Pro Se

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COURT DENIES MOTIONS TO DISMISS URINALYSIS CLASS ACTION

As many of you know, Prisoners' Legal Services (PLS) and the law firm of Emery Celli Brinckerhoff Abady Ward & Maazel ("Emery Celli") have been litigating a putative class action filed in response to DOCCS' use of the Indiko Plus urinalysis analyzer (Indiko Plus Analyzer) in 2019. Captioned as *Steele Warrick v. Microgenics Corporation*, this case was initially filed solely against the analyzer's manufacturers, Microgenics and Thermo Fisher Scientific, Inc., but as we reported last year, the lawsuit has since been amended twice, first to include Section 1983 civil rights claims and later, in March 2022, to add several senior DOCCS employees as defendants in those 1983 claims.

The third amended complaint sets forth two causes of action against the DOCCS Defendants. First, the complaint alleges, the DOCCS Defendants acted with deliberate indifference when they adopted an unreliable urinalysis test process and thereafter imposed discipline based on those test results, thus exposing incarcerated individuals to unjustified disciplinary sanctions in violation of the Eight Amendment right to be free from cruel and

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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 II

A Message from the Executive Director, Karen L. Murtagh

In the last issue of *Pro Se*, I dedicated this column to a discussion of PLS' PREP program (our Pre-Release and Re-Entry Project) and promised to update our readers on PLS's funding efforts to expand the program.

I am happy to report that for FY 2023-24, PLS received additional monies in the Final NY State Budget that will enable us to expand our PREP program beyond NYC into the Newburgh and Buffalo areas (two other areas of the state to which many formerly incarcerated people return).

Our ultimate goal is to expand the program into all areas served by our five PLS offices which, in addition to Buffalo, Newburgh and NYC, include Albany and Ithaca.

PLS also received a grant from the New York Bar Foundation (NYBF) in response to our proposal to fund a fellowship in honor of PLS Board Member, John R. Dunne. The John R. Dunne NYBF Fellow, a law student, will work throughout the summer and the fall and spring semesters of law school, compiling a "Know Your Rights" guidebook for formerly incarcerated individuals who are reentering society.

As I explained in my last column, the PREP program targets those who will be "maxing" out of prison – an underserved population that returns to their communities of origin often without any "safety net" services at their disposal. They are often only provided the proverbial $40 and a bus ticket.

Our PREP program strives to provide this population with re-entry services that commence during the final year of their incarceration and continue for three years thereafter.

As we enter the third year of the program, we are extremely proud of our "zero recidivism" record and realize that, as we expand PREP, the key to our continued success will ultimately reside with those who have gone through the program and "pay it back" as mentors. A well-run mentorship program will help us achieve our goal of building familiarity and trust with our new clients; such peer support has and will translate into the positive outcomes that we all seek.

I also want to use this opportunity to renew our call for stories, poems, thoughts and insights from our readership – those most directly impacted by programs such as PREP – on what leads to successful re-entry and, alternatively, what accounts for recidivistic behavior. As I said before: "You are our best teachers, and we need to hear from you before moving forward."

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unusual punishment. Second, this imposition of unwarranted discipline further violated the Plaintiff Class members' substantive due process rights and the protections afforded to them by the Fourteenth Amendment.

In June of 2022, the DOCCS Defendants moved under rule 12(b)(6) of the Federal Rules of Civil Procedure (FRCP) to have the claims against them dismissed. In general, they argued that 1) the third amended complaint failed to allege sufficient facts to establish that the DOCCS Defendants had violated the Plaintiff's constitutional rights and 2) the DOCCS Defendants were entitled to qualified immunity.

Qualified immunity is a legal doctrine which shields government officials from being held personally liable for conduct that violates the constitution, so long as the right was not "clearly established" at the time of the violation. For example, if a facility superintendent were to enact a policy that was later struck down as unconstitutional, and if they were then sued in a 1983 claim, the superintendent would not be personally liable provided they did not violate any DOCCS regulations or State/federal laws in enacting the policy. Qualified immunity can be difficult to overcome and is thus a common defense raised in many, if not most, Section 1983 suits against State or federal officials.

