

ProSe

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ALBANY COUNTY SUPREME COURT FINDS HALT ACT VIOLATIONS; REDUCES DISCIPLINARY CONFINEMENT SANCTION TO 3 DAYS

Unless certain criteria are met, the HALT Act, which went into effect in April 2022, limits 1) the duration of segregated confinement (SHU conditions) to 3 consecutive days and no more than 6 days in any 30-day period and 2) placement in a residential rehabilitation unit (RRU) for any period of time. In this article, we call confinement beyond the 3/6-day limit or in an RRU “extended disciplinary confinement.” The specific criteria that DOCCS must meet before placing someone in extended disciplinary confinement is set forth in Correction Law (CL) §137(6)(k).

Correction Law §137(6)(k)(i) provides that before an incarcerated individual may be placed in extended disciplinary confinement, the criteria of CL §137(6)(k)(ii) must be met. Known as the (k)(ii) criteria, this section of the law both defines the seven categories of conduct that can lead to extended disciplinary confinement and the additional procedures DOCCS must use to support a finding that an incarcerated individual's conduct falls within one of the categories.

To meet the extended disciplinary confinement provisions, in addition to proving that an alleged act of misconduct falls within one of the categories of misconduct with respect to which (k)(ii) permits extended disciplinary confinement, CL §137(6)(k)(ii) requires the DOCCS Commissioner or their designee to

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A GOODBYE . . . AND WELCOME

A Message from the Executive Director, Karen L. Murtagh

The readership is well aware of recent changes at the top of DOCCS administration: after decades of service, Acting Commissioner Anthony Annucci has retired and Deputy Commissioner Daniel Martuscello has taken over as Acting Commissioner.

I have known and worked with both of these gentlemen during their entire DOCCS' tenures and I would be remiss if I didn't provide the readership with my perspective on their lengthy service to the State of New York.

I worked with Tony Annucci during his entire time with DOCCS, both as Counsel and Commissioner. In fact, our professional careers – mine at PLS and his with DOCCS – started at about the same time. For the entirety of that period, I found Commissioner Annucci's knowledge regarding the operation of DOCCS to be unsurpassed and his concern and compassion for incarcerated individuals and their families to be both sincere and well-intentioned.

Despite the often adversarial nature in our respective positions, there were countless instances where, due to Commissioner Annucci's respect for the role of PLS and his willingness to listen, we avoided costly litigation (and uncertain results) by resolving disputes administratively, and in the process saved the State millions of dollars.

Examples of this positive relationship abound, not the least of which is the newsletter you are now reading.

Anthony Annucci was the Commissioner who entered into a contract to provide all incarcerated individuals with electronic tablets and, upon my request, authorized the distribution of *Pro Se* on the tablets. It was also Commissioner Annucci who had previously (and generously) facilitated distribution of paper copies of *Pro Se* to our readership in DOCCS facilities statewide.

It was Commissioner Annucci who proposed that DOCCS have periodic phone calls with key advocacy groups throughout the entire COVID pandemic. He did so in order to allow DOCCS to report to us, in real time, what was happening in the prisons and keep the lines of communication open. In addition, on these phone calls, Commissioner Annucci not only addressed the COVID-related issues raised by advocates, but also allowed us to use the calls to request investigations and remedial action with respect to issues unrelated to COVID.

It was under Anthony Annucci's leadership that PLS initiated the Albion and Bedford Hills Telephone Program. Through this program, incarcerated women have the opportunity to make weekly calls to PLS for legal advice and counsel on issues associated with their conditions of confinement and preparation for re-entry.

Due to the support and cooperation of both Anthony Annucci and Daniel Martuscello, PLS was able to obtain funding to initiate our Pre-Release and Re-Entry Program (PREP) which currently provides re-entry and supportive services to a select group of incarcerated individuals who have reached their maximum release date and are returning to one of the five boroughs of NYC,

Dutchess, Orange or Erie Counties. We have recently secured additional State and private dollars to take PREP to scale statewide.

Without the cooperation of DOCCS' leadership, PREP would not even exist.

PLS, with Anthony Annucci's assistance, was able to initiate and expand the provision of immigration defense to incarcerated individuals facing deportation. As a result, PLS has not only been incredibly successful in these cases, our representation has resulted in precedential decisions that have positively impacted thousands of immigrants across the county.

When PLS approached Commissioner Annucci about opening a unit for veterans in a maximum-security prison, he immediately established a departmental working group to look into the proposal. Within a short period of time, DOCCS created a veterans' unit at the Clinton Annex.

Pushing for transparency and accountability, Commissioner Annucci, who had already been instrumental in bringing cameras into DOCCS facilities to address claims of security breaches and violence, reached out to me to ask for a letter in support of his effort to obtain a federal grant to fund a pilot project to place body cameras on corrections officers.

It was because of procedures developed by Commissioner Annucci that PLS staff, when visiting the prisons to interview clients who alleged brutality, are able to take photographs and interview clients and prospective witnesses privately and without interference or intimidation by DOCCS staff.

Acknowledging that words really do make a difference, it was under Commissioner Annucci's leadership that the term "inmate" was changed to "incarcerated individual." While this may not seem like a major change, it has had a monumental impact. The change demonstrates respect for the person and conveys a sense of dignity and humanity that had been stripped away by prior terminology.

Those are only some of the highlights in my many years of working with Tony Annucci. To be sure, not all of our interactions had such favorable results, but in all our dealings, Commissioner Annucci demonstrated the perseverance, dedication and commitment to ensuring that positive change happens. I will miss him, our time working together and the respect we showed each other along the way.

Working alongside Tony during much of his tenure has been new Acting Commissioner Daniel Martuscello. I have known and worked with Dan for many years, not as long as Tony, but long enough to know that he is a man of character, good to his word and equally concerned about a better NYS.

Acting Commissioner Martuscello has been an indispensable partner to both me and former Commissioner Annucci during all of the positive interactions highlighted above and I have no reason to assume anything other than more of the same. In fact, I have cause for great optimism based on recent events.

For example, Commissioner Martuscello took the following steps within weeks, in some cases days, of being named the new DOCCS Acting Commissioner:

- he rescinded a “restraints order” that we found violative of the HALT statute;
- he rescinded a “creative arts” directive that would have hampered an incarcerated individual’s ability to participate in various arts-related activities; and
- he attended PLS’ recent PREP event in NYC with his chief-of-staff, staying for the entire program and making himself available to our formerly-incarcerated honorees.

Doubtless, Acting Commissioner Martuscello and I will find ourselves in adversarial positions going forward, but I am equally confident in his willingness to negotiate, intervene and address issues promptly and, like his predecessor, where possible, without litigation. Additionally, I am confident, by both his words and deeds, that he shares my belief that the primary role of prison is rehabilitation of the incarcerated individual and that person’s successful reintegration back into society.

I welcome working with Commissioner Martuscello to maintain the progress we have made thus far and move forward with our efforts to reform the state corrections system.

... Continued from Page 1

determine **in writing, based on specific objective criteria**, that the conduct was so **heinous** (evil) or destructive that housing the individual in general population creates a significant risk of imminent serious physical injury to staff or other incarcerated persons and creates an unreasonable risk to the security of the prison.

