Pro Se

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Second Circuit Remands PRS Damages Case to District Court

Since 1998, New York has required that determinate sentences include a term of post-release supervision (PRS). *See,* Penal Law §70.45. Because many sentencing judges failed to include a term of PRS when they imposed determinate terms, for roughly 8 years, the Department of Correctional Services (DOCS)* administratively imposed PRS on individuals in its custody whose determinate terms did not include a term of PRS. By 2006, DOCS had administratively imposed PRS on 1,800 individuals who had been released to parole supervision. Following parole revocation proceedings, a significant number of these individuals were returned to prison where they served some or all of the administratively imposed PRS.

In 2006, the Second Circuit ruled that only a court can lawfully impose PRS. *See, Earley v. Murray*, 451 F.3d 71 (2d Cir.) (*Early I*), *reh'g denied*, 462 F.3d 147 (2d Cir. 2006) (*Earley II*). As a result of the *Earley* decisions, individuals subjected to administratively imposed PRS have been asking federal courts to impose damages for the injuries they suffered as a result of the Department's unconstitutional imposition of PRS. Some of these individuals, including Shawn Michael Vincent, were incarcerated for parole violations such as, in Mr. Vincent's case, possession of a credit card and failure to report an address change.

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Also Inside . . .

This project is supported by a grant administered by the New York State Division of Criminal Justice Services (DCJS). Points of view in this document are those of the author and do not necessarily represent the official position of DCJS.

PLS' PRE-RELEASE AND RE-ENTRY PROJECT
PART I
A Message from the Executive Director, Karen L. Murtagh

This issue of Pro Se includes our "Call for Submissions" announcement seeking stories, poetry, or other written submissions for our upcoming Pro Bono Event which will be held in October 2023. We are hopeful that this year's theme, "Reducing Recidivism", will be as successful as last year's focus on "Convictions Beyond a Conviction" which resulted in over 100 submissions.

Much has been written about ways to reduce recidivism and the challenges to successful reintegration. As a consequence, I have served on many a committee (public and private) seeking re-entry reform but, admittedly, with little to show in terms of tangible results.

My point? Despite good intentions, and much study and publication, recidivism statistics have remained largely unchanged and reintegration has continued to pose extreme hurdles for formerly-incarcerated individuals.

I believe this is so, despite the most recent DOCCS "Release From Custody Report" [available at: final-2018-releases_three-year-post-release-follow-up.pdf (ny.gov)], showing a decline in return rates as the report notes that the decline appears to be primarily attributable to the COVID pandemic having forced a suspension of DOCCS intake in 2020 and 2021.

It was against this backdrop that, in 2020, PLS initiated a Pre-Release and Re-Entry Pilot Project (PREP) (with generous private seed funding from the New York Community Trust and the van Ameringen Foundation).

The goals of PREP then and now are threefold: (1) to prepare people who currently receive little if any discharge planning for re-entry prior to release; (2) to help people transition from prison to their communities by connecting them with available resources in the communities to which they are returning; and (3) to reduce recidivism by improving the likelihood of successful re-entry and reintegration.

We decided to focus on people who were "maxing" out of prison because, unlike those who are released on parole or post-release supervision (PRS), people maxing out of prison receive limited pre-release services and have no supervision or safety net upon release.

On a pilot basis, we focused our initial efforts on the areas of the state to which most formerly incarcerated people return (the Bronx and Manhattan). We subsequently expanded to all five boroughs, and to Orange and Dutchess counties.

We work with clients for months while they are still in DOCCS custody to help plan for their ultimate reintegration. Planning includes accessing programs within DOCCS during the final year of the client's incarceration and applying for services in the community that will maximize the likelihood that each client will achieve his or her re-entry goals. Upon their release, we provide each client with regular support for three years.

We are entering our third year of this program and, to date, none of our clients has returned to prison. Why? There isn't just one reason, and the answer doesn't lend itself to a quick and easy soundbite. Obviously, it is way more complicated than that. However, I feel strongly that one of the main reasons PREP has been so successful is that it is premised on providing individualized, client-centered services that begin with an intense focus on pre-entry planning months before our clients are released from prison – an approach that allows us to build familiarity and trust with our clients.

Going forward, we plan to create a mentoring program involving our successful clients to provide peer support and further expand PREP to other parts of the state.

As I am writing this article, the NYS budget has not yet been enacted. We are hoping that the budget will include additional funding for PLS to expand our PREP program to enable us to provide these crucial pre-and post-release services to more individuals and, hopefully, continue our terrific track record of zero recidivism.

I will update you on that front in my next Executive Director column.

For now, I want to focus on what I think is the main ingredient to a successful re-entry effort: getting insights from those most directly impacted by such programs. To that end, I urge our readers to share with us their stories, poems, thoughts and insights into re-entry, reintegration and recidivism. You are our best teachers, and we need to hear from you before moving forward.

As former Chief Justice Warren Burger so poignantly noted: "We must accept the reality that to confine offenders behind walls without trying to change them is an expensive folly with short-term benefits – winning battles while losing the war. It is wrong. It is expensive. It is stupid."

Please help us all to go forward with renewed purpose, intelligence and commitment.

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The two major cases seeking damages for the unlawful imposition of PRS are *Vincent v. Annucci*, a single plaintiff case out of the Western District of New York, and *Betances v. Fischer*, a class action case out of the Southern District of New York (S.D.N.Y.). This article discusses a recent Second Circuit decision in the *Vincent* case; an article under the heading **Federal Cases** in this issue of *Pro Se* discusses a recent S.D.N.Y. decision in the *Betances* case.

In *Vincent v. Annucci*, 2023 WL 2604235 (2d Cir. March 23, 2023), the Second Circuit reviewed and decided to remand for additional proceedings, a district court decision granting the plaintiff compensatory damages of $175,000.00 for 596 days of unlawful confinement. To understand the significance of the district court's award, and the limited basis of the issue on remand, it is helpful to understand the basis for the finding that Defendant Annucci was liable for the violation of the plaintiff's constitutional rights.

Shawn Michael Vincent was sentenced to a five-year determinate term in September 2001. His sentence did not include a term of post-release supervision. Nonetheless, DOCS administratively added five years of PRS to his sentence. The maximum expiration date of Mr. Vincent's determinate term was October 4, 2005. He was released to administratively imposed PRS on January 4, 2005 and "violated PRS" on October 14, 2005, 10 days after his judicially imposed sentence had expired. None of the time that Plaintiff Vincent spent under parole supervision or incarcerated after October 4, 2005 was lawful.

In 2008, Mr. Vincent filed a complaint against *inter alia* (among others), then-DOCS Counsel Anthony Annucci, seeking damages for the time that he spent unlawfully serving PRS. In 2019, the parties cross-moved for summary judgment. In September 2020, the district court granted the plaintiff's motion for summary judgment for violation of the plaintiff's constitutional rights. See, *Shawn Michael Vincent v. Superintendent Bruce S. Yelich, et al.*, Case 6:08-cv-06570 (DGL), Document 56 (W.D.N.Y. Sept. 15, 2020) *(Vincent v. Yelich* 9/15/20).