In response to the motions to dismiss, Emery Celli and PLS filed papers in opposition. The District Court (Eastern District of New York) then deliberated on the matter, issuing a written opinion on April 26, 2023. *See*, *Steele-Warrick v. Microgenics Corporation*, 2023 WL 3081290 (E.D.N.Y. April 26, 2023). In its decision the Court granted some portions of the DOCCS Defendants' motions while denying others.

The Court concluded there were no viable Eighth Amendment claims against any of the DOCCS Defendants. Generally, lawsuits involving the Eighth Amendment concern one of two types of harm: harm caused by the conditions of a prisoner's confinement and harm directly inflicted by prison personnel, such as the excessive use of force. Depending on the harm alleged, legal precedents have established different criteria for determining if an alleged act by DOCCS violates the Eighth Amendment. Notably, if a suit challenges the conditions of confinement in a prison, prior caselaw requires those conditions to be an extreme deprivation, **akin** (similar) to denying someone "the minimal civilized measure of life's necessities" (*Walker v. Schult*, 45 F.4th 598, 620 [2d Cir. 2022]), before the condition implicates the Eighth Amendment.

In this lawsuit, the Court determined that the Eighth Amendment claims against the DOCCS Defendants were most like those challenging a prison condition. The Court then concluded that the harms suffered by both the named Plaintiffs, as well as the putative class members (which included serving periods of disciplinary confinement and lost privileges), were routine experiences in prison and not sufficiently serious to establish an Eighth Amendment violation.

Turning to substantive due process, a Fourteenth Amendment claim, the Court again looked to prior case law establishing a two-step test for determining whether a defendant's conduct violates the law. Specifically, to show a substantive due process violation, a plaintiff must generally show that a defendant's conduct put a constitutional right at stake and that this conduct also "shocks the conscience," (*Hurd v. Fredenburgh*, 984 F.3d 1075 [2d Cir. 2021]).

Here the Court concluded that the third amended complaint established that a constitutional right was at stake; specifically the right to be free from arbitrary confinement. Indeed, the Court noted that the complaint, which alleged a "systemic reliance on a demonstrably unreliable source of evidence" [unconfirmed Indiko Plus Analyzer results], was "precisely the sort of deprivation substantive due process is meant to address."

Accordingly, the Court next went on to analyze the conduct of each DOCCS Defendant, to determine if the complaint plausibly alleged acts (or the failure to act) which shocked the conscious. In this regard, and relying on the recent decision in *Matzell v. Annucci*, 64 F.4th 425 (2d Cir. 2023), the Court concluded that conduct that shocks the conscience can, in circumstances like those in this case, result from deliberate indifference. (See column, *"FEDERAL COURT DECISIONS"* in this issue of *Pro Se* for an article on the *Matzell* decision).

The Court held that with respect to five DOCCS Defendants – former Acting Commissioner Anthony Annucci; former Deputy Commissioner James O'Gorman; former Assistant for Special Housing and Drug Testing Charles Kelly; Assistant Commissioner for Special Housing and Drug Testing Richard Finnegan; and now Correction Captain Corey Bedard – the complaint set forth sufficient factual allegations such that a jury could plausibly find that the conduct of these DOCCS Defendants was deliberately indifferent and thus shocking to the conscience.

Included in these allegations was the allegation that despite mounting evidence that the unconfirmed Indiko Plus Analyzer results were unreliable, the DOCCS Defendants continued to allow incarcerated individuals to be disciplined based upon the analyzer's results. As a result, the Court denied five of the eight DOCCS Defendants' motions to dismiss these substantive due process claims. The Court granted the motions to dismiss filed by three less senior DOCCS Defendants.

Likewise, the Court further determined that the remaining five DOCCS Defendants were not entitled to qualified immunity at this stage of the litigation. Notably, qualified immunity defenses are construed **stringently** (narrowly and strictly) on motions to dismiss. This means plaintiffs are entitled to have all reasonable inferences drawn in their favor from the facts alleged in their complaint, including, for instance, not only those that support their claims, but also those that could defeat an immunity defense.