There are seven categories of (k)(ii) conduct for which extended disciplinary confinement may be imposed. The first such category involves causing, attempting to cause, or threatening to cause serious physical injury or death to another person. CL §137(6)(k)(ii)(A) defines this conduct as follows:

[C]ausing or attempting to cause serious physical injury or death to another person or making an **imminent threat** [a threat of action that is likely to take place in the very near future] of such serious physical

injury or death if the person has a history of causing such physical injury or death and the commissioner and, when appropriate, the commissioner of mental health or their designees reasonably determine that there is a strong likelihood that the person will carry out such threat. The commissioner of mental health or his or her designee shall be involved in such determination if the person is or has been on the mental health caseload or appears to require psychiatric attention. The department and the office of mental health shall promulgate rules and regulations pertaining to this clause ...

While DOCCS adopted quite a few regulations to implement various other parts of the HALT Act – for example, the definition of special populations – it has not enacted any regulations pertaining to the (k)(ii) criteria. Rather, DOCCS has imposed extended disciplinary confinement on numerous incarcerated individuals based on the regulations that were in effect prior to the effective date of the HALT Act.

The question of whether DOCCS complied with the requirements of CL §137 (6)(k)(ii) in imposing extended disciplinary confinement was presented to the Albany County Supreme Court in the case *Matter of Pernell Griffin v. DOCCS Acting Commissioner Anthony J. Annucci and Office of Mental Health Commissioner Anne Marie T. Sullivan*, Index No. 901471-23. Represented by Prisoners' Legal Services of New York (PLSNY), Pernell Griffin challenged DOCCS' decision to place him in extended disciplinary confinement for 365 days, alleging that having failed to comply with (k)(ii) requirements, DOCCS only had authority to place him in disciplinary confinement for 3 days.

Background

In August 2022, Pernell Griffin, who was on the Office of Mental Health caseload, was serving a disciplinary sanction at Lakeview Shock Incarceration C.F. After the Superintendent conducted rounds in Mr. Griffin's housing unit, an officer charged Mr. Griffin with threats and harassment, alleging that he had "made threats of violence toward the Superintendent and her family making statements like, 'Wait til I get outta here!' and 'Just wait til you see what happens in your driveway!!'"¹

After finding Mr. Griffin guilty of the charges, the hearing officer imposed a sanction of 365 days in disciplinary confinement. Mr. Griffin appealed, arguing that the sanction was unauthorized, due to DOCCS' failure to comply with the HALT Act requirements for the imposition of extended disciplinary confinement. The determination was affirmed on administrative appeal.²

The Litigation

Having exhausted his administrative remedies, Mr. Griffin filed an Article 78 petition asking the Court to find that because

the 365-day sanction was imposed in violation of the HALT Act requirements, it was in violation of lawful procedure and affected by error of law. The Petitioner requested that the Court reduce the sanction to 3 days.³

DOCCS responded to the petition, arguing that the procedures and regulations in place before the effective date of the HALT Act satisfied the (k)(ii) requirements.⁴

In reply, the Petitioner pointed out that the HALT Act's (k)(ii) criteria are far more specific and stringent than the prior disciplinary procedures. For instance, before imposing extended disciplinary confinement, the statute makes clear that the Respondents were required to make several written findings, which they failed to do here. These required findings include written determinations concluding that:

- The alleged threat was imminent;⁵
- The Petitioner has a history of causing physical injury or death;
- There is a strong likelihood that the Petitioner will carry out the threat;
- Based on specific objective criteria, the alleged conduct was so evil or destructive that housing the Petitioner in general population would create a significant risk of imminent serious injury to staff and create an unreasonable risk to the security of the prison.

Further, the Petitioner argued, the Respondents also failed to comply with two procedural requirements of CL 137(6)(k)(ii)(A):

- First, even though the Petitioner was on the OMH caseload at the time of the alleged misconduct, no one from OMH was involved in his hearing and there was no determination

concluding that there was a strong likelihood he would carry out the threat;

- Second, neither DOCCS nor OMH have adopted rules and regulations with respect to how to determine whether there is strong likelihood that a person on the OMH caseload accused of threatening serious injury or death will carry out that threat.

Notably, in the lead up to the *Griffin* case, PLSNY contacted OMH in writing, both regarding Mr. Griffin's hearing specifically and to point out that new regulations had not yet been drafted despite CL §137(6)(k)(ii)(A)'s statutory mandate. OMH responded to the letter, writing that 1) OMH relies on DOCCS to advise the agency of when testimony is needed for the purposes of Correction Law §137(6)(k)(ii)(A) and to date, DOCCS had not called OMH to testify pursuant to this section of the law; and 2) in their opinion, it did not appear that the behavior for which Mr. Griffin was disciplined rose to the same level of the acts specified in (k)(ii)(A).

The Court's Decision

Based upon the evidence before it, the Court found that while there was sufficient evidence that the Petitioner had made a threat of serious injury, the penalty imposed was an abuse of discretion as a matter of law and must be vacated and amended to the statutory three consecutive day maximum, "given respondents' failure to demonstrate the statute was complied with and that the explicitly required statutory findings and determinations set forth in CL §137(6)(k) were made." *Matter of Griffin v. Annucci and Sullivan*, Index No. 901471-23 (Sup. Ct. Albany Co. July 6, 2023). In reaching this result, the Court listed the shortcomings of the Respondents' decision-making process, focusing on the written determinations

required by the HALT Act, including the following:

- There were no findings in the hearing record that Petitioner committed an act falling within one of the (k)(ii) categories of conduct that allow the imposition of extended disciplinary confinement;
- There was nothing in the hearing determination that references CL §137(6)(k) or demonstrates that the statute guided the penalty determination in any way;
- There was nothing in the record demonstrating that a finding was made that the threat of serious physical injury was imminent;
- The record did not show that the Respondents made the required finding that there was a strong possibility that the Petitioner would carry out the threat;
- There was nothing in the hearing determination or transcript demonstrating that the hearing officer considered the requirement that to impose extended disciplinary confinement, the Petitioner must have a history of causing such physical injury or death;
- There was no determination by the Commissioner or their designee that the Petitioner's conduct was so heinous or destructive that placement in general population would create a significant risk of imminent serious physical injury to staff or other incarcerated persons and create an unreasonable risk to facility security; and
- Although the Petitioner was on the OMH caseload and OMH should therefore have been involved in determining the likelihood that

Petitioner would carry out the threat, DOCCS did not involve OMH in making such a determination.

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- ¹ These facts are taken from the Court’s decision.
 - ² In February 2023, the sanction was reduced to 150 days.
 - ³ The petition also requested two other forms of relief, including an order 1) requiring Respondents to promptly propose regulations to implement Correction Law §137(6)(k)(ii)(A) and 2) enjoining Respondent Annucci and DOCCS from placing incarcerated individuals in disciplinary confinement for more than three days for alleged threats of violence until DOCCS and OMH have adopted regulations as required by Correction Law §137(6)(k)(ii). The Court denied this relief.
 - ⁴ The Respondents also argued that because the Petitioner had already served the 150-day sanction, the petition was moot and should be dismissed. The Court found that the petition was not moot and that even if it were, the issues raised were capable of repetition and evading review and the resolution of the issues was in the public interest.
 - ⁵ Petitioner also argued that such a finding of imminence was not possible as Petitioner is not eligible for release until the end of October 2026.