In ruling for the plaintiff, the district court noted that in *Betances v. Fischer*, 837 F.3d 162, 170-172 (2d Cir 2016), the Second Circuit had found that Defendant Annucci was liable for his personal involvement in creating the policies and customs by which the constitutional violations against Plaintiff Vincent, and other individuals upon whom PRS was administratively imposed and enforced, occurred. *Vincent v. Yelich,* 9/15/20 at 5.

In the same Second Circuit decision, the Court also found that that Defendant Annucci was not entitled to qualified immunity for his "post-*Earley II*" inaction, because:

- the unconstitutionality of DOCS' imposition of PRS was clearly established by the Second Circuit's decisions in *Earley;*
- Defendant Annucci was aware of those decisions and their meaning almost immediately after they were issued;
- In spite of this knowledge, Defendant Annucci failed to act.

Id.

In *Vincent v. Yelich* 9/15/20, the court also addressed whether the plaintiff was entitled to compensatory damages. Opposing the entitlement to compensatory damages, Defendant Annucci argued that had he acted more promptly following the *Earley II* decision, the outcome would have been no different; Defendant Annucci would simply have, at an earlier date, notified the plaintiff's sentencing judge of the need to resentence him and the judge would have imposed the same period of PRS that DOCS had imposed. *Vincent v. Yelich* 9/15/20 at 7.

The district court disagreed, noting that it was also possible that the sentencing court might not have imposed any term of PRS. *Id.* "While what might have happened if the defendant had promptly referred the plaintiff for resentencing," the court wrote, "will forever remain a mystery, what did happen to him is clear and undisputed and it is those events upon which the court must focus in assessing an appropriate damages award." *Id.*, at 8.

The court found that the plaintiff had served roughly 1,006 days of incarceration for violating administratively imposed PRS. *Id.* Of that, 686 days – roughly 70% of the total number of days that Plaintiff Vincent was subjected to unlawful PRS – were served after *Earley II*. *Id.* Thus, but/for Defendant Annucci's failure to promptly remove PRS from the term of the plaintiff's sentence or timely refer him for resentencing, the plaintiff might have served far less than 686 days.

Subsequently, in a separate decision issued on December 4, 2020, the court found that it was reasonable to give Defendant Annucci 90 days from the date that *Earley II* was decided to put a system in place for dealing with the courts' failures to impose PRS. *See*, *Shawn Michael Vincent v. Superintendent Bruce Yelich*, Case 6:08-cv-06570 (DGL), Document 66, at 4 (W.D.N.Y. Dec. 4, 2020) (*Vincent v. Yelich* (12/4/20). Having found that Plaintiff Vincent was entitled to damages for 596 days of wrongful confinement, after a hearing, the court awarded Plaintiff Vincent $175,000. *Id.*, at 5. Defendant Annucci appealed the summary judgment decision – arguing that he was entitled to qualified immunity – and the award of damages.

In its decision on Defendant Annucci's appeal, the Second Circuit, citing its decision in *Vincent v. Yelich*, 718 F.3d 157 (2d Cir 2013), noted that it had previously held that the unconstitutionality of administratively imposed terms of PRS was clearly established by *Earley I*. *Vincent v. Annucci*, 63 F.4th 145, 147. And in its 2016 *Betances* decision, the Court noted, it had ruled that because Defendant Annucci had failed to make objectively reasonable efforts to comply with federal law that was clearly established by *Earley I*, he was not entitled to qualified immunity. The Court refused to re-consider those rulings. *Id*.

The Court was, however, receptive to the defendant's challenge to the damages award. A critical point, according to the Court, was that Plaintiff Vincent's court-imposed term of incarceration expired on October 4, 2005. Thus, by the time that the Court decided *Earley*, the sentence had expired, and Mr. Vincent could not legally be re-sentenced to add a term of PRS. *Id.* (A defendant cannot be re-sentenced after the originally imposed sentence expires).

The Court began its discussion of damages by noting that a plaintiff seeking compensatory damages in a §1983 suit must prove more than a deprivation of rights; they must also establish that the deprivation caused some actual injury. *Id.,* at 151. Similarly, the Court continued, "when a defendant has deprived the plaintiff of liberty, but the adverse action would have been taken even in the absence of the wrongful conduct, the plaintiff is entitled only to nominal damages." *Id.* This sort of analysis, the Court concluded, "requires the court to reconstruct what would have occurred had proper procedure been observed." *Id.*

Here, the Court noted, the defendant's liability arose from his unreasonable delay in developing a plan for complying with *Earley I*. The dispositive issue before the Court, therefore, is whether, in moving for summary judgment, the plaintiff established that he had suffered an injury that would not have occurred if the defendant had complied with the Second Circuit's directive in *Earley*. *Id*. at 152.

The Second Circuit stated that the district court had relied on the undisputed facts that the defendant had not promptly referred the plaintiff for resentencing following the *Earley* decision and that the plaintiff was not released until two years after the decision was issued (when he filed a state habeas proceeding). *Id.* Instead, the Court wrote, the district court should have addressed what might have happened to the plaintiff had the defendant responded more quickly to *Earley*. In failing to take this step, the Court concluded, the district court improperly failed to consider what steps were available to the defendant, did not discuss the plaintiff's burden of proving damages, and did not determine whether the plaintiff had met that burden. *Id.*

In cases such as Plaintiff Vincent's, where the sentencing court could not have resentenced him because his determinate term expired before 2006, when the defendant was put on notice that administratively imposed was a nullity and unconstitutional, the only option available to the defendant was to **excise** (cut) the term of illegal PRS. The Court found that it was unclear from the record whether DOCCS needed court approval to eliminate the PRS term it alone had imposed. *Id.*, at 7. On the record before it, the Court wrote, it was not clear whether there was any impediment, legal or otherwise, to Defendant Annucci simply and unilaterally releasing Vincent. *Id.* Accordingly, the Court directed the district court to clarify that issue, "bearing in mind that the burden rests upon the plaintiff to establish the onset date for calculating any compensatory damages to which he may be entitled." *Id*. However, the Court concluded, if there was no **impediment** (obstacle) to Defendant Annucci excising the term of PRS, the plaintiff will have satisfied his burden upon the existing record.

*In 2011, the Department of Correctional Services (DOCS) became the Department of Corrections and Community Supervision (DOCCS).

Jon Getz, Law Office Joh Getz, Rochester N.Y., represented Shawn Vincent in this §1983 appeal. K. Wade Eaton, Eaton Law Firm, Pittsford, N.Y., was on the brief, and Matthew Brinckerhoff, Emery Celli Brinckerhoff Abady Ward & Maazel LLP, New York, N.Y., submitted an *amici curiae* brief for the Plaintiff Class in *Betances v. Fischer*.

NEWS & NOTES

CALL FOR SUBMISSIONS

REDUCING RECIDIVISM
HELP PRISONERS' LEGAL SERVICES CELEBRATE NATIONAL PRO BONO WEEK

National Pro Bono Week (October 22 – 28) is a time to celebrate and recognize the dedicated work of *pro bono* volunteers, as well as to educate the community about the many legal and other issues faced by incarcerated New Yorkers. PLS is happy to announce that this year we will again be celebrating National Pro Bono Week with an event highlighting our commitment to serving the incarcerated community.