Here, the Court reasoned that any reasonable corrections official would know that the substantive due process clause forbids arbitrary punishment and that

deliberate indifference to such punishment can shock the conscience. After a review of prior caselaw, the Court further concluded that deliberate indifference can be inferred from an official's failure to take effective action in the face of an open and known risk.

In their motions to dismiss, the DOCCS Defendants offered several reasons why their actions were appropriate, in light of what they knew about the urinalysis issue as it progressed through 2019. However, given the facts as alleged in the complaint and after drawing all inferences in Plaintiff's favor, the Court concluded that at this point, the five remaining DOCCS Defendants were not entitled to qualified immunity.

Following the District Court's decision, all five of the DOCCS Defendants have appealed the denial of their motions to dismiss to the Second Circuit and several have also filed counterclaims against the Indiko Plus Analyzer's manufacturer (Microgenics and Thermo Fisher). While these issues will be resolved in the future, the current District Court decision is a victory for this ongoing putative class action as the case will continue to move forward against both the corporate and DOCCS Defendants.

Prisoners' Legal Services of New York and Emery Celli Brinckerhoff Abady Ward & Matzell, LLP, New York, New York represent Nadezda Steele-Warrick and Darryl Schultz in this Section 1983 action.

NEWS & NOTES

Challenge Filed to DOCCS' Implementation of HALT

The HALT Solitary law took effect on March 31, 2022. It is intended to dramatically reform the use of disciplinary confinement in New York's prisons and jails by limiting its use and improving the conditions, of such confinement.* Observing that many individuals were being placed in segregated confinement for periods of time longer than HALT generally permits, and without the factual basis required for such placements, PLS, the New York Civil Liberties Union (NYCLU), and the Rutgers Law School Constitutional Rights Clinic recently filed *Fields v. Annucci*, a state court putative class action** seeking a court order requiring DOCCS to implement the confinement criteria of the HALT Solitary law.

The heart of HALT – the provision that is most essential and most fundamental to the goal of reforming the use of disciplinary confinement in New York – is the confinement criteria set forth in Correction Law (C.L.) §137(6)(k)(ii). If these criteria were implemented as they are written, the Plaintiffs argue, there would be far fewer people subject to any form of disciplinary confinement.

Acknowledging that under certain circumstances, HALT permits longer periods of cell confinement or confinement in an

RRU (extended SHU or RRU confinement), the *Fields* complaint notes that to effectuate a term of confinement beyond 3 consecutive days, with a maximum of 6 days in a 30-day period (3/6 day limit), or to be placed in an RRU, the misconduct the individual has been found guilty of committing must meet the criteria found in C.L. §137(6)(k)(ii). Known as the (k)(ii) criteria, the seven acts for which people can be confined beyond the 3/6 day limit or in RRU are narrowly and precisely defined as:

> (A) causing or attempting to cause serious physical injury or death to another person or making an imminent threat 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;
>
> (B) compelling or attempting to compel another person, by force or threat of force, to engage in a sexual act;
>
> (C) extorting another, by force or threat of force, for property or money;
>
> (D) coercing another, by force or threat of force, to violate any rule;
>
> (E) leading, organizing, inciting, or attempting to cause a riot, insurrection, or other similarly serious disturbance that results in the taking of a hostage, major property damage, or physical harm to another person;
>
> (F) procuring a deadly weapon or other dangerous contraband that poses a serious threat to the security of the institution; or
>
> (G) escaping, attempting to escape or facilitating an escape from a facility or escaping or attempting to escape while under supervision outside such facility.

These seven acts have their own definitions which do not **correspond to** (match) the related rules in the Standards of Incarcerated Individual Behavior. See 7 NYCRR §270.2. Typically, the DOCCS rules have fewer elements than are present in the statutory criteria for extended SHU or RRU confinement. (The more elements a rule has, the more facts must be proven to show a violation.) For this reason, the *Fields* Plaintiffs argue, DOCCS' authority to place people in an RRU or in SHU beyond the 3/6 day limit must include additional findings beyond the finding that an individual violated a rule that warrants a Tier III hearing.