Prisoners’ Legal Services of New York represented Pernel Griffin in this Article 78 proceeding.

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, Orange or Erie Counties. 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 **The Culinary Arts Training Program of Project Renewal**. The Culinary Arts Training Program offers training in the food service industry to low-income and formerly homeless adults. Students learn basic cooking theory and food preparation in the teaching kitchen and obtain internships at local restaurants and corporate dining services to equip them with on the job experience. The program includes three months of hands on training, a three-month internship (with stipend), and three months of job placement assistance and participation in the alumni job club.

The program offers multiple options:

- **The Culinary Arts Course:** an intensive 12-week program with classroom lectures, demonstrations, hands-on cooking, written tests as well as supervised on-the-job training at their catering company, City Beet Kitchens. This program introduces students to culinary basics, from safety and sanitation to the preparations of stocks, sauces, meats, vegetables and fish.
- **The Pastry and Baking Course:** an 11-week course for students wishing to enhance their skills in the baker’s art. This program focuses on the

skills of measuring and mixing, baking and finishing. Topics include cakes, cheese- and pound cakes, pies and tarts, chocolate and sugar work, souffles, breads and more!

- **Culinary/Pastry and Baking Course:** a program that follows the same curriculum for Culinary Arts Course and Pastry and Baking Course, but both are completed at the same time.

To enroll: upon your release, contact Cylvenia Cherry at (212) 913-9993 ext. 223 or submit a form of interest on the Project Renewal website (www.projectrenewal.org/catp).

PRO SE VICTORIES!

Matter of Barry Yorke v. Anthony Annucci, Index No. 1055/22 (Sup. Ct. Dutchess Co. May 30, 2023). In May 2022, Officer Scott wrote a misbehavior report stating that he had observed Barry Yorke using a dark colored cell phone as he lay on his bed in his cell at Fishkill C.F. When Officer Scott asked Mr. Yorke to give him the phone, the report alleges, Mr. Yorke initiated a scuffle, allowing other incarcerated individuals to take the phone, which, the report continues, was later found in pieces on a roof top. Officer Scott testified consistently with his report at the hearing.

Mr. Yorke, however, had a different version of the incident. He testified that he had been using his DOCCS-issued tablet when Officer Scott initiated the altercation between the two men and that another officer, C.O. Hall, had witnessed the incident. Other than Mr.

Yorke and Officer Scott, no one with firsthand knowledge testified at the hearing.

Mr. Yorke made several requests that the hearing officer call Officer Hall as a witness. The hearing officer denied the requests, explaining that the officer was not available that day, and “because there is a legitimate correctional goal in completing this hearing in an expeditious fashion, I am going to deny Officer Hall as a witness, due to the need to move the hearing along and complete it in a timely fashion.” (spelling and grammatical errors corrected).

The Court found that completing the hearing **expeditiously** (quickly) and in a timely fashion does not implicate matters of institutional safety or correctional goals. For this reason, the Court concluded, the hearing officer did not have a legal basis to refuse to obtain testimony from C.O. Hall. Based on this finding, the Court ordered the determination of guilt annulled and remitted the matter for further proceedings “as the Respondent finds appropriate.”

Steven Thomas v. Anthony Annucci, Index No. 916-23, (Sup. Ct. Albany Co. June 30, 2023). In June 2022, officers searched Steven Thomas’s dorm at Greene C.F. Mr. Thomas was not present during the search. Officers alleged in a misbehavior report that after an OSI search dog alerted at Mr. Thomas’s cube, they recovered a green leafy substance in a plastic bag from behind a small locker in the cube. As a result, Mr. Thomas was charged with smuggling and possession of contraband. At the resulting hearing, the hearing officer found Mr. Thomas guilty of possessing contraband.

After his administrative appeal was denied, Mr. Thomas filed an Article 78 challenge to the hearing, alleging that 1) the green leafy

substance had not been adequately identified to support a determination that it was contraband and 2) while photographs of the substance had been taken and Mr. Thomas requested that the photographs be produced, the hearing officer failed to produce the any photographs.

Rather than defend the hearing, DOCCS reversed the determination of guilt, expunged the charges and asked that the Court dismiss the petition as moot because all of the relief to which Mr. Thomas was entitled had been granted by the Respondent.

Jessie J. Barnes v. David A. Rock, Appeal No. 22-2902 (2d Circuit May 18, 2023). In 2013, Jessie Barnes filed a *pro se* Section 1983 case against over 60 DOCCS Defendants at Upstate C.F., for what Mr. Barnes alleged was unconstitutional misconduct between June 2010 and September 2011. In 2018, in response to the parties' cross motions for summary judgment, the District Court denied the Plaintiff's motion in its entirety and narrowed the claims, dismissing defendants with respect to whom the Plaintiff had failed to state a claim but retaining those claims with respect to which there were disputed issues of material fact. The remaining issues involved the use of excessive or unnecessary force, retaliation for the exercise of Mr. Barnes' First Amendment rights, and due process violations at disciplinary hearings.

In 2022, after a two-year delay due to COVID restrictions, the Court appointed counsel for Mr. Barnes and the case was heard by a jury, beginning on September 19. The parties rested on September 26. The jury reached a unanimous verdict in favor of the Defendants on September 29. Mr. Barnes appealed to the Second Circuit.

On May 18, 2023, the Second Circuit granted Mr. Barnes' motion for appointment of counsel with respect to the issue of whether the District Court erred in granting judgment as a matter of law on Mr. Barnes' First Amendment retaliation claims against two correction officers and a sergeant.

Matter of Michael Mosley v. Mary Pat Donnelly, Rensselaer County District Attorney and Carl Kempf, III, Rensselaer County Attorney, Index No. 2022-272262 (Sup. Ct. Rensselaer Co. March 31, 2023).

In November 2021, Michael Mosley submitted a FOIL request asking for photographs of the victim of his crime taken at the crime scene or during the autopsy, that show "bloody palm prints on her back." The Respondent refused to produce the photographs, arguing that because Mr. Mosley stated in his request that the photographs are essential for the preparation of a post-conviction appeal/proceeding, production of the photos would interfere with ongoing judicial proceedings.

The Respondents cited Public Officers Law (POL) §87(2)(e)(i) as the basis for the argument that they were not required to produce the photographs. POL §87(2)(e)(i) provides that an "agency may deny access to records or portions thereof that ... are compiled for law enforcement purposes only to the extent that disclosure would interfere with law enforcement investigations or judicial proceedings."

Petitioner Mosley appealed the decision, noting that his state and federal appeals in relation to his criminal case had concluded. The agency affirmed its denial of the request. Petitioner then filed an Article 78 challenge. Rather than submit an answer, the Respondent moved to dismiss, arguing that the petition failed to state a cause of action.

In deciding the motion, the Court first noted that under the Freedom of Information Law (FOIL), “all government records are presumptively open for public inspection and copying unless they fall within one of the exemptions listed in the statute” The Court then turned to the law enforcement exemption.

In order to claim entitlement to the law enforcement exemption, the Court wrote, the agency must state a factual basis identifying the generic kinds of documents for which the exemption is claimed and the generic risks posed by disclosure of these types of documents. For example, the Court wrote, mandating production of certain records during a criminal prosecution would interfere with the orderly process of disclosure in the proceeding and would create a substantial likelihood of delay in the disposition of that proceeding. The exemption applies to trial exhibits and continues through appeals. However, the Court continued, the exemption ceases to apply after law enforcement investigations and any ensuing judicial proceedings have run their course.

Thus, the Court concluded, after the judicial proceedings have ended, a requestor is entitled to documents that have previously been provided. However, access to photographs related to a criminal case may be restricted despite an individual’s status as a criminal defendant.

When the Court applied the law to the facts before it, the Court first noted, the criminal prosecution and appeals in the Petitioner’s criminal case had ended. While Petitioner’s hopes for a future motion gave some credence to Respondent’s argument that there may at some point be a judicial proceeding, “[p]etitioner’s generalized hope that these already disclosed exhibits may assist him in a

yet to be filed Criminal Procedure Law (CPL) 440 motion which may never be filed, cannot be said to cause a ‘substantial likelihood of delay in the adjudication of that proceeding’ nor ‘interfere with the orderly process of disclosure in the criminal proceeding set forth in CPL Article 240.’”

The Court also rejected the Respondents’ argument that they are entitled to dismissal because, having provided the photographs once before, they are not required to do so again, and the case is therefore moot. While the Court agreed that generally speaking, the agencies are only required to produce the records once, the Petitioner’s assertion that he no longer has access to the copies previously provided changes the analysis. In *Matter of Scarola v. Morgenthau*, 246 A.D.2d 417 (1st Dep’t 1998), the Court found that where the Petitioner presented proof that his former attorney had not given him a copy of the documents and the lawyer no longer had possession of them, the Petitioner had sufficiently demonstrated that the documents were no longer available to him. While the record on this matter was not sufficiently developed, the Court held that the Petitioner had sufficiently raised the issue that dismissal on this basis was not warranted.

The Court gave the Respondent four weeks to submit an answer to the petition. After the Respondent answered, and based on the above analysis, the Court granted the Petition.

Matter of Rogelio Ferrer v. NYS Department of Corrections and Community Supervision, Index No. 1483-2023 (Supreme Court, Albany Co.). According to Mr. Ferrer’s Article 78 petition, in August 2022, a DOCCS hearing officer found him guilty of possession of contraband (a USB stick) and imposed a penalty of 15 days SHU. Following the denial

of his administrative appeal, Mr. Ferrer filed an Article 78 petition and an affidavit in support of his request for an order to show cause swearing that the author of the misbehavior report, who did not testify at the hearing, 1) had written the misbehavior report before the cube was searched, 2) neither conducted the search nor was present when the cube was searched, and 3) falsely stated in the report that photographs had been taken of the contraband. Further, Mr. Ferrer argued, the hearing should be annulled and the charges expunged because the Respondent failed to comply with Directive No. 4910's requirement that contraband be photographed.

Rather than defend the hearing, on June 7, 2023, DOCCS reversed and expunged all references to the charges and asked that the Court dismiss the petition as moot because all of the relief to which Mr. Ferrer was entitled had been granted by the Respondent.

***Pro Se Victories!** features summaries of successful pro se administrative advocacy and unreported pro se litigation and. 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

FAMILY LAW

Court Orders Visits and Phone Calls for Incarcerated Father

After Nicholas Serrano was incarcerated, he petitioned to modify the parental access provisions of a 2019 court order relating to his four-year-old son, asking for contact and daily phone calls. The Court granted his petition, awarding Mr. Serrano quarterly visits and daily telephone contact, not to exceed one call a day. The child's mother appealed from this order.

In *Matter of Serrano v. Abizeid*, 217 A.D.3d 957 (2d Dep't 2023), the Court began its analysis by reviewing the law, noting that in order to modify an existing court-ordered child custody or parental access order, there must be a showing that there has been a change in circumstances such that modification is required to protect the best interests of the child. Further, the Court continued, parental access with a noncustodial parent is presumed to be in the best interests of the child. This presumption may be overcome when the preponderance of the evidence shows that parental access would be harmful to the child's welfare or is not in the child's best interests.

Reviewing the Family Court's application of the law to the facts, the Court found that the father's incarceration was a change in circumstances necessitating a change in the parental access provisions of the 2019 order. The Court concluded that the Family Court's

rejection of the arguments against parental access made by the mother and the attorney for the child was a prudent exercise of that court's discretion in that they – the mother and the attorney for the child – had failed to rebut the presumption in favor of parental access.

With respect to parental access, the Appellate Court noted that the father had established a relationship with the child prior to his incarceration and had made efforts to maintain contact with the child after his incarceration. Further, the mother and the attorney for the child had not offered any specific evidence as to how quarterly visits – to be arranged and financed by the father – and daily phone calls would be harmful to the child's well-being.

Based on this analysis, the Court affirmed the decision of the Family Court to allow the father to have four visits a year and daily phone calls with his child.

Amy Colvin, Esq., Huntington, N.Y., represented Nicholas Serrano in this appeal from a Family Court order.

Court of Claims

The State is Strictly Liable for Harm Caused by DOCCS Product

In *Darryl Whitley v. State of New York*, 79 Misc.3d 443 (Ct. Clms. 2023), the Court addressed the issue of whether the State is strictly liable for injuries resulting from products manufactured by DOCCS. Here, the Claimant alleged that while at Otisville C.F., he

was cleaning a dishwashing machine using a combination of hot water and Germicidal Cleaner 128, a cleanser manufactured by Corcraft – a part of DOCCS – when the liquid entered the Claimant's left eye, damaging it. He further alleged that the Defendant was *strictly liable* for his injury. The Defendant moved to dismiss, arguing that a claim of strict liability could not be brought against the State.

Strict liability means that a defendant will be found liable for committing an action, *regardless of their intent or mental state at the time that they acted*. A manufacturer of defective products who places them into the stream of commerce may be held **strictly liable** for injuries caused by its products, regardless of privity, foreseeability or due care. **Privity** is defined as the closeness of the relationship between the injured party and the manufacturer. **Foreseeability** in this context is defined as how likely it was that a manufacturer could have anticipated the potential or actual results of its actions.

In support of its motion to dismiss, the State argued that because it is not engaged in commerce nor is it a manufacturer of products that it places in the stream of commerce, the balance of economic incentive and consumer protection underlying all causes of action for strict products liability does not exist when the State is the defendant.

In response, the Claimant pointed out that in *Baker v. Scully*, 157 A.D.2d 719 (2d Dep't 1990), the Court described Corcraft as a profit-making corporation owned and operated by DOCCS, and argued that in every relevant way, Corcraft operates like any other manufacturer as its products are widely distributed in New York, it has a procedure for setting prices for its products and advertises

its products. Further, the Claimant pointed out, while not a traditional manufacturer, Corcraft should be held liable for the Claimant's injuries because it has the same relationship with its end users that traditional manufacturers have. Finally, the Claimant argued, Corcraft should not be held to a lesser duty of care than any other manufacturer just because it manufactures products in a prison and by law is limited to selling products to government agencies and non-profits.