This will be our 12th year celebrating National Pro Bono Week, and we are excited to announce our theme of "Reducing Recidivism." As it relates to incarceration, recidivism is

when an individual, who was previously incarcerated, becomes incarcerated again based on a new conviction. For this year's celebration, PLS will be hosting a panel of experts, for an extensive conversation about what causes recidivism and how the recidivism rate can be reduced. We will cover topics including housing, employment, mental health care, and more.

To assist with this year's event, PLS is seeking ideas, stories, questions, poetry, or other written submissions from incarcerated people, which focus on recidivism. Submissions can address topics such as:

- *Concerns you have about your impending release from incarceration*
- *How society can best support someone who has recently been released from incarceration*
- *What led to your recidivism*
- *Things you wish you knew before you were released from incarceration*
- *Assistance or services that may have helped reduce your chances of recidivism*
- *Anything else that relates to recidivism or how to reduce the chances that a person returns to prison after being released*

Our goal is to give every incarcerated New Yorker a chance to contribute, and have their ideas and stories of recidivism heard. Whether this is your first time in prison, or you have returned to prison after being released, we welcome your thoughts on how to prepare for successful reintegration and/or avoid recidivism. If you speak/write in a language other than English, please feel free to send us a submission in the language in which you are most comfortable expressing yourself. Selected submissions will be read and/or used as talking points at our National Pro Bono Week event.

Submissions should be no more than two (2) pages in length and mailed to: Pro Bono Director, Prisoners' Legal Services of NY, 41 State Street, Suite M112, Albany, New York 12207, **no later than June 30, 2023.**

By hosting a panel on reducing recidivism, we hope to raise awareness, educate the public, and inspire change. We also hope to recruit attorneys to take cases *pro bono*, thus increasing access to justice for indigent incarcerated persons across the State. While we cannot guarantee that each submission will be read or included in our event, we encourage all submissions and will do our best to integrate as many submissions as possible. PLS reserves the right to make editorial changes to submissions.

Please note that contributing your submission for the Pro Bono Event described above is not the same as seeking legal assistance or representation from PLS. If you are seeking legal assistance, you must write separately to the appropriate PLS office.

With your submission, please indicate yes or no for the following:

- PLS may use my real name.
- I authorize PLS to use my submission at their National Pro Bono Week event.
- I authorize PLS to use my submission on their website, in *Pro Se*, and/or for other informational purposes.
- My submission can be used again by PLS after the event.

Eligibility for Financial Assistance for College

If you are interested in college programs, but need financial assistance to pay for your education, you are now eligible to apply for

federal Pell grants under the provisions of the *Free Application for Federal Student Aid Simplification Act* (FAFSA). Passed on December 27, 2020, the FAFSA restores the right of incarcerated individuals to apply for state and federal tuition assistance.

It has been almost 30 years since incarcerated individuals last had the right to apply for tuition assistance by means of what are known as Pell grants. The elimination of Pell grants for incarcerated students began in 1988 when individuals with drug convictions were restricted from receiving such grants. Next, the Higher Education Amendments of 1992 excluded individuals who were given death sentences or life without parole. Finally, in 1994, with the Violent Crime Control and Law Enforcement Act, Pell grants were denied to all incarcerated people. States followed suit by blocking access to funds through regional programs, including the New York State Tuition Assistance Program (TAP) grants.

As a result of the *FAFSA Simplification Act*, incarcerated students are once again eligible for Federal Pell grants and New York State TAP grants.

Federal Pell Grants

What is a Pell grant? A Pell grant is a form of need-based financial aid. These need-based grants are awarded by the U.S. Department of Education to help low-income students pay for college costs. As of July 1, 2023, incarcerated people who are enrolled in eligible Prison Education Programs (PEP) will be able to apply for Pell grants to assist with paying for college.

Pell grants are not loans; they do not need to be paid back. There is, however, a limit on the number of Pell grants a student can receive in their lifetime. You cannot receive Pell grants for more than 12 semesters of college. The grant may be used to cover what are called Costs of Attendance. Costs of Attendance include: tuition and fees; books, course materials, supplies and equipment; and the cost of obtaining a license, certification or first undergraduate degree.

To receive a Pell grant, a student must show "exceptional financial need" and have not yet received a bachelor's, graduate or professional degree.

You must complete the FAFSA (Free Application for Federal Student Aid) as part of the Pell grant application. You may mail the Incarcerated Applicant Form to the Federal Student Aid Office for processing. Once the FAFSA is complete, the Department of Education (DOE) will review your application for eligibility for the Pell grant. The DOE will then send this information to the financial aid office of your college program. The college program will distribute the Pell grant funds directly toward your bill. In order to keep receiving Pell grants, you must complete the FAFSA every year you are enrolled in a college program.

It is important to note that students who are incarcerated may not receive Pell grant funds that **exceed** (are more than) their Cost of Attendance. If the funds you receive exceed your actual Cost of Attendance, the excess will be returned by the school to the DOE and will be credited to your remaining Pell eligibility.

Pell grants can be used to pay for distance and correspondence college classes as long as the class is offered by an eligible Prison

Education Program and the school is certified to accept Pell grants.

Tuition Assistance Program (TAP)

For incarcerated New Yorkers enrolled in college programs, the Tuition Assistance Program (TAP) helps eligible students pay tuition at approved schools in New York State. In April 2022, the New York State Legislature repealed the 27-year ban on college tuition assistance for incarcerated students. TAP is administered by the New York State Higher Education Services Corporation (NYS-HESC). Like Pell grants, TAP grants do not have to be repaid.

TAP grants have their own eligibility requirements. Students must:

- be a United States citizen or eligible noncitizen and a resident of New York State;
- have graduated from high school or earned a high school equivalency diploma;
- be **matriculated** (enrolled) in an approved program of study and be in good academic standing with at least a cumulative "C" average as of the fourth semester payment;
- be charged at least $200 tuition per year;
- not be in default on any state or federal student loans and not be in default on any repayment of State awards; and
- meet income requirements.

NYS-HESC determines the TAP award amount by evaluating: the academic year in which first payment of TAP or any state award is received; the type of postsecondary institution and the tuition charge; and your NYS taxable income.

The TAP application period opens at the same time as the FAFSA application period and must be completed by June 30 of the academic year for which the grant is sought. The easiest way to apply for TAP is through the FAFSA.

If you are enrolled in a college program or wish to enroll for the coming year, and want to apply for a Pell and TAP grant, you should contact your education supervisor, teacher, or counselor now. We encourage you to pursue your interests, follow your dreams for a brighter future, and have confidence in yourself that you can obtain a college education if you want one. We hope to have more information as to how you can access the application process within DOCCS in the near future. If you would like further advice or assistance with Pell and/or TAP grant or any education related matter, please write to Maria E. Pagano, Education Unit Director, Prisoners' Legal Services of NY, 14 Lafayette Square, Suite 510, Buffalo, NY 14203.

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 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

The PREP spotlight shines on **Prisoner Express.** Prisoner Express is an organization based out of Ithaca, NY and is a program of Durland Alternatives Library.

Prisoner Express provides creative resources and mailings to currently incarcerated individuals throughout the United States. Prisoner Express has a number of programming options for incarcerated folks, including meditation mailings, a book club, an anthology series of poetry and journaling written by incarcerated individuals, and information about mental health. For a small cost, they will also send books.

Prisoner Express publishes a newsletter for incarcerated individuals every six months that contains art, writing and poetry submitted to the organization by other incarcerated individuals. The newsletter also informs individuals how to submit work of their own and enroll in Prisoner Express programming.

To sign up for the newsletter, write to:

CTA / Durland Alternatives Library
Prisoner Express
PO Box #6556
Ithaca, NY 14851

Or have a loved one sign you up at:
https://prisonerexpress.org/programs/newsletter/enrollment/

PRO SE VICTORIES!

***Matter of Joseph Vidal v. Anthony J. Annucci*, Index No. 9164-19 (Sup. Ct. Albany Co. (Aug. 5, 2020).** After an officer allegedly observed Incarcerated Individuals 1 and 2 "exchanging closed fist punches to the head and torso of [Joseph Vidal]," he went to the scene of the fight where, he alleges, Mr. Vidal failed to comply with his orders. The officer gave Mr. Vidal a misbehavior report, charging him with fighting, violent conduct, creating a disturbance and refusing a direct order. In preparation for the hearing, Mr. Vidal asked his assistant to interview Incarcerated Individuals 1 and 2 and if they refused to testify, to inform Mr. Vidal of the reasons for their refusals. Incarcerated Individual 1 agreed to testify; Incarcerated Individual 2 reportedly refused. However, the employee assistant did not memorialize the refusal in writing and gave no reason for Incarcerated Individual 2's refusal.

At his hearing, Mr. Vidal asked the hearing officer to determine the reason for Incarcerated Individual 2's refusal to testify. The hearing officer refused, stating that witnesses "who refuse to testify do not have to give a reason of why they don't want to testify."

The hearing officer found Mr. Vidal guilty of all the charges except for the charge of refusing an order. The determination of guilt was affirmed on administrative appeal. Mr. Vidal then filed an Article 78 challenge to the

determination of guilt, asserting that the hearing officer had violated his constitutional right to call witnesses.

The respondent argued that when a witness refuses to testify, they are not required to provide a reason for the refusal and the hearing officer has no responsibility to try to determine the reason.

The Court agreed with Mr. Vidal, quoting from *Matter of Alvarez v. Goord*, 30 A.D.3d 118 (3d Dept. 2006), "A hearing officer's outright denial of a witness without a stated good-faith reason, or lack of any effort to obtain a requested witness's testimony, constitutes a clear constitutional violation." And, the Court continued, quoting from *Matter of Brown v. Fisher*, 79 A.D.3d 1132 (3d Dep't 2010), such a violation "requires an annulment of the determination and expungement."

Based on this analysis, the Court ordered Mr. Vidal's hearing annulled and directed the respondent to expunge all references to this proceeding from Mr. Vidal's prison record.

***Joseph Vidal v. Anthony J. Annucci and Michael Ranieri*, Index No. 2492-22 (Sup. Ct. Albany Co. Dec. 15, 2022)**. In an Article 78 petition, Joseph Vidal challenged a Tier III hearing and sought to compel the respondents to produce records that he had requested in four Freedom of Information Law (FOIL) requests. In August 2022, the Court granted the respondents' motion to sever the FOIL claims from the challenge to the disciplinary hearing "so that individual answers and records could be submitted with respect to each." The Court dismissed the FOIL claims and ordered the respondents to submit an answer and records with respect to the disciplinary hearing within 30 days. Four months after the order was issued, the respondents still had not submitted an answer. The Court then granted the petition and ordered that 1) the determination of guilt be struck and set aside; 2) all records of the same be expunged; and 3) the petitioner be refunded all filing fees incurred in connection with the filing of the petition.

Pro Se Victories! *features summaries of successful pro se administrative advocacy and unreported pro se litigation. In this way, we recognize the contribution of pro se 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

Parole

Second Department Reverses Order Finding Respondent in Contempt

In *Matter of Derek Slade v. Tina M. Stanford*, 212 A.D.3d 636 (2d Dep't 2023), the Appellate Division reversed a lower court order finding

the respondents, Tina Stanford, Chairperson of the Board of Parole, and the Department of Corrections and Community Supervision (DOCCS) in contempt of a court order. Because there are few facts in the Appellate Division decision and no reference to the lower court's analysis of those facts, we first review Justice Maria G. Rosa's December 23, 2019 decision finding the respondents in contempt. *See, Matter of Derek Slade v. Tina Stanford*, Index No. 203-19 (Sup. Ct. Dutchess County, Dec. 23, 2019).

Derek Slade was charged with having caused the death of his infant son in 2000.* He was convicted of murder in the second degree and sentenced to 15 years to life. Mr. Slade became eligible for parole in 2015. Despite being a model incarcerated person, he was denied parole several times before he filed an Article 78 challenge to the June 2018 parole denial which led to the December 2019 contempt decision.

In her review of the petitioner's June 2018 parole hearing (also known as a parole interview), Justice Rosa found that the Board had failed to demonstrate that it had considered 1) the factors the Executive Law requires it to consider and 2) the factors the regulations require the Board to consider and had failed to articulate a reason for the denial other than the seriousness of the crime of the conviction.**

The statutory factors the Board is required to consider are set forth in at least two sections of the Executive Law. Executive Law §259-i(2)(c)(A) requires the Board to consider whether there is a reasonable probability that, if the incarcerated individual is released, they will live and remain at liberty without violating the law, and that their release is not incompatible with the welfare of society and will not so deprecate the seriousness of their crime as to undermine respect for law. Executive Law 259-c requires the Board to incorporate risk and needs principles to measure the rehabilitation of persons appearing before the Board and the likelihood of success of such persons if they are released.

The regulatory factors that the Board is required to consider are set forth in 9 NYCRR 8002.2 and include the scores of the Board's risks and needs assessment (COMPAS scores) and its reasons for deviating from any score; the individual's institutional record, performance in a temporary release program, release plans, and prior criminal record and the seriousness of the individual's offense.

Based on the record of the June 2018 parole release proceeding, the court concluded that the respondents had failed to articulate a factual basis for rationally concluding that Derek Slade had not been rehabilitated and would not live in the community without violating the law and without undermining respect for the law or threatening the welfare of society. The court therefore vacated that decision denying parole and granted Mr. Slade's petition for a new hearing. Justice Rosa directed the Board to consider at the new hearing the relevant statutory factors set forth in Executive Law and the relevant regulations, and to articulate a reason for denying parole other than the underlying offense.

On September 16, 2019, the Board of Parole conducted a new parole release hearing. The Board again denied Mr. Slade release. Mr. Slade then moved to hold the respondents in contempt based upon the alleged failure to comply with the court's June 2019 decision, order and judgment.

Judge Rosa, finding that the petitioner had made a ***prima facie*** showing – that is, had produced sufficient evidence to establish a fact or raise a presumption unless disproved or rebutted – of contempt, scheduled a contempt hearing for December 16, 2019. Judge Rosa advised the respondents that to defeat the petitioner's motion, they would need to present a witness with first-hand knowledge of the September 16 parole release interview.

In scheduling a contempt hearing, the court found that after reviewing the records of the September 16 hearing, neither the court's directives nor the statutory requirements had been met. Specifically, the court found that while its order required the Board to include the relevant statutory facts set forth in Executive Law §259-c(4) – those facts necessary for analyzing risk and needs principles to measure rehabilitation and the likelihood of success upon release and those facts needed to assist the Board in determining which individuals may be released to parole supervision – the Board had not done so.

At the December 2019 contempt hearing, the court learned that in addition to the September 2019 parole hearing, the respondents had conducted an additional parole release interview on November 19, 2019. Following that interview, at which the Board corrected some factual errors that may have negatively affected its September parole release decision, the Board again denied parole release to Mr. Slade. According to Justice Rosa, the only reason given for the November denial was the Board's conclusion that Mr. Slade lacked insight with regard to domestic violence/the underlying crime; a conclusion, Justice Rosa found, that had no support in the record.

Following the contempt hearing, the court found that the transcripts of both the September and November hearings showed that in rendering its decisions, the Parole Board had failed to document that it had considered the relevant statutory factors in Executive Law §259-c(4)and thus were in clear violation of the court's order. The court also found the Board had again based its decision exclusively on the facts underlying the conviction, that is, the seriousness of the crime, and had not shown that it considered the statutory factors.

Turning to the law, the court noted, citing *El-Dehdan v. El-Dehdan*, 114 A.D.3d 4 (2nd Dep't 2013), that to prevail in a contempt proceeding, the moving party must prove by clear and convincing evidence:

1. the existence of a clear and lawful mandate of the court;
2. that the party alleged to have disobeyed the order was aware of its terms; and
3. that the moving party's rights were prejudiced.

Applying this law to the facts before it, the court found that the respondents were in contempt of court because they had:

- failed to present witnesses with first-hand knowledge of any relevant facts,
- presented no written evidence, and no witnesses with first-hand knowledge; and

- failed to articulate any basis to controvert the conclusion that the denial of parole was solely due to the underlying offense.

Based on these findings, the court ordered the respondents to pay $250.00 a day until a de novo hearing was held and either a determination was made to release Mr. Slade to parole or a legitimate basis for denial was articulated in a manner consistent with the requirements of the statutes, the rules, case precedent and this court's prior determination.

The respondents appealed the finding of contempt. In 2023, the Second Department issued a decision reversing the lower court's order. *See*, *Matter of Slade v. Tina Stanford*, 212 A.D.3d 636 (2d Dep't 2023).

The Second Department held that Petitioner Slade had failed to establish by clear and convincing evidence that the Chairwomen of the NYS Board of Parole had not complied with the lower court's June 4, 2019 judgment. Relying on the November 2019 parole release proceeding, the Court found that the Board had genuinely considered the statutory factors and had not denied petitioner's application for parole release solely on the basis of his underlying conviction. Consequently, the Court ruled, the lower court had erred in granting the petitioner's motion to hold the Chairperson of the Board of Parole in contempt.

Happily, on May 19, 2022, Derek Slade was released to parole supervision.

*In this article, in addition to Justice Rosa's decision, the factual background for the proceedings is taken from the DOCCS Incarcerated Lookup website page and, with respect to the nature and date of Mr. Slade's crime and conviction, the Board of Parole's Appeal Unit Findings and Recommendation relating to the April 2021 Parole Board decision.

**The First, Second and Fourth Departments of the Appellate Division have held that in the absence of aggravating or egregious circumstances, a denial of parole based solely on the seriousness of the crime is irrational. *See Matter of King v. NYS Division of Parole*, 190 A.D.2d 423 (1st Dep't 1993), *affirmed on other grounds*, 83 N.Y.2d 788 (1994); *Matter of Huntley v. Evans*, 77 A.D.3d 945 (2d Dep't 2010); *Matter of Johnson v. NYS Division of Parole*, 65 A.D.3d 838 (4th Dep't 2009).

In *Matter of Hamilton v. NYS Division of Parole*, 119 A.D.3d 1268 (3d Dep't 2014), the Third Department expressly rejected the conclusion reached by the First Department in *Matter of King v. NYS Division of Parole,* holding that the Board may deny parole based on the seriousness of the crime, in the absence of aggravating or egregious circumstance, even where the applicant has an exceptional prison record and the COMPAS assessment finds a low risk of re-offending.

Prisoners' Legal Services represented Derek Slade in this Article 78 appeal.

FEDERAL COURT DECISIONS

Third Attempt to Derail Trial for Unlawfully Imposed PRS Fails

In 2006, the Second Circuit, held that because only a court can impose a sentence for a criminal conviction, the administrative imposition of post-release supervision (PRS) was a nullity. See, *Earley v. Murray*, 451 F.3d 71 (2d Cir.) (*Earley I*), *reh'g denied*, 462 F.3d 147

(2d Cir. 2006) (*Earley II*). Five years later, Paul Betances filed a §1983 class action lawsuit in the Southern District of New York seeking damages from the defendants for their roles in administratively imposing PRS on the plaintiff and the proposed class.

In 2015, the district court certified the class, *Betances v. Fischer*, 304 F.R.D. 416 (S.D.N.Y. 2015), and found four of the defendants had violated the plaintiffs' constitutional rights by administratively imposing PRS, *Betances v. Fischer*, 144 F.Supp.3d 441 (S.D.N.Y. 2015). The Second Circuit affirmed these decisions, *Betances v. Fischer*, 837 F.3d 162, 165 (2d Cir. 2016), and remanded the case to the district court to determine what damages were appropriate, *Betances v. Fischer*, 11 CV 3200 (RWL), 2023 WL 2609133, at *1 (S.D.N.Y. March 23, 2023) (2023 *Betances* Dist. Ct. Decision).

Since the Second Circuit's 2016 decision, counsel for the parties have been engaged in discovery relating to determining the damages for members of the plaintiff class. In addition, according to the most recently reported decision in the case, the defendants have twice unsuccessfully moved to decertify the *Betances* class, arguing that it was improper to determine damages on a class wide basis. See, 2023 *Betances* Dist. Ct. Decision, at *1. The district court denied the first two decertification motions, holding that "the class should be maintained for the purposes of trial to determine general damages for the loss of liberty and that other damages could be addressed individually following decertification." *Id.*

Recently, the defendants moved for the third time to decertify the class, arguing that a class determination of damages was no longer viable because the plaintiffs had failed to **mitigate** (take reasonable steps to reduce) their damages. In light of this alleged failure, the defendants continued, individualized issues will **predominate** (require the most attention) at trial. This argument is similar to the argument that the defendants made when they opposed the plaintiff's motion to certify the class. In opposition to that motion, the defendants argued the class should not be certified because individualized damage issues would predominate over the issues that class members have in common.

In the most recent motion to decertify the class, the defendants argued that class members would have to individually show how they had mitigated the damages resulting from the unlawful administrative imposition of PRS. The court approached the issue by first discussing the concept of mitigation.

The principle of mitigation, the court wrote, requires victims of legal wrongs to make reasonable efforts to reduce their damages once they have been injured. In support of this principle, the court cited *APL Co. PTE Ltd. v. Blue Water Shipping U.S. Inc.*, 592 F.3d 108 (2d Cir. 2010). The problem with the defendants' argument, the court continued, is that they "misapprehend the relevant point of injury"; there is no duty to mitigate damages until the injury causing those damages occurs. 2023 *Betances* Dist. Ct. Decision, at *2. For example, in *Miller v. Lovett*, 879 F.2d 1066, 1071 (2d Cir. 1989), the Court rejected the argument that the plaintiff had a duty to mitigate injuries inflicted during his arrest by not getting arrested in the first place, noting, "if a plaintiff's duty to

mitigate damages were to include the duty to avoid the underlying injury, few arrestees could recover damages under §1983 since most could have avoided engaging in the conduct that **precipitated** [led to] the arrest."

In *Betances*, the district court found, plaintiffs were victims of unconstitutional conduct when the defendants subjected them to PRS in the absence of a judicial imposition of PRS. They were not injured by this misconduct, however, until the defendants enforced, or failed to take any reasonable actions to prevent enforcement of, the unconstitutionally imposed PRS.

Thus, the court continued, there were "two distinct points of injury." One point of injury was when a plaintiff began serving wrongfully imposed PRS and was subject to restrictions such as curfew, limits on travel and obligations to report. The second point of injury occurred when a plaintiff served extended prison time for a violation of wrongfully imposed PRS.

The court commented that the defendants, by focusing on when PRS was unlawfully imposed as the point at which the plaintiffs' duty to mitigate started, erred in their analysis of the mitigation issue. The defendants' argument – that by engaging in conduct that violated PRS the plaintiffs failed to mitigate their damages – the court wrote, ignores both the nature of the defendants' liability and the relevant points of injury. 2023 *Betances* Dist. Ct. Decision, at *3.

Based on the above discussion of the law, the court ruled that mitigation of damages is not relevant to class-wide trial of general damages for loss of liberty. Rather, mitigation may come into play when, for example, a plaintiff's wrongful incarceration was extended by disciplinary infractions. For these reasons, the district court denied what it characterized as the defendants' latest attempt to derail the class from proceeding to trial. [For reasons related to the Second Circuit's *Betances* decision, see page 1, in late April, the trial was adjourned].

Emery Celli Brinckerhoff Abady Ward & Maazel LLP, New York, N.Y., and Justice Catalyst Law, New York, N.Y., represent the plaintiff class in this §1983 action.

Trans Woman Housed in Men's Housing Unit Settles Claims

On January 14, 2021, Rona Love, a transgender woman, was moved from a female housing unit on Rikers Island to a male housing unit, to punish her for engaging in misconduct while in the female housing unit.* This transfer violated New York City's policies for housing transgender detainees. In spite of notice from her lawyer that housing Ms. Love in a male housing unit was a threat to her safety, Rikers officials did not immediately move her back to a female housing unit. On January 19, 2021, while in the male housing unit, Ms. Love was sexually assaulted at knife point by another detainee. After she informed an officer about the assault, she was not provided with any medical treatment or mental health counselling. She was however, transferred to a women's housing unit.

In May 2022, Ms. Love filed a Section 1983 lawsuit in the Southern District of New York. Ms. Love's complaint highlighted the fact that in 2018, the City of New York had announced a policy change: going forward, incarcerated people would be housed according to their gender identity. In adopting this policy, the City acknowledged that housing incarcerated people according

to their gender assigned at birth puts them at higher risk for physical and sexual violence.

In December 2022, she reached an agreement with the City of New York and settled her case. *See, Rona Love v. City of New York*, 22 Civ. 1694 (S.D.N.Y. Jan. 12, 2023).

*The facts in this article were taken from the complaint filed in *Rona Love v. City of New York*.

Alexander Goldenberg and Eric J. Hecker of Cuti Hecker Wang, LLP, represented Ms. Love in this Section 1983action.

"Three Strikes" Leads to Denial of *In Forma Pauperis* Status

To file a complaint in federal court, plaintiffs must pay filing fees. 28 United States Code (U.S.C.) §1914. As of this writing, the filing fee for civil rights actions is $402.00. *See*, *Jason ET Cato v. Patrick Reardon*, 9:22 CV 1173, 2023 WL 386757, at *1 (N.D.N.Y. Jan. 25, 2023). The law also provides that the federal courts can **waive** (not require) the filing fee for people *who are not imprisoned* and are **indigent** (do not have enough money to provide the necessities of life). 28 U.S.C. §1915.

The law does not extend the waiver of filing fees to incarcerated plaintiffs who are indigent; incarcerated indigent plaintiffs are required to pay the full filing fee if they are able, but may be permitted to pay the fee over a period of time. 28 USCA §1915(b)(1); *see*, *Harris v. City of New York*, 607 F.3d 18, 21 (2d Cir. 2010); *Cash v. Bernstein*, No. 09-CV-1922, 2010 WL 5185047, at *1 (S.D.N.Y. Oct. 26, 2010) ("Although an indigent incarcerated individual need not prepay the filing fee … at the time of filing, he must subsequently pay the fee, to the extent he is able to do so … "). The fees are paid through periodic debits from the plaintiff's prison account which are forwarded to the court by the prison administration. *Harris v. New York City*, 607 F.3d at 21.

Under certain circumstances, courts may deny incarcerated plaintiffs even the limited reduction in filing fees. The Prison Litigation Reform Act (PLRA) provides that: "In no event shall a prisoner bring a civil action … under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the ground that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury." 28 USC § 1915(g). This provision is known as the "three strikes rule."

In *Jason ET Cato v. Reardon*, the Court considered whether the plaintiff should be granted *in forma pauperis* (IFP) status. The Court first found that the plaintiff had shown sufficient economic need, that is, he was indigent. The Court then turned to the issue of whether he had three strikes. To make this determination, the Court reviewed the plaintiff's litigation history on the Federal Judiciary's Public Access Court Electronic Records (PACER) Service. [PACER was established in 1988. It is an electronic system providing access to the filings in federal cases.] The Court's review revealed that the plaintiff had filed three previous civil actions while he was incarcerated that were

dismissed because they were **frivolous** (the lawsuits had no legal merit) or because they failed to state a claim upon which relief may be granted.

There is an exception to the rule requiring an incarcerated plaintiff who has three strikes to pay the full filing fee; the plaintiff may be granted IFP status if the "imminent danger" exception applies. The imminent danger exception was enacted as a safety valve to prevent harm to incarcerated plaintiffs otherwise barred from proceeding IFP. *Malik v. McGinnis*, 293 F.3d 559, 563 (2d Cir. 2002). For the exception to apply, the imminent danger must exist at the time the plaintiff files the complaint. *Id.* The purpose of the exception is to prevent **impending harms** (harm that is likely to occur in the near future).

The *Cato* Court then described the process for determining the existence of imminent danger. To determine whether the plaintiff qualifies for the imminent danger exception, the court looks at "the non-conclusory allegations in the complaint." The non-conclusory allegations are the facts; they do not include conclusions such as the plaintiff merely asserting he is in imminent danger. An extreme example would be, the plaintiff's assertion that he had been confined to his cell for 20 days and had only been given five meals, the last one on the 10th day. There, the court could conclude that not allowing the plaintiff to proceed IFP would place the plaintiff in imminent danger. The danger must be real and not merely speculative or hypothetical. *Nelson v. Nesmith*, No. 06-CV-1177 (TJM), 2008 WL 3836387, at *5 (N.D.N.Y. Aug. 13, 2008). It also must be related to the claims in the complaint and the harm must be from one or more of the defendants.

With respect to Plaintiff Cato, the Court found that the complaint alleged that the defendants had failed to treat him fairly pursuant to due process, and asserted that the defendants were stealing his legal mail, legal packages and finances. The Court noted that the plaintiff did not allege that he feared serious physical injury from the defendants at the time that he filed his complaint. Based on its reading of the complaint, the Court found that the plaintiff had failed to plead facts that suggested imminent danger was present when he filed the complaint. Thus, he did not qualify for the imminent exception to the three strikes rule.

The Court gave the plaintiff the opportunity to present an amended complaint that in addition to setting forth a short and plain statement of facts showing that the named defendants violated his constitutional rights must also contain factual allegations sufficient to plausibly suggest that he faced imminent danger of serious physical injury from one or more of the defendants when he filed the action.

Jason ET Cato represented himself in this Section 1983 action.

Court Imposes Payment of Costs on Pro Se Incarcerated Plaintiff

Towaun Coleman's Eighth Amendment excessive force and failure to intervene claims went to trial in February 2024. The jury entered a verdict in favor of the defendants. Following the verdict in their favor, the defendants moved for taxation of costs.

Federal Rule of Civil Procedure 54(d)(1) provides that in cases heard by the federal courts "costs other than attorney's fees

should be allowed … to the prevailing party unless the court directs otherwise." Section 1920 of 28 United States Code provides that a judge or clerk of any court in the United States may tax as costs any of the following:

(1) Fees of the clerk and marshal;

(2) Fees for printed or electronically recorded transcripts necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for **exemplification** [an official transcript of a public record, authenticated as a true copy for use as evidence] and the costs of making copies of any materials where the copies are necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title; and

(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1928 of this title.

In granting the defendants' motion, the Court in *Towaun Coleman v. LT. Durkin,* 9:18-CV-00390, Document. No. 150, at 6 (MAD/CFH), noted "[a]warding costs to the prevailing party is the rule, not the exception, in civil litigation." "Accordingly," the Court continued, "the losing party has the burden to show that costs should not be imposed; for example, costs may be denied because of misconduct by the prevailing party, the public importance of the case, the difficulty of the issues, or **the losing parties financial resources.**" *Id.* (emphasis added).

In *Coleman*, the Court found that the defendants (DOCCS employees) were the prevailing parties; the requested costs were within the costs that may be awarded; and the plaintiff failed to file any objections to the defendants' bill of costs. Based on these findings, the Court awarded the defendants $1,265.12 in costs.

There is one important takeaway from this decision: if you lose a case that is tried before a jury, to defeat a motion to pay the defendants' costs you must oppose the motion for costs. To do so, be aware that the "motion" for costs may not look like and may not even be entitled a Motion for Costs. Instead, as Plaintiff Coleman did, you may receive a form which looks like it was generated by the court clerk – it is a court form AO 133 – entitled BILL OF COSTS. On it are the costs requested by the defendants. You may also receive correspondence from the court advising you of the time you have to oppose the motion.

Whether you receive a standard motion or a form "Bill of Costs," if you are indigent, or if your case falls within the other grounds to oppose the motion – misconduct by the prevailing party, the public importance of the case or the difficulty of the issues – be sure to submit opposing papers that make this point.

Towaun Coleman represented himself in the post-verdict portion of this Section 1983 action.

IMMIGRATION MATTERS

Nicholas Phillips

This month's immigration column will again focus on *United States v. Gibson*, a Second Circuit Court of Appeals' case which has significant immigration consequences for noncitizens with New York convictions for the possession or sale of a "narcotic drug" as defined by New York Penal Law ("NYPL") §220.00(7). As explained in the previous issue's Immigration Matters column, in December 2022, the Second Circuit issued a sentencing decision which concluded that New York's definition of "narcotic drug" was not a categorical match to the federal controlled substance definition contained in the Controlled Substances Act ("CSA"). *See United States v. Gibson*, 55 F.4th 153 (2d Cir. 2022) ("*Gibson I*"). The Second Circuit reached this conclusion because New York's definition of "narcotic drug" includes naloxegol, an opium alkaloid derivative, while naloxegol was removed from the federal CSA schedule on January 23, 2015. *See id.* at 162–64. Because of this mismatch, the Second Circuit concluded that the defendant's conviction for third-degree attempted criminal sale of a controlled substance under NYPL §110-220.39(1)—a statute which criminalizes the attempted sale of a "narcotic drug" as defined by NYPL §220.00(7)—was not a federal controlled substance offense and therefore could not be used as the basis for a sentencing enhancement.

Following the December 2022 decision in *Gibson*, the federal government filed a petition for rehearing, and on February 21, 2023, the Second Circuit issued a second decision, *United States v. Gibson*, 60 F.4th 720 (2d Cir. 2023) ("*Gibson II*"), which again affirmed that New York's definition of "narcotic drug" does not match the CSA's controlled substance definition. The government's petition focused on a procedural aspect of *Gibson I*. In *Gibson I*, the government had conceded before the district court that New York's definition of "narcotic drug" was no longer a match to the CSA after naloxegol was removed from the federal CSA schedule in 2015. However, the government argued that the defendant's conviction was still a federal CSA offense because the defendant had been convicted in 2002, at which point naloxegol was still included in the CSA schedule. Their appeal in *Gibson I* therefore focused on whether the trial court should compare the drug schedules *at the time of conviction* or *at the time the sentencing took place*—an argument *Gibson I* resolved in the defendant's favor by finding that the district court correctly compared the state and federal convictions in effect at the time of sentencing.

In the petition for rehearing, the government argued that because their appeal focused solely on the timing issue, the question of whether New York's narcotic drug definition was a mismatch to the CSA was not presented, and so the court's decision on that question was dictum—that is, a statement which was unnecessary to the court's ruling and therefore not binding on future parties. The *Gibson II* court rejected that assertion and affirmed that "[r]egardless of the manner in which the government chose to support its argument for the imposition of an enhanced sentence . . . the question of the comparability of the state drug schedules applicable to Gibson's 2002 conviction and the current federal schedules was in fact an issue in the case and was in fact 'handled' in the district court." 60 F.4th at 722. The Second Circuit also reaffirmed that the district court was correct to conclude that at the time of sentencing in 2020, New York's definition of "narcotic drug" did not match the federal CSA definition and therefore did not support a sentencing enhancement. *Id.* at 723.

Since the federal immigration statute uses the same CSA definition as federal sentencing law, the immigration implications of *Gibson* are enormous. Under *Gibson I* and *II*, any New York conviction for possession or sale of a "narcotic drug" which was entered after January 23, 2015, does not constitute a controlled substance offense under the Immigration and Nationality Act and therefore cannot be used as the basis for deportation proceedings. That applies to convictions under any of the following NYPL provisions: NYPL §§220.09(1); 220.16(1) & (12); 220.18(1); 220.21(1); 220.39(1); 220.41(1); 220.43(1); 220.44(2) & (4) (if the underlying offense is in violation of NYPL § 220.39(1)); 220.46; 220.50; and 220.77(2) & (3).

What are the consequences for someone who has already been ordered deported based on a conviction covered by *Gibson I* and *II*? Federal immigration law currently provides two different bases for vacating a deportation order. First, 8 U.S.C. §1229(c)(6) allows a noncitizen to file a motion to reconsider a prior deportation order where the order is premised on "errors of law or fact." Under this statutory provision, a noncitizen may file one motion to reconsider, which must be filed within 30 days of the date of the removal order. *See* 8 U.S.C. § 1229(c)(6)(A) & (B). That 30-day deadline is subject to equitable tolling, a doctrine which allows for the extension of statutory deadlines in the interests of fairness and equity. *See Zhao v. I.N.S.*, 452 F.3d 154, 157–59 (2d Cir. 2006). Under the doctrine of equitable tolling, a noncitizen can obtain an extension of the 30-day deadline by demonstrating (1) that the noncitizen has been pursuing his or her rights diligently, and (2) that some extraordinary circumstance stood in the noncitizen's way and prevented timely filing. *See Holland v. Florida*, 560 U.S. 631, 632 (2010). Since *Gibson* is an "extraordinary circumstance" that prevented timely filing, a noncitizen affected by *Gibson* can vacate his or her removal order by providing evidence, such as an affidavit, demonstrating that he or she diligently filed the motion after discovering *Gibson*.

A second method for vacating a removal order is set forth in 8 C.F.R. §1003.2(c)(3)(v). That federal regulation was promulgated in 2021 but was enjoined—that is, prevented from taking legal effect—by the Northern District of California district court in *Centro Legal de la Raza v. Exec. Off. for Immigr. Rev.*, 524 F. Supp. 3d 919 (N.D. Cal. 2021). However, in a 2022 decision, the Second Circuit concluded that the *Centro Legal de la Raza* injunction is not binding in the Second Circuit, and so the regulation can be invoked by anyone in the jurisdiction of the Second Circuit, which includes New York, Connecticut, and Vermont. *See Chen v. Garland*, 43 F.4th 244, 253 n.7 (2d Cir. 2022) ("*Centro Legal* does not bind this court. An agency subject to review in the Second Circuit cannot point to a decision from the Northern District of California to explain why it failed to follow its regulations.").

Under 8 C.F.R. §1003.2(c)(3)(v), a three-judge panel of the Board may reopen a case where there exists "[a] material change in fact or law underlying a removability ground or grounds specified in section 212 or 237 of the Act that occurred after the entry of an administratively final order that vitiates all grounds of removability applicable to the alien," provided that "[t]he movant exercised diligence in pursuing the motion to reopen." The regulation further provides that no time limit applies to such a motion, although a noncitizen is limited to filing one motion to reopen under this provision.

What about noncitizens convicted *before* January 23, 2015? Several pending cases before

the Second Circuit present the question of whether New York's definition of "narcotic drug" contains other mismatches with the federal CSA schedule, and those cases may affect convictions prior to 2015. For now, *Gibson* presents a significant change in the law which will provide immigration relief to many noncitizens with New York drug convictions.

WHAT DID YOU LEARN?

Brad Rudin

1. **In the 2020 decision involving Joseph Vidal, the Article 78 court annulled the disciplinary finding because the hearing officer did not:**

   a. possess sufficient evidence to justify a disciplinary finding.
   b. allow Mr. Vidal to consult with counsel.
   c. explain the reason for the absence of a witness called by Mr. Vidal.
   d. properly apply the rule allowing a charged individual to cross-examine the author of the misbehavior report.

2. **In the 2022 case involving Joseph Vidal, the Article 78 court struck the determination of guilt because DOCCS failed to:**

   a. present sufficient evidence of guilt.
   b. submit an answer and record by the court's deadline.
   c. reimburse Mr. Vidal for his expenses connected with the filing of the Article 78 petition.
   d. allow Mr. Vidal to question the facility superintendent about certain disciplinary procedures.

3. **Which conclusion can be properly drawn from the article on *Matter of Derek Slade v. Tina M. Stanford*?**

   a. In a parole hearing, members of the Board of Parole may not consider the seriousness of the parole applicant's crime.
   b. Parole applicants have no right to a hearing on their application for parole.
   c. The Board of Parole for good cause shown may disregard the parole eligibility factors set forth in the Executive Law.
   d. The Departments of the Appellate Division are split on the question of whether parole can be denied based only on the seriousness of the crime.

4. **Which conclusion can be drawn from the article on *Vincent v. Annucci*?**

   a. Unlawful confinement resulting from the administrative imposition of Post-Release Supervision may result in the award of compensatory damages.
   b. Post-Relief Supervision constitutes an unlawful exercise of state authority.
   c. In the absence of sentencing order by the court, DOCCS may impose a term of Post-Release Supervision.
   d. A court may not impose a term of Post-Release Supervision unless the defendant is charged with a violent felony.

5. **The article on *Vincent v. Yelich* refers to Post-Release Supervision caselaw holding that:**

   a. the doctrine of qualified immunity prohibits the award of compensatory damages.
   b. Defendant Annucci was not entitled to qualified immunity because he failed to make reasonable efforts to comply with federal law.

c. Defendant Annucci was entitled to qualified immunity from the award of compensatory damages because the plaintiff did not establish any actual injury.
d. the plaintiff had no standing to contest confinement resulting from the unlawful application of Post-Release Supervision.

6. The caselaw on class action damages arising from unlawful Post-Release Supervision holds that:

a. it is permissible to determine damages on a class-wide basis.
b. there is no duty to mitigate damages.
c. injury to a plaintiff can be calculated for the time prior to the point where the defendant state official could take any reasonable action to prevent the enforcement of the unconstitutionally imposed Post-Release Supervision.
d. none of the defendant state officials were not liable for administratively failing to act to stop enforcement of wrongfully imposed Post-Release Supervision.

7. In a class-wide trial of general damages for loss of liberty arising from wrongfully imposed Post-Release Supervision, the doctrine requiring a plaintiff to mitigate damages:

a. has the effect of prohibiting any claim for damages.
b. limits the amount of damages to the award of medical expenses,
c. blocks the award of any damages on the theory that the plaintiff's criminal conduct shows a failure to mitigate.
d. is not relevant to a class-wide trial of general damages for loss of liberty.

8. The filing fee for an indigent incarcerated person:

a. must be waived if indigency is proven.
b. may be waived if indigency is proven.
c. may be satisfied over a period of time if indigency is proven.
d. must always be paid in full at the time the complaint is filed.

9. Under the Prison Litigation Reform Act, an incarcerated person may be barred from bringing a civil action if that person:

a. failed to prevail in three prior civil rights cases.
b. is unable to retain counsel.
c. has been found to have filed frivolous claims in three prior civil rights cases.
d. lost three or more cases before the Second Circuit Court of Appeals or the U.S. Supreme Court.

10. In *Jason ET Cato v. Reardon,* the Court reviewed the "imminent danger" exception to the "three strikes" and found that:

a. fact-based allegations of imminent harm may exempt the plaintiff from the "three strikes" rule.
b. even generalized but plausible assertions of harm may exempt a plaintiff from the "three strikes" rule.
c. the exception violated the due process clause of the 5th and 14th Amendments.
d. the "three strikes" rule violated the New York State Constitution.

ANSWER KEY:

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

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