What steps must be taken before an individual can be subjected to extended SHU or RRU confinement? Where the

Fields Plaintiffs and DOCCS differ with respect to the application of the HALT Act lies in how each answers to this question.

Correction Law §137(6)(k)(ii) requires DOCCS to make two determinations before a person may be placed in RRU or in SHU beyond the 3/6 day limit. First, DOCCS must make a written determination, following an evidentiary hearing, that the individual committed one of the seven acts defined in the statute.

Second, if a person is found to have committed one of the seven acts defined in the statute, DOCCS must make a written determination "based on specific objective criteria [that] the acts were so heinous or destructive that placement of the individual in general confinement housing 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 facility." *See* C.L. §137(6)(k)(ii).

Thus, the Plaintiffs take the position that before placing someone in segregated confinement beyond the 3/6 day limit or in the RRU, DOCCS must make written determinations that:

1. the charged misconduct falls within one of the acts set forth in (k)(ii)(A-G); and
2. based on specific objective criteria, housing the individual in general confinement would create a significant risk of imminent serious physical injury to staff or an incarcerated individual and create an unreasonable risk to facility security.

DOCCS, on the other hand, appears to take the position that being found guilty of any Tier III infraction automatically satisfies the (k)(ii) criteria.

In their complaint, the *Fields* Plaintiffs assert that DOCCS has not been making either of the determinations required by C.L. §137(6)(k)(ii). The result is that people are often subject to extended SHU or RRU confinement for Tier III infractions, without a specific determination that the person's misconduct falls within the (k)(ii)(A-G) criteria, or a determination that the misconduct at issue was "so heinous or destructive" that allowing the individual to remain in general confinement would create a significant risk of imminent serious physical injury. In many cases, the *Fields* Plaintiffs' point out, people are serving extended periods of confinement in SHU or RRU for conduct that may constitute a Tier III infraction, but does not plausibly fall within any of the seven acts defined in (k)(ii).

Although Tier III is the most serious level of DOCCS' disciplinary system, much of the conduct prohibited by Tier III rule violations falls outside the scope of the seven acts for which extended confinement can be imposed under HALT. For example, a determination made at a Tier III hearing that a person is guilty of assault would only warrant extended SHU or RRU confinement if the incarcerated individual "caus[ed] or attempt[ed] to cause *serious physical injury or death* to another person." *See*, C.L. §137(6)(k)(ii)(A) (*emphasis added*). Not all assaultive behavior causes or is an attempt to cause, serious physical injury or death. Many completed assaults do not

cause any injury and many attempted assaults do not include any facts that would support a finding that the attempted assault was intended to cause serious physical injury.

Similarly, a person could be found guilty of threats at a Tier III hearing but not fall within the (k)(ii)(A) criteria that allows extended SHU or RRU confinement. Under C.L. §137(6)(k)(ii)(A), making threats may result in extended SHU or RRU confinement only if the threat involves *imminent serious physical injury or death and the person making the threat has a history of causing serious physical injury*. Further, if the person who made the alleged threat is on the OMH caseload, before the individual can be placed in extended SHU or RRU, both DOCCS and OMH must determine there is a "strong likelihood" the threat will be carried out.

An "unhygienic act" – which Rule 118.22 defines as conduct such as "urinating or defecating on the floor or any other area; propelling urine, feces, bodily fluids, water, or food; or storing urine, feces or bodily fluids" – can be a Tier III offense, but none of the seven acts set forth in (k)(ii)(A-G) include the conduct prohibited by the rule.

Engaging in a sex act can be a Tier III offense, but under (k)(ii)(B), sexual conduct can only result in extended SHU or RRU confinement, if it involves "compelling or attempting to compel another person, by force or threat of force, to engage in a sexual act." Thus, a sex act that is not compelled by force could be a Tier III infraction, but would not fall within the (k)(ii)(B) criteria.

Whenever the conduct violating the acts described in (k)(ii)(A-G) and the conduct violating the corresponding DOCCS rule are not an exact match, the *Fields* complaint alleges that by subjecting incarcerated individuals to extended SHU confinement based solely on a determination of guilt at a Tier III hearing, DOCCS is not complying with the HALT confinement criteria and continues to use extended confinement and RRU to punish people found guilty at Tier III hearings, even when the conduct does not meet the (k)(ii) criteria.

The (k)(ii) confinement criteria limiting who can be placed in SHU and RRU, for what reasons, and for how long, is the heart of the HALT Act. It is the one provision that, if applied as the *Fields* Plaintiffs argue the Act requires, would significantly reduce the number of people subject to all forms of disciplinary confinement. This is the issue PLS and our partners are addressing in the *Fields* case. Our goal is to persuade the Court to limit disciplinary confinement to those extreme cases which actually meet the HALT Act's (k)(ii) criteria.

*For a more complete description of:

- The HALT Act's provisions, write your local PLS office for a copy of the handout, "The HALT Law: Effective March 31, 2022;"

- The HALT Act's limitations on the use of segregated confinement, write your local PLS office for a copy of the PLS memo "HALT Limits on Confinement Sanctions."

**A lawsuit filed as a class action is called a "putative class action" until the judge assigned to the case decides whether the class should be certified.

Vocational Education and Individuals with Disabilities

Individuals who receive vocational training while in prison are more likely to find employment and are less likely to return to prison. Protections for incarcerated students with disabilities, including learning disabilities, apply to vocational education and training. Incarcerated individuals in New York State prisons are eligible for numerous vocational programs that provide training to develop the skills and knowledge needed to increase an individual's employability. Vocational programming may include classes or training in small engine repair, welding, tailoring, barbering, cosmetology, carpentry, horticulture, culinary arts, the electrical trades, maintenance, computer programming, and other hands-on skills and trades. To ensure that all individuals have access to these programs and their benefits, people with disabilities, including learning disabilities, are protected by federal laws.

These laws include the Individuals with Disabilities Education Act (IDEA), the Americans with Disabilities Act (ADA), and Section 504 of the Rehabilitation Act of 1973 (Rehab Act). Together, these laws protect the rights of disabled individuals to access education and reasonable accommodations for their disabilities in vocational instruction. The IDEA applies to students with disabilities, including those with learning disabilities, and provides for special education services. It does not apply to people who are older than 22. The ADA and the Rehab Act apply to individuals with disabilities, including those with learning disabilities, and provide for reasonable accommodations in order to ensure equal access to programs. Under the ADA and the Rehab Act, there are no age limitations – the laws apply to anyone with a disability.

Students who are IDEA eligible are entitled to a free, appropriate public education (known as "FAPE"). IDEA services can be provided in regular education programs, specially designed instruction, and vocational education.

Incarcerated students with disabilities are eligible for special education services under the IDEA if they meet two conditions. First, they must be identified as having a disability such as a health condition, a psychological diagnosis, or being deaf. Second, they must show that the disability has an educational impact. (For example, a student who uses a wheelchair but still gets straight A's would not qualify as having a learning disability.)

The student, or others in contact with the student, may make a referral to DOCCS if they think the student may have a learning disability. The Committee on Special Education (CSE), which can include a psychologist, education counselor, social worker, offender rehabilitation coordinator, teacher, student, the student's parent, and others must then meet within ten business days to review the referral and determine if the student needs to be evaluated. If the CSE

decides the student needs to be evaluated, the evaluation must be completed within 60 days.

If it is determined that the student is eligible for IDEA services, the CSE must meet to write the student's individualized education plan (IEP). An IEP is a legal document that includes information about the student and their disability, their needs and evaluation results, their annual goals and objectives to meet them, accommodations, program modifications, and reports on student progress. These services and accommodations are designed to support students in completion of their entire education program, including vocational education.

The ADA and the Rehab Act protect the rights of individuals with disabilities –including those age 22 and older – to equal access to vocational education programs. Title II of the ADA prohibits governmental entities (including states) from discriminating against any qualified individual with a disability in the programs, services, and activities offered by the state.

An individual with a disability is defined as anyone who has a physical or mental impairment that substantially limits one or more of the person's major life activities, and who has a record of having such impairment or is regarded as having such impairment. To be a qualified individual with a disability means that a person with a disability, with the assistance of a reasonable accommodation, is able to meet the essential eligibility criteria for the program.

The Rehab Act applies to federal, state and private prison facilities that receive federal funding, and the programs and activities conducted at these facilities. It requires correctional institutions to ensure that qualified individuals with disabilities are not excluded from participation in, or denied the benefits of, the services, programs, or activities of a facility because the benefits/services/programs are inaccessible to, or unusable by, individuals with disabilities.

When enrolled in a vocational program, an incarcerated individual with disabilities may request reasonable accommodations pursuant to the ADA in order to participate successfully in the program. Reasonable Accommodation is:

- any change in the program environment;
- the provision of auxiliary aids or services: or
- other change that would allow an individual with a disability to participate.

For example, a student with a seizure disorder that is triggered by loud noises could be provided with a quiet space as needed. A student with dyslexia – a language processing disorder –could be provided with verbal rather than written instructions or given more time to complete assignments. Other examples of accommodations or modifications include making the program space accessible or modifying equipment.

Modifying equipment may take many forms, depending on the student's needs and what

the task of the class requires. Examples of equipment modifications include:

- providing calculators or keyboards with large buttons;
- reaching devices;
- assistive listening devices;
- electronic readers; or
- spell check technology.

Vocational instructors are required to provide modifications or strategies to assist the student with learning and to document any modifications made to instruction to accommodate the student.

An ADA request for reasonable accommodations pursuant must be made in writing to the Deputy Superintendent for Program Services. If the student needs assistance in completing the form, they should contact their assigned Offender Rehabilitation Coordinator (ORC). A request for accommodations should be granted or denied within ten business days. If the student objects to the denial or is not satisfied with DOCCS response, they should file a grievance and appeal through to the CORC if necessary.

If you are interested in obtaining more information regarding eligibility for special education or accommodations for vocational programs and training, you can write to Maria E. Pagano, Education Unit Director, Prisoners' Legal Services of NY, 14 Lafayette Square, Suite 510, Buffalo, NY 14203.

PLS' FAMILY MATTERS UNIT

PLS' Family Matters Unit is funded by a grant from Judiciary Civil Legal Services. The grant enables PLS attorneys to assist incarcerated parents in certain family law matters. The scope of the population to which the Family Matters Unit provides services was recently expanded to include incarcerated parents convicted in *Albany, Bronx, Dutchess*, *Erie, Kings, Monroe, Nassau, New York, Onondaga, Orange, Queens, Richmond,* or *Suffolk County** (or whose children are currently living in these counties). The Family Matters Unit helps eligible incarcerated parents to:

- Prepare child visitation petitions;
- Prepare child support modification petitions;
- Access family court records; and
- Challenge prison disciplinary proceedings that result in interference with visitation or communication with their minor children.

The Family Matters Unit is a resource for incarcerated parents. The Unit helps parents who were convicted in, or have children currently living in, the thirteen identified counties to use the court system to help maintain family ties during their incarceration. For parents who are subject to child support orders, the Family Matters Unit also helps to remove one of the major barriers to successful reintegration – the accumulation of insurmountable debt as a result of child support arrears.

You are eligible for services from PLS' Family Matters Unit if:

- You are an incarcerated individual convicted in *Albany, Bronx, Dutchess, Erie, Kings, Monroe, Nassau, New York, Onondaga, Orange, Queens, Richmond,* or *Suffolk County;* **OR**

- You have a child visitation or child support issue involving minor children who currently reside in *Albany, Bronx, Dutchess, Erie, Kings, Monroe, Nassau, New York, Onondaga, Orange, Queens, Richmond,* or *Suffolk County;* **AND**

- You are interested in seeking a court order for child visitation; **OR**
- You are interested in seeking modification of an existing child support order; **OR**
- You are seeking access to family court records; **OR**
- You have been subjected to a recent prison disciplinary proceeding that resulted in suspension or termination of visits, or interference with communication, with your minor children.

If you would like the assistance of the Family Matters Unit and you meet the above eligibility requirements, please write to the Family Matters Unit at this address:

Prisoners' Legal Services of New York
Family Matters Unit
41 State Street, Suite M112
Albany, NY 12207

*Formerly, the Family Matters Unit was only able to assist incarcerated individuals who were convicted in the counties of *Albany, Bronx, Erie, Kings, Nassau, Queens and Richmond* (or who had children in those counties).

PREP SPOTLIGHT
Jill Marie Nolan

PLS' Pre-Release and Re-Entry Program (PREP program) is a holistic program staffed by licensed social workers who help incarcerated persons serving their maximum sentence develop the skills necessary for successful re-entry into their communities. We connect clients to services that meet their re-entry needs, working 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 the College Initiative Program of the John Jay College Institute for Justice and Opportunity. The College Initiative Program is a college preparatory program for previously incarcerated or court-involved students that

helps them achieve their higher education goals. The program's three pillars are academic counseling, peer mentoring and community support. These pillars offer students the support they need to grow as learners and leaders.

- The academic counseling portion of the program provides students the information and connections they need to apply to college. Counselors help students set academic and professional goals, choose a campus and field of study and complete enrollment and financial aid applications.

- Peer mentors are senior students and alumni who work with first-year students to ensure that they can smoothly transition from their first to second year of college.

- The program offers community support through workshops and professional development opportunities. These might include memoir writing series, grammar and writing workshops, drop-in tutoring hours, and motivational interviewing workshops.

Enrollment

Upon your release, visit https://justiceandopportunity.org/educational-pathways/college-initiative/ to complete the "expression of interest form" or email JustOppInfo@jjay.cuny.edu .

If you are interested in the program, but do not yet have your GED or high school diploma, you can utilize John Jay College's HSE Connect Initiative, also found on the site above.

PRO SE VICTORIES!

***Matter of Sterling Stevens v. Anthony Annucci*, Index No. 7320-22 (Sup. Ct. Albany Co. Feb. 22, 2023).** In March 2022, Sterling Stevens was found guilty of threats, violent conduct, employee harassment and stalking. The misbehavior report alleged that Mr. Stevens had made written threats against facility staff. While the report included what the author stated were quotes from the written statement, a copy of the letter was not attached. Mr. Sterling challenged the Tier III in an Article 78 and the Respondent reversed the hearing and expunged the charges.

Mr. Sterling also made a FOIL request for the admittedly unsigned written statement attributed to him in the misbehavior report. Although not required, he explained that he wanted the document to show that it was not in his handwriting and noted that medical staff had concluded that a suicide note purportedly written by Mr. Sterling around the same time had in fact been forged. The request was denied based on the exemption that disclosure of the statement "would endanger the life or safety of any person," Public Officers Law (POL) §87(2)(f) and would violate the rules forbidding possession of contraband.

The Court rejected the Respondent's justification for withholding the requested written statement, finding that DOCCS had failed to meet its burden of showing that the entire document was exempt. Specifically, the Court found, DOCCS had

failed to consider whether 1) the one-page letter might be disclosed with redactions or 2) the Petitioner might be able to review the letter without being given a copy. In reaching this result, the Court noted that the objectionable language in the letter was repeated **verbatim** (word for word) in the misbehavior report. The Court ordered the Respondent to issue a new decision in accordance with the Court's decision and awarded Mr. Sterling $15.00 in costs. In response to the Court's order, the Respondent allowed Mr. Sterling to inspect the letter.

Mr. Sterling is now seeking costs relating to the proceeding that resulted in the reversal of the Tier III hearing and has appealed the Court's award of costs relating to the proceeding that resulted in production of the unsigned statement.

***Victor E. Johnson, SR., v. A. Rodriguez*, 2023 WL 3194837 (W.D.N.Y. April 28, 2023).** When Victor Johnson, Sr., filed his §1983 complaint alleging violations of his Fourth, