding.

FEDERAL COURT DECISIONS

Has DOCCS Complied With its Agreement to Provide Menorahs to People in SHU?

In 2016, while Dana Gibson was in SHU, she requested an electric menorah so she could celebrate Hanukah. When her request was denied, and after exhausting her administrative remedies, Ms. Gibson filed a complaint in federal court, alleging that DOCCS’ failure to allow her to have a menorah substantially burdened the exercise of her Jewish faith, thereby violating the Religious Land Use and Institutionalized Persons Act (RLUIPA).

In March 2021, the Court denied Defendant DOCCS’ motion for summary judgment with respect to the RLUIPA claim, finding that while the parties had agreed that depriving the plaintiff of a menorah substantially burdened the plaintiff’s exercise of her faith,

DOCCS had failed to show that depriving Jewish individuals in SHU the opportunity to have menorahs during Hanukah was the least restrictive means for limiting items in SHU that could easily be turned into weapons. While it is possible, the Court wrote, that barring electric menorahs in SHU was the only way to achieve DOCCS’ compelling interest in protecting incarcerated individuals and officers, DOCCS had not produced any facts showing this, nor did they explain why electric menorahs are considered safe in the general population but are unsafe in SHU.

Following the denial of DOCCS’ motion for summary judgment on the plaintiff’s RLUIPA claim, in September 2021, the parties entered into a settlement **stipulation** (agreement) in which in exchange for the plaintiff’s agreement to release the defendants from all claims, DOCCS agreed that “upon full execution of the agreement ... DOCCS [would] immediately issue a memorandum to all facilities initiating a policy change having the effect of modifying Directive 4933 Sec. 302.2(f)(2) [the section of the directive listing the items incarcerated individuals are permitted to have in SHU] to add (xxv) an electric menorah.”

In May 2021, *before* the stipulation was executed, DOCCS had issued a memo stating that incarcerated individuals “confined to SHU during Hanukah will be allowed to light an electric or battery menorah.” In November 2021, a few months after the Stipulation was fully executed, DOCCS issued a memo which pertained only to the 2021 Hanukah protocols. This memo provides that an incarcerated individual housed in SHU may *request* a

battery-operated menorah during Hanukah. And in July 2022, DOCCS issued a revised version of Directive 4933 which does not include a menorah among the items of property incarcerated individuals are permitted when they are housed in SHU.

For Hanukah 2021, Plaintiff Gibson requested a menorah while she was in SHU at Attica C.F. Her request was denied by the Superintendent. Plaintiff Gibson then contacted the Assistant Attorney General (AAG) who had represented the defendant in her lawsuit about the Superintendent's refusal to provide her with a menorah. When she did not hear from the him, she filed a motion asking the Court to hold DOCCS in contempt and order the payment of sanctions.

In its decision on the contempt motion, *Gibson v. New York State Department of Corrections and Community Supervision (DOCCS)*, No. 1:17-CV-00272, Document 145 (W.D.N.Y. Oct. 18, 2022), the Court denied the plaintiff's motion to find DOCCS in contempt. The Court found that the evidence presented (discussed above) did not show that DOCCS was in contempt of the order because 1) the settlement agreement was neither clear nor unambiguous – a prerequisite to making a finding of contempt – and 2) there was not clear and convincing evidence that DOCCS had failed to comply with the agreement.

However, the Court also expressed concern over DOCCS' compliance with the stipulation. For this reason, the Court requested briefing from DOCCS on how the policy change promised in the settlement is being implemented, stating that it is

unclear whether a memo issued before the stipulation was fully executed and a memorandum pertaining only to the celebration of Hanukah in 2021 constitutes full compliance with the stipulation. The Court gave DOCCS 30 days from entry of the order to file its brief and later extended that time period through December 1, 2022.

Dana Gibson represented herself in this action under the Religious Land Use and Institutionalized Persons Act.

Pre-trial Rulings on Evidentiary Issues

Prior to trial, in *Kendu P. Starmel v. Sgt. Tompkin*, 2022 WL 6737723 (N.D.N.Y. Oct. 11, 2022), an excessive force case alleging violation of the Eighth Amendment, the plaintiff moved to exclude at trial the names, dates and sentences imposed for the plaintiff's prior felony convictions and his prison disciplinary history. The defendants argued that they should be allowed to use the plaintiff's prior convictions to **impeach the plaintiff** (attack his credibility) and his prison disciplinary history to demonstrate plaintiff's disregard for law and order and his **propensity for deception** (tendency to lie).

A motion made prior to trial seeking to determine the admissibility of evidence is known as a motion *in limine*. "Evidence should be excluded on a motion *in limine*," the Court wrote, "only when the evidence is clearly inadmissible on all potential grounds." The moving party has the burden of establishing that evidence is inadmissible and thus, excludable.

1995 Convictions

Federal Rule of Evidence 609(a)(1) provides that for the purpose of attacking the credibility of a witness, *subject to Rule 403*, evidence that the witness has been convicted of crime punishable by more than a year in prison must be admitted in a civil case. Rule 403 provides that a court may exclude relevant evidence if its probative value is substantially outweighed by a danger of:

- Unfair prejudice;
- Confusing the issues;
- Misleading the jury;
- Undue delay;
- Wasting time; or
- Needlessly presenting **cumulative evidence** [evidence which proves a fact with respect to which other evidence has already been admitted].

Where more than 10 years have passed since the later of the conviction or the individual's release from confinement on the sentence for the conviction, Rule 609(b) provides that the conviction is admissible only if "its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and ... the proponent gives the adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use." In balancing probative value against prejudicial effect, courts examine:

- The impeachment value of the prior crime;
- The remoteness of the conviction;

- The similarity between the past crime and the conduct at issue; and
- the importance of the credibility of the witness.

The first factor – the impeachment value of the prior crime – is the primary consideration.

While Rule 609(a) presumes that all felonies are at least somewhat probative of a witness's credibility, the Court wrote, citing *United States v. Estrada*, 430 F.3d 606, 618 (2d Cir. 2005), "violent crimes such as murder, conspiracy, robbery and weapons possession are generally not particularly probative as to honesty and veracity."

In *Starmel*, the plaintiff's prior convictions were for possession of a weapon and possession of a controlled substance and he had been released from prison for those crimes in 1999. These convictions, the Court noted, are presumptively inadmissible under Rule 609(b), except where the Court finds that their probative value substantially outweighs their prejudicial effect. Here the Court found that because the plaintiff was released from prison 23 years ago, the crimes were not similar to the conduct at issue in the lawsuit and, most significantly, neither possession of a weapon or possession of controlled substance are probative of credibility, the probative value of the convictions did not substantially outweigh their prejudicial effect. Based on this reasoning, the Court excluded their use at trial.

Plaintiff's Disciplinary History

As noted above, defendants sought to admit plaintiff's disciplinary history because the rule violations demonstrate plaintiff's disregard for the law and order and his propensity for deception. The defendants also argued that the plaintiff's disciplinary history is relevant to damages as some of the injuries that he claims resulted from the incident that is the subject of the lawsuit may, in fact, have resulted from other interactions with DOCCS personnel.

With respect to this request, the Court began by noting that Federal Rule of Evidence 404(b) provides that "evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion, the person acted in accordance with the character." Thus, as a judge in the Southern District of New York wrote, "Federal Rule of Evidence 404(b) prohibits the introduction of character evidence to show that an individual has a certain predisposition, and acted consistently with such predisposition during the event in question." *See, Lombardo v. Stone*, No. 99 CIV 4603, 2002 WL 113913, *3 (S.D.N.Y. Jan. 29, 2002). This same opinion goes on to state that "[i]n particular, disciplinary records of a state ward plaintiff, e.g., a prison inmate or psychiatric patient, are almost always inadmissible. *Id.* However, the *Starmel* Court added, such evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or lack of accident. *See*, Federal Rule of Evidence 404(b).

Here, the Court found that defendants' attempt to introduce plaintiff's disciplinary history in order to demonstrate his disregard for law and order is not an appropriate use of this evidence under Rule 404(b) as defendants "plainly seek to use it to prove plaintiff's character in order to show that on a particular occasion plaintiff acted in accordance with that character." The Court went on to state that to the extent that "defendants wish to show plaintiff's **propensity for** (leaning toward) deception ... a court may on cross examination, allow specific instances of a witness's conduct ... to be inquired into if they are probative of the witness' character for truthfulness or untruthfulness."

In the motion before the *Starmel* Court, the defendants did not identify any incident as probative of the plaintiff's character for truthfulness. Noting that many of the incidents on the plaintiff's disciplinary history did not appear to be probative of the plaintiff's character for truthfulness, the Court reserved decision on the issue of whether any of the incidents in the plaintiff's disciplinary history were probative of the plaintiff's character for truthfulness until the defendants make an offer of proof identifying the incidents about which they want to inquire and state precisely how those incidents appear to be probative of plaintiff's character for truthfulness.

Following this evidentiary ruling, at the trial, the plaintiff was successful. The jury found the one defendant used excessive force and injured the plaintiff and another failed to intervene to prevent the use of excessive force, thereby proximately

causing injury to the plaintiff. The jury awarded \$100,000 to compensate the plaintiff for one defendant's conduct and \$150,000 to compensate the plaintiff for the second defendant's conduct.

Edward Sivin, Glenn D. Miller Clyde Rastetter and David Roche, of Sivin, Miller & Roche LLP, represented Kendu P. Starmel in this §1983 action.

IMMIGRATION MATTERS

Nicholas Phillips

This issue's column focuses on *Garcia-Aranda v. Garland*, 53 F.4th 752, 2022 WL 17086457 (2d Cir. 2022), a major decision by the Second Circuit Court of Appeals which significantly clarifies the concept of governmental acquiescence under the Convention Against Torture ("CAT"). CAT is one of several types of relief available in deportation proceedings to noncitizens who fear harm in their country of origin. The most widely known of these fear-based forms of relief is asylum, which protects noncitizens who establish a "well-founded fear of persecution" on account of race, religion, nationality, political opinion, or membership in a particular social group. 8 U.S.C. §1101(a)(42). A fear "is well-founded" if there is a "a slight, though discernible, chance of persecution," *Tambadou v. Gonzales*, 446 F.3d 298, 302 (2d Cir. 2006), while persecution requires that the harm be sufficiently severe, rising above "mere harassment,"

Ivanishvili v. U.S. Dep't of Justice, 433 F.3d 332, 341 (2d Cir. 2006).

While asylum offers many benefits, the Immigration and Nationality Act ("INA") prohibits a noncitizen from obtaining asylum, as well as a related form of relief known as withholding of removal, if the individual has "been convicted by a final judgment of a particularly serious crime [and is] a danger to the community of the United States." 8 U.S.C. §1158(b)(2)(A)(ii). For noncitizens subject to this statutory bar, the only available fear-based form of relief is deferral of removal under the CAT, under which a noncitizen must prove that it is more likely than not that he or she will be "tortured" in their home country. 8 C.F.R. §208.16(c)(3).

"Torture" is defined as:

- "severe pain and suffering," 8 C.F.R. §208.18(a)(1):
 - which is "specifically intended," 8 C.F.R. §208.18(a)(5); and
 - which constitutes "an extreme form of cruel and inhuman treatment, 8 C.F.R. §208.18(a)(2).

Of relevance here, to qualify as torture under the CAT, the harm must also be inflicted "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." 8 C.F.R. §208.18(a)(1). Thus, if a noncitizen fears harm at the hands of the government, that harm would qualify for

then to qualify for CAT protection, the noncitizen must also establish that the CAT protection. But if a noncitizen fears harm at the hands of *private* actors—for example, members of a criminal gang—harm would be inflicted with the “acquiescence of a public official.”

So, what exactly is required to show acquiescence? Federal regulations state that acquiescence “requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity.” 8 C.F.R. §208.18(a)(7). But this definition leaves several questions unanswered. Is it enough to show that *one* public official would acquiesce to the harm, or do *most* public officials have to acquiesce? What is the required level of governmental awareness and of governmental inaction? And what about if the government is actively taking steps to prevent the harm but simply lacks the resources to effectively do so?

The Second Circuit attempted to resolve some of these questions in *De La Rosa v. Holder*, 598 F.3d 103 (2d Cir. 2010). *De La Rosa* concerns the removal proceedings of Marino De La Rosa, a Dominican citizen who extensively cooperated with federal prosecutors after being charged with drug trafficking, ultimately facilitating the conviction of a Dominican national named Jonas Brito. In removal proceedings, De La Rosa sought CAT protection on the grounds

that Brito and his family would more likely than not murder him if he returned to the Dominican Republic. After an immigration judge (“IJ”) granted his CAT application, the Board of Immigration Appeals (“the Board”) reversed the IJ’s decision on appeal, reasoning that the Dominican government had taken steps to investigate police complaints filed against Brito and therefore would not acquiesce to any harm inflicted upon De La Rosa. The Second Circuit reversed and remanded, concluding that:

[I]t is not clear to this Court why the preventative efforts of some government actors should foreclose the possibility of government acquiescence, as a matter of law, under the CAT. Where a government contains officials that would be complicit in torture, and that government, on the whole, is admittedly incapable of actually preventing that torture, the fact that some officials take action to prevent the torture would seem neither inconsistent with a finding of government acquiescence nor necessarily responsive to the question of whether torture would be “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”

Id. at 110 (quoting 8 C.F.R. §208.18).

While *De La Rosa* helped to clarify what does *not* constitute acquiescence under the CAT, immigration courts after *De La Rosa* continued to struggle to determine what *does* constitute acquiescence, ultimately leading to the Second Circuit's decision in *Garcia-Aranda*. In that case, a Honduran citizen named Karla Iveth Garcia-Aranda sought CAT protection because she and her family had been threatened, kidnapped, and beaten in Honduras by the Mara 18 criminal gang while a local Honduran police officer was present. An IJ denied her CAT application and the Board affirmed, reasoning that Garcia-Aranda failed to prove that the police officer would actively participate in torturing her and failed to show that "higher officials" would remain willfully blind to her mistreatment. 2022 WL 17086457 at *3.

The Second Circuit reversed and remanded, concluding that the immigration agency had again applied an incorrect definition of acquiescence. With respect to the Board's determination that "higher officials" must acquiesce to torture, the Court concluded that the Board had misinterpreted a Second Circuit case, *Khouzam v. Ashcroft*, 361 F.3d 161 (2d Cir. 2004), which analyzed whether a man accused of murder in Egypt was eligible for CAT relief. While the petitioner in *Khouzam* had supplied evidence that higher-level officials would acquiesce to his torture, the *Garcia-Aranda* Court explained that such evidence is not *required* to establish CAT acquiescence. Rather, the critical

question is whether "*any member of the local police who is acting under color of law will participate in, or acquiesce in,*" the torturous conduct. 2022 WL 17086457 at *6 (emphasis in original). The Court continued:

Where, as here, the primary perpetrator of likely harm is a gang, the relevant state-action question (should the [Board] reach it) is whether any public official, or any other person, including low-level local police officers, when acting under color of law, will participate or acquiesce in harm that the gang is likely to inflict and that is recognized as torture under [8 C.F.R. §1208.18(a)].

Id. *Garcia-Aranda* thus stands as an important statement on CAT acquiescence, one which will hopefully provide critical guidance to the immigration agency as it continues to adjudicate CAT applications in removal proceedings.

<p>WHAT DID YOU LEARN? Brad Rudin</p>
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1. **In *Nicholas Hansen v. James Johnson*, Petitioner Hansen, an incarcerated person, sought habeas relief from the federal district court on the grounds that:**
 - a. the state court did not allow him to proceed to trial with counsel of his choice.
 - b. his trial counsel did not inform him about his right to testify irrespective of counsel's preference.
 - c. the federal rules of criminal procedure contradicted state rules on the substance of the right-to-counsel issue.
 - d. appellate counsel in the federal courts declined to present his constitutional claims.

2. **When New York State criminal defendants have a claim of ineffective assistance of counsel, the *best* practice is for the defendant, whenever possible, to *first* present that claim:**
 - a. during the state criminal trial.
 - b. to the federal district court considering the habeas corpus application.
 - c. to the Second Circuit Court of Appeals.
 - d. during the appeal to the Appellate Division of the New York court system.

3. **Under the rule stated in *Matter of Jermaine Davis v. Annucci* and related cases, when all of the Tier III charges are reversed and only Tier II charges remain, the administrative record of the accused individual:**
 - a. may include a reference to both the Tier II and Tier III charges.
 - b. must include a reference to the Tier III charge.
 - c. may not designate the hearing as a Tier III.
 - d. may not include a reference to any charge.

4. **In *Matter of Ramos v. Annucci*, the Court found that the charge of creating a disturbance was not supported by substantial evidence showing that the incarcerated person:**
 - a. refused to stop talking.
 - b. failed to produce identification when asked to so.
 - c. disrupted the operation of the prison commissary bullpen.
 - d. refused a direct order.

5. The Court's decision in *Matter of Mackenzie v. Tedford* requires an incarcerated person to obey a direct order:

- a. unless the order contradicts federal health guidelines.
- b. if the order is in fact legitimate under DOCCS rules.
- c. if the order bears a rational relationship to legitimate correctional goals.
- d. under all circumstances even if the individual to whom the order was given believes it to be unjustified.

6. In *Matter of Jackson v. Annucci*, the Court found that the charge of creating a disturbance was not established because of an absence of evidence showing:

- a. disobedience of a lawful order imposed by authorized officers.
- b. conduct inciting other incarcerated individuals.
- c. refusal to be cuffed.
- d. significant mental health issues.

7. Incarcerated individuals give up their right to be present at a disciplinary hearing when they fail to:

- a. sign a notarized agreement to comply with DOCCS' rules.
- b. admit guilt when there is clear and compelling substantial evidence showing the accuracy of the misbehavior report.

- c. comply with the hearing officer's warnings to stop interrupting.
- d. provide notice of their intent to challenge the finding of the hearing officer in court.

8. Under the rule set forth in *People v. Cain* and related cases, the use of physical restraints when an incarcerated defendant testifies before a grand jury is allowed if:

- a. there is an actual justification specific to the particular witness and this justification is placed on the record.
- b. the defendant is in custody on another matter.
- c. the testifying defendant has a history of smuggling drugs into a correctional facility.
- d. the officers who have custody of the defendant have a policy of using physical restraints on incarcerated persons who testify in the grand jury or at trial.

9. An incarcerated individual may challenge the meal plan ordered by the DOCCS medical staff on the grounds that the decision of the facility doctor:

- a. runs counter to the stated non-religious preference of the incarcerated individual.
- b. is arbitrary and capricious or irrational.

- c. is contrary to an article the individual read in the Journal of American Medicine.
- d. Contradicts the recommendation made by the individual's family physician.

10. When the plaintiff in *Gibson v. New York State Department of Corrections and Community Supervision* asked the Court to find DOCCS in contempt of an agreement allowing Jewish persons incarcerated in SHU to have a menorah during Hanukah, the Court denied the plaintiff's motion because:

- a. persons in SHU are not entitled to possess religious articles in their cells.
- b. the Religious Land Use and Institutionalized Persons Act was found to be in violation of the Constitution.
- c. the settlement agreement was not clear.
- d. the plaintiff failed to exhaust her administrative remedies.

Answers

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

Your Right to a Education



- If you are under 22 years old and have a learning disability, or
- If you are an adult and have a learning disability, or
- If you need a GED, or
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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.

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