The Court stated that the first question to be answered is whether New York is the manufacturer of Germicidal Cleaner 128; the Court answered this question affirmatively. Second, the Court found, the State of New York, by selling its product to state and federal agencies, places the product in the stream of commerce. Accordingly, the Court concluded, the State fits the characteristics of a manufacturer who may be subject to liability under the theory of strict liability. Based on this analysis, the Court found that the Claimant had stated a viable cause of action against the State.

Bob Rickner of Rickner PLLC, New York City, represented the Claimant Darryl Whitley.

Conduct Underlying Sexual Assault Claim Found to Be Within Scope of Employment

Claimant M.K. filed a claim to recover for injuries suffered when two unidentified correction officers humiliated and degraded him during a strip frisk at Elmira C.F. In its answer, the Defendant argued that the State was not liable because the conduct of the officers fell outside the scope of their employment.

The Trial

At the Court of Claims trial on liability, Claimant M.K. testified that as two officers were escorting him to a mental health observation cell, they questioned him about being "into little kids" and began hitting him. They then ordered him to remove his clothing for a strip frisk, and asked him to run his fingers through his gums. Next, the officers instructed him to lift his genitalia and run his fingers through his gums again. When he reluctantly complied, the officers "chuckled a little."

Twice more, the officers instructed him to lift his genitals and each time, after he did so, they instructed him to run his fingers through his gums. The officers then instructed him to bend over, spread his buttocks and put his finger in his anus, following which they directed him to run his fingers through his gums. After this, the officers placed him in the observation cell and warned him to keep quiet or they would make it look like a suicide. Finally, before leaving the cell, one of the officers ordered him to lie on the floor and after he did so, nudged the Claimant's genitals with his boot, placed his boot on the Claimant's chest and leaned over while grabbing himself, saying, "think about this next time."

Acting as the trier of fact, the Court found the Claimant to be credible and the Defendant liable for conduct during the strip frisk and scheduled a trial on the issue of damages. The Defendant appealed, arguing that the Court had erred in finding the conduct within the scope of the employees' employment.

The Appeal

In *M.K. v. State of New York*, 191 N.Y.S.3d 538 (3d Dep't 2023), the Third Department affirmed the lower court's order. The Court began its analysis by reviewing the facts upon

which the lower court relied, and concluded that “there can be little dispute that the employee-employer relationship, time, place and manner and the common nature of the strip frisk and placement in the observation cell ... are established by the record.” Accordingly, the Court wrote, the Defendant’s contentions on appeal are directed toward the extent that the conduct may have departed from the officers’ regular duties and the foreseeability of the alleged deviation. It then noted that “the crux of the Defendant’s contention is that the officers’ conduct during the strip frisk and placement in the cell was motivated solely by personal **animus** [spiteful ill will or hatred] which inherently rendered such conduct outside the scope of employment.”

The Court first stated that intentional torts – for example, assault – may fall within the scope of employment and the motivation for the conduct is a factor, but it is not dispositive as to the defendant’s liability. While the Court noted that the officers’ actions may have been motivated *in part* by an intent to humiliate the Claimant, it disagreed that such intent was 1) the sole motivation for each of the officers’ commands and that 2) such actions were undertaken without any furtherance of the Defendant’s business.

The Court found that the majority of the acts performed during the strip frisk and placement into the observation cell did not significantly deviate from the mandates of Directive 4910, the Directive governing strip frisks, and were required by the Directive prior to placing an individual into an observation cell. What rendered the incident demeaning, the Court wrote, and the reason that the Claimant has a viable claim, is the product of the sequence in which those acts occurred. Moreover, the Court noted, the Directive explicitly states that “in performing

a strip search or frisk, officers shall conduct themselves professionally ... [and] ... shall be alert to the sensitive nature of the strip search or strip frisk and conduct such searches in a manner least degrading to all involved.”

Here, the Court found, the motivation of the officers and the resulting conduct, while clearly a despicable and perverse distortion of the procedures required by the Directive, was not undertaken solely to humiliate the Claimant, but rather was part of the employment related function of performing a strip frisk. The Court also noted that principles concerning the use of excessive force are equally applicable to the actions taken by the officers in this case. These actions, the Court went on, clearly crossed the line of sanctioned conduct but cannot be readily divorced from the authorized strip frisk that they were conducting.

Clyde Rastetter, of Sivin, Miller & Roche, LLP, New York City, represented the Claimant M.K.

FEDERAL COURT DECISIONS

Pain Meds: Court Grants Preliminary Injunction

Background of Decision

In 2019, Peter Allen filed a class action lawsuit in the Southern District of New York seeking a declaration that the DOCCS policy with respect to “medications with abuse potential” (MWAP) – a category of medications that includes many pain medications – violated the Plaintiffs’ Eighth Amendment rights and asking the Court to 1) **enjoin** (stop) the Defendants from applying the policy; 2) direct the Defendants to allow primary care physicians, consultants and specialists to conduct individualized assessments of the Plaintiff’s

need for such medications; and 3) order the Defendants to pay compensatory damages to the Plaintiff. *Peter Allen v. Carl Koenigsmann*, S.D.N.Y., Case 1:19-cv-08173-LAP, Document 1 filed 09/02/19.

In 2021, the Defendants replaced the MWAP Policy with Health Services Policy No. 1.24A (Policy 1.24A) and moved to dismiss the case. According to the Defendants, Policy 1.24A:

1. allows DOCCS medical providers to prescribe “their choice of pain treatment”;
2. eliminates any future risk of providers being unable to prescribe the pain medication of their choice;
3. permits primary care physicians to order specialty pain consults; and
4. gives primary care physicians the ultimate decision of whether to follow a specialist’s recommendations.

Allen v. Koenigsmann, No. 19-CV-8173, 2023 WL 2752375 (S.D.N.Y. March 31, 2023) (*Allen 1*, 3/31/23).

The Plaintiffs opposed the motion to dismiss and moved for a preliminary injunction.

While the Defendants’ motion to dismiss and the Plaintiffs’ motion for a preliminary injunction were pending, in May 2022, the Plaintiffs moved for certification of two classes of plaintiffs:

- Liability Class: incarcerated individuals who suffer (or will suffer) from chronic pain and/or neuropathies who were denied MWAP medications or had their prescriptions discontinued without an individualized assessment of medical need or **efficacy** (effectiveness).
- Injunctive Class: incarcerated individuals who are or will be in DOCCS custody who suffer or will suffer from chronic pain and/or neuropathies who

require individualized assessments of medical need for treatment with MWAP medications.

On March 31, 2023, the Court certified the injunctive class as defined, but denied the certification of the liability class because the Plaintiffs “failed to allege sufficient facts to show that the liability class has standing to sue the particular defendants named in the lawsuit.” *See, Allen v. Koenigsmann*, No. 19-CV-8173, 2023 WL 2731733 (S.D.N.Y. March 31, 2023) (*Allen 2*, 3/31/23).

Court Denies Motion to Dismiss and Grants Injunction

Also on March 31, 2023, the Court granted the Plaintiffs’ motion for a preliminary injunction and denied the Defendants’ motion to dismiss. *Allen 1*, 3/31/23. In reaching this result, the Court made the following findings with respect to the Defendants’ application of Policy 1.24A:

- Members of the Plaintiff Class continue to have MWAP medications discontinued for non-medical reasons;
- DOCCS continues to fail to adequately treat Plaintiff Class members’ pain;
- After DOCCS’ voluntary cessation of the MWAP policy and its adoption of Policy 1.24A, the provision of MWAP medications by DOCCS medical care providers continues to suffer from the same infirmities as it did when the MWAP policy was in effect and therefore the lawsuit is not moot;
- The Plaintiffs are likely to succeed on the merits;
- The Plaintiffs are likely to suffer irreparable harm in the absence of preliminary relief;

- The balance of equities tips in the Plaintiffs' favor; and
- An injunction is in the public interest.

The Court, however, found that additional submissions from the parties was necessary before it could determine the terms of the injunction.

After receiving the requested submissions from the parties, on June 12, 2023, the Court issued the injunction. *See, Allen v. Koenigsmann*, No. 19-CV-8173, 2023 WL 3948533 (S.D.N.Y. June 12, 2023). Among its provisions is the requirement that the Chief Medical Officer (CMO) order the Facility Health Services Directors (FHSD), primary care physicians (PCP), and relevant medical staff to comply with Policy 1.24A. The Court went on to write that complying with Policy 1.24A includes the following actions:

- Giving DOCCS patients with chronic pain conditions the Problem Code 338 "Pain Management;"
- Allowing a PCP to prescribe any medication deemed appropriate for the patient's chronic pain condition;
- Ordering Specialty consultations as indicated for the evaluation and care of chronic pain patients;
- Discontinuing pain management medication only after a provider has met with the patient, discussed the issues regarding the use of medication, analyzed the patient's situation, and subsequently determined that it is in the patient's best interest for the medication to be discontinued;
- Noting in the patient's ambulatory health record (AHR) the discussion with the patient regarding the continuance of pain medication and

the reason for discontinuance of pain medication;

- Ensuring that all patients with the pain medication designation Code 338 are seen by a PCP at least every 90 days; and
- Ensuring that a PCP meets with each patient at least annually to discuss the patient's treatment plan.

The injunction also provides that failure to comply with the order will not be excused by allegations of inadequate staffing.

Because the Prison Litigation Reform Act (PLRA) only permits preliminary injunctions to be in effect for 90 days, the Court set a trial date of August 8, 2023, for the determination of whether the injunction should become permanent. Assuming that the trial proceeds as it is currently scheduled, the trial will have ended before this issue of *Pro Se* reaches your tablet. We will let you know when the Court issues its decision in the issue of *Pro Se* that follows the issuance of the decision.

Amy Jane Agnew and Joshua Lee Morrison, Law Office of Amy Jane Agnew, P.C., represent Peter Allen and the Plaintiff Class in this Section 1983 case.

False Positive Lawsuit: Court Denies Corporate Defendants' Motion to Dismiss

In the last issue of *Pro Se*, we reported on the Court's decision in *Steele-Warrick v. Microgenics, Corp., et al.*, to deny, with the exception of the Eighth Amendment claim, the DOCCS Defendants' motion to dismiss the claims against them. More recently, the Court denied in large part, a motion to dismiss brought by the defendants,

Microgenics Corp. and Thermo Fisher Scientific, Inc. (Microgenics Defendants). *Steele Warrick v. Microgenics Corp., et al.*, No. 19-cv-6558, 2023 WL 3959100 (S.D.N.Y. June 12, 2023) (*Steele-Warrick v. Microgenics*). Among the claims the Microgenics Defendants asked the Court to dismiss were the state negligence and business law claims and the Section 1983 Eighth and Fourteenth Amendment claims.

To survive a motion to dismiss, under Federal Rules of Evidence 12(b)(6), a complaint must set forth sufficient facts, which, if accepted as true, state a claim for relief that is plausible on its face.

Negligence Claims

In 2021, the Court denied the Microgenics Defendants' motion to dismiss the Plaintiff's negligence claim. After the Plaintiffs filed an amended complaint, the Defendants renewed their argument to dismiss the negligence claim, arguing they did not owe the Plaintiffs a duty of care. To impose liability in a negligence claim, the defendant must owe a duty of care to the plaintiff.

The Plaintiffs countered that the Defendants owed them a duty of care "to ensure that the Indiko Plus urinalysis analyzers were used in accordance with the applicable standards and produced accurate and reliable results. *Id.*, at *2. In support of this argument, the Plaintiffs noted that DOCCS, lacking the capability of understanding the risk factors for false positive urinalysis test results, relied on the Microgenics Defendants to provide this expertise, a dependence of which the Microgenics Defendants were aware.

The Court began its analysis with a review of New York State negligence law. To state a claim for negligence in New York, the plaintiff must plead:

1. A duty owed by the defendant to the plaintiff;
2. A breach of that duty; and
3. Injury proximately resulting from the breach.

In *Landon v. Kroll Lab. Specialists, Inc.*, 22 N.Y.3d 1, 6-7 (2013), the Court of Appeals held that a laboratory that processed an incarcerated individual's urine sample owed a duty to the incarcerated individual to perform the drug test on his urine sample by means that are in keeping with relevant professional standards. And in *Pasternack v. Lab. Corp. of Am. Holdings*, 27 N.Y.3d 817 (2016), the Court **elaborated** [expanded] on the *Landon* decision, finding that "a laboratory can owe a duty to testing subjects when they fail 'to adhere to professionally accepted scientific testing standards' or standards that 'implicate the scientific integrity of the testing process.'"

With respect to the Plaintiffs' negligence claim, in 2021, the Court found that the Plaintiffs had plausibly alleged that the Microgenics Defendants were in the best position to prevent false positive results because DOCCS relied on Microgenics' warranties that the Indiko analyzer would be provided consistent with relevant professional standards and exercised significant authority over testing. While the Microgenics Defendants made some additional arguments in support of the current motion to dismiss, the Court rejected these arguments and again denied the motion to dismiss the negligence claim.

General Business Law Claim

The Plaintiffs allege that the Microgenics Defendants violated Section 349 of the New York Business Law by deceiving DOCCS as to whether the Indiko analyzer could be used without confirmatory testing. Section 349, in relevant part, bars deceptive acts or practices

in the furnishing of any service. To state a Section 349 claim, a plaintiff must allege that:

1. the defendant's conduct was consumer oriented;
2. the defendant's act was deceptive or misleading in a material way; and
3. the plaintiff suffered an injury as a result.

Steele-Warrick v. Microgenics, at *3.

To show that a defendant is "consumer oriented," a plaintiff must allege that the defendant's conduct had a broader impact on consumers at large. *Id.* Some courts have allowed Section 349 claims involving business contracts that allege "harm to the public interest." *See, Securitron Magnalock Corp. v. Schnabolk*, 65 F.3d 256, 264 (2d Cir. 1995). Here, the Court noted, the Plaintiffs have alleged that the Microgenics Defendants' deceptions harmed the public interest.

The Court found that the Plaintiffs sufficiently alleged the Microgenics Defendants' conduct affected the public interest: the Plaintiffs claim the Microgenics Defendants conduct caused thousands of incarcerated New Yorkers to be punished without justification. Further, the Court found, no caselaw disqualifies individuals in DOCCS custody from the consuming public for the purposes of Section 349. Thus, the Court held, the widespread effect on individuals in DOCCS custody, as well as the public nature of the Microgenics contract, justify allowing Plaintiffs' Section 349 claims to proceed.

Section 1983 Claims

The Plaintiffs brought Eighth Amendment and Fourteenth Amendment claims against the Microgenics Defendants. The Court dismissed the Eighth Amendment claim on the same basis that it dismissed that claim against the DOCCS Defendants. (See, *Pro Se*, Vol.

33, No. 4). As it did with respect to the Fourteenth Amendment substantive due process claims against the DOCCS Defendants, the Court denied the Microgenics Defendants motion to dismiss the Fourteenth Amendment claim.

The Court looked at two issues to determine the Microgenics Defendants' motion to dismiss the Fourteenth Amendment claim:

1. whether the Plaintiffs plausibly allege that the Microgenics Defendants' conduct is attributable to the state; and
2. whether the Plaintiffs plausibly allege that their injuries resulted from an official policy or custom of Microgenics Defendants.

The state is responsible for a private entity's conduct when the state was involved with the activity that caused the injury giving rise to the action. *Steele-Warrick v. Microgenics*, at *5. Here, the Court found that the Plaintiffs had plausibly alleged that the Microgenics Defendants had been delegated a public function by the state, and thus the conduct of the Microgenics Defendants was attributable to the state.

Next the Court noted, a §1983 plaintiff must also allege that action pursuant to an official policy of some nature caused the claimed constitutional violation. *Id.*, at *6. Here, the Court found, the Plaintiffs adequately plead that misrepresenting the Indiko analyzer's reliability was an official custom of its contractual relationship with DOCCS and this official custom is what caused the Plaintiffs' injuries.

Fourteenth Amendment Substantive Due Process Claim

The Court then turned to the claim that the Microgenics Defendants had violated the Plaintiffs' Fourteenth Amendment right to substantive due process. To state a claim for a violation of the right to substantive due process, the plaintiff must:

1. Identify the constitutional right at stake; and
2. Demonstrate that the state action was so egregious, so outrageous, that it may fairly be said to shock the conscience.

Id. Finding that the Court had already held that the Plaintiffs had alleged the deprivation of a cognizable liberty interest – freedom from arbitrary discipline – the Court proceeded to whether the Plaintiffs had alleged “sufficiently shocking behavior.” *Id.*

The Plaintiffs allege that the Microgenics Defendants repeatedly misrepresented to DOCCS whether the Indiko analyzer tests alone, without confirmatory testing, were sufficiently reliable to serve as the sole basis for discipline. The Court found that these allegations are sufficiently conscience-shocking – they involve deliberate indifference at the least and malicious disregard for wellbeing of incarcerated individuals in pursuit of profit at worst. Thus, the Court held, the Plaintiffs had adequately alleged deprivation of a protected liberty interest owing to conscience-shocking behavior by the Microgenics Defendants.

Prisoners' Legal Services of New York and Emery Celli Brinckerhoff & Abady, LLP, New York City, represent the Plaintiffs in this action.

IMMIGRATION MATTERS

Nicholas Phillips

This issue's immigration column reviews two recent precedential decisions of the Second Circuit Court of Appeals, each of which concerns the application of federal immigration law to noncitizens convicted of criminal offenses. The first case, *Giron-Molina v. Garland*, 71 F.4th 95 (2d Cir. 2023), is the latest in a long line of Second Circuit cases dealing with the so-called “categorical approach,” a technique which is applied in immigration proceedings to determine the immigration consequences of state criminal convictions.

In *Giron-Molina*, Maria Monserrat Giron-Molina, a native and citizen of Mexico, was convicted in Arkansas for abuse of a corpse in violation of Arkansas Code Annotated (“ACA”) §5-60-101. The conviction was based on the fact that she had concealed her child's body in a closet after her child was murdered by a man named Tyler Hobbs. Because of her conviction, Ms. Giron-Molina was placed into deportation proceedings by the Department of Homeland Security (“DHS”), which alleged that her conviction was a “crime involving moral turpitude” (“CIMT”). A CIMT is a type of immigration offense which “requires two essential elements: reprehensible conduct and a culpable mental state.” *Matter of Silva-Trevino*, 26 I. & N. Dec. 826, 834 (BIA 2016)). A CIMT thus includes conduct which is “inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general.” *Mendez v. Barr*, 960 F.3d 80, 84 (2d Cir. 2020). An immigration judge agreed that Ms. Giron-Molina's conviction was a CIMT and ordered her removed to

Mexico. Ms. Giron-Molina appealed to the Board of Immigration Appeals, which affirmed the judge's decision, and she then timely petitioned for review by the Second Circuit.

The Second Circuit concluded that Ms. Giron-Molina's conviction was not a CIMT and remanded for additional proceedings before the immigration agency. In so holding, the Court applied the categorical approach, which analyzes the noncitizen's statute of conviction in the abstract to determine the "elements" of the conviction, which are "the constituent parts of a crime's legal definition—the things the prosecution must prove to sustain a conviction." *Mathis v. United States*, 579 U.S. 500, 504 (2016) (internal quotation marks and citation omitted). Once the elements of the conviction have been ascertained, the Court then considers whether the minimum conduct criminalized by the elements of the statute of conviction is a categorical match to the federal generic offense. If every violation of the state offense is necessarily a violation of the generic federal offense, the state offense is a categorical match to the federal offense. If the state offense encompasses a broader range of conduct than the generic federal offense, the state offense is "overbroad" compared to that federal offense and there is no categorical match.

In this case, the Court observed that Ms. Giron-Molina was convicted under ACA §5-60-101, which applies where a defendant "knowingly disinters, removes, dissects, or mutilates a corpse, or physically mistreats or conceals a corpse in a manner offensive to a person of reasonable sensibilities[.]" Because the conviction record did not specify which branch of the statute Ms. Giron-Molina was convicted under, the Court considered whether *all* of the conduct criminalized by the

statute constituted a CIMT. The Court found that "[w]e can easily think of scenarios under which a coffin could be 'removed' or 'disinterred' that do not involve 'vile,' 'base,' or 'depraved' conduct"—for example, where "a family . . . disinters a loved-one's body from a cemetery and reburies it in a family plot without completing the paperwork required by state law," or where someone "removed a coffin containing the body of a family member so that it would not be damaged or washed away" during a flood. 71 F.4th at 101.

The immigration agency had dismissed the above possibilities by applying the "realistic probability test," which requires a noncitizen to establish that such conduct could realistically be prosecuted under the statute. The Second Circuit rejected this approach and reiterated that "the realistic probability test is not applicable when, as here, the statutory language itself creates the realistic probability that a state would apply the statute to conduct beyond the federal standard." *Id.* at 102 (internal punctuation marks and citation omitted).

The second case, *Medley v. Garland*, 71 F.4th 35 (2d Cir. 2023), concerns the immigration court case of Leon Leonard Medley, a 32-year-old native and citizen of Jamaica who was arrested by three Immigration and Customs Enforcement ("ICE") officers inside a 7-Eleven convenience store in New York City and taken into immigration detention. In his subsequent deportation proceedings, he argued that his arrest was so egregious that his removal proceedings should be terminated. In support of his request, Mr. Medley alleged that he was arrested immediately following surgery on his hand; that ICE officers pushed him against a display rack, causing his hand to start bleeding; that the officers confiscated his pain medication and ignored his requests to be taken to the

hospital; and that he was subsequently subjected to an interrogation during which he was denied food, water, and access to his lawyer.

After the immigration agency denied his request for termination of proceedings, Mr. Medley petitioned for review by the Second Circuit, which agreed that termination was not warranted. In so holding, the Court observed that under Second Circuit precedent, termination of removal proceedings is potentially appropriate in two situations: first, where federal officers violate agency regulations in a manner that is “so egregious as to shock the conscience [and] call for invalidation of the deportation order[,]” *Rajah v. Mukasey*, 544 F.3d 427, 446 (2d Cir. 2008); and second, where the noncitizen suffered an illegal arrest amounting to an “egregious violation” of his or her constitutional rights, a test which requires either an “especially severe” arrest or an arrest “based on race (or some other grossly improper consideration),” *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 235 (2d Cir. 2006).

Reviewing the circumstances of Mr. Medley’s arrest, the Court noted that he made no allegation that his arrest was based on an impermissible consideration such as race, and so the Court considered only whether the agency had committed an egregious violation of its own regulations or of Mr. Medley’s constitutional rights. With respect to his arrest, the Court found that “[d]espite [the] roughness, we are unable to say that the ICE officials’ conduct so deviates from the routine rough and tumble of an arrest—particularly of someone with an extensive history of arrest and who has been charged with resisting arrest on six prior occasions—such that it warrants termination with prejudice.” 71 F.4th at 48.

With respect to his interrogation, the Court concluded that “[t]he tactics used by ICE during Medley’s interrogation . . . do not amount to unlawful coercion.” *Id.* at 46. Specifically, the Court found that circumstances of his interrogation “cannot be characterized as so offensive or brutal to amount to egregiousness, given the comparatively short length of the interrogation, the brevity of the threats of withholding food, water, and medical treatment, and the low level of his need for medical treatment.” *Id.* at 47. Finally, the Court found that Mr. Medley suffered no prejudice because there was “substantial evidence establishing Medley’s removability independent of his arrest,” including his passport, visa, and other immigration records. *Id.* at 49. The Court thus denied Mr. Medley’s petition and affirmed the agency’s decision to order his deportation to Jamaica.

WHAT DID YOU LEARN?

Brad Rudin

1. **To be at risk for extended disciplinary confinement under the HALT Act:**
 - a. DOCCS must make written findings that the accused individual engaged in conduct that falls within one of the seven categories of misconduct set forth in Correction Law §137(6)(k)(ii).
 - b. the DOCCS Commissioner or their designee must make a written finding, based on specific objective criteria, that the conduct was so heinous or destructive that housing the accused individual in general population creates a significant risk of imminent serious physical injury to staff or other incarcerated individuals and creates an unreasonable risk to the security of the prison.

- c. the accused individual must have been charged with violating the DOCCS rule prohibiting disobeying a direct order.
 - d. both a and b but not c.
2. **In *Matter of Griffin v. Annucci and Sullivan*, Supreme Court Albany County vacated the sanction of 365 days of extended disciplinary confinement on the grounds that:**
- a. insufficient proof supported the charge of making a threat.
 - b. the imposed sanction violated the Eighth Amendment of the U.S. Constitution.
 - c. the hearing record did not establish that the incarcerated individual committed an offense falling within the HALT Act (k) (ii) criteria.
 - d. the hearing officer disputed the accuracy of OMH evidence showing that the incarcerated individual suffered from a mental illness.
3. **Under the HALT act, a disciplinary sanction that does not fall within the (k) (ii) criteria is limited to:**
- a. 365 total days.
 - b. 6 consecutive days in any 14-day period and a total of 60 days in any 180 period.
 - c. 3 consecutive days and a total of 6 days in any 30-day period.
 - d. any period of time determined by OMH.
4. **In *Matter of Barry Yorke v. Anthony Annucci*, the Court found that the hearing officer:**
- a. failed to complete the disciplinary hearing in a timely manner.
 - b. wrongfully refused to obtain the testimony of a correction officer.
 - c. violated the right of the charged person to testify at the hearing.
 - d. unlawfully confiscated the charged person's DOCCS-issued tablet.
5. **In *Matter of Steven Thomas v. Anthony Annucci*, DOCCS asked the Court to dismiss the Article 78 petition as moot because:**
- a. DOCCS had administratively reversed the disciplinary determination.
 - b. the Court had already ruled in favor of the charged individual.
 - c. the green leafy substance was proven not to be contraband.
 - d. DOCCS failed to photograph the green leafy substance.
6. **In *Jessie J. Barnes v. David A. Rock*, the Second Circuit appointed counsel in this Section 1983 civil rights case because the incarcerated individual:**
- a. was constitutionally entitled to representation by counsel at all phases of the proceedings.
 - b. needed counsel to present his appellate claim concerning the District Court's ruling on the First Amendment retaliation issue.
 - c. required the assistance of counsel during the District Court trial on claims of excessive or unnecessary force and First Amendment issues.
 - d. failed to present a competent argument when filing cross motions for summary judgment.
7. **In *Matter of Michael Mosley v. Mary Pat Donnelly and Carl Kemp III*, the Court ruled that Rensselaer County had wrongfully denied Mr. Mosley's FOIL request for photographs that were introduced as evidence at his criminal case because:**
- a. such evidence is subject to discovery under CPL 240.

- b. all evidence relevant to a CPL 440 motion must be disclosed to the accused.
- c. the State is constitutionally obligated to disclose evidence casting doubt about the guilt of the accused.
- d. the FOIL Law's law enforcement exception asserted by the Respondents was not applicable to the facts in this case.

8. Matter of Serrano v. Abizeid resulted in a court decision granting parental access to the incarcerated father because:

- a. the Respondent opposing the access order failed to show that parental access by the father would be harmful to the child.
- b. an incarcerated father has an absolute right to access to his child when access does not disrupt the functioning of the facility.
- c. the party (the father) asking for access successfully challenged the mother's fitness as a parent.
- d. the father's conviction was not related to domestic violence or endangering the welfare of a child.

9. In M.K. v. State of New York, the Third Department held that the Defendants' degrading conduct:

- a. was not relevant to the issue of damages;
- b. was a small part in conduct that was largely within the scope of their employment.
- c. was not within the scope of their employment because it did not further their employer's interests.
- d. was not proven by the Claimant.

10. In the Microgenics case, the Court denied the Microgenics Defendants' motion to dismiss the Plaintiffs' negligence claim because the microgenics Defendants' urine testing company:

- a. showed that its test accurately detected the presence of drugs in urine.
- b. successfully demonstrated that DOCCS was at fault by misusing testing equipment supplied by the Microgenics company.
- c. received contaminated urine samples taken by DOCCS employees.
- d. knew that a positive result from the Indiko analyzer was not a reliable basis for imposing discipline on an incarcerated individual.

Answers

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

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PLS OFFICES

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

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

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

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

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

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

Auburn • Cape Vincent • Cayuga • Elmira • Five Points

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

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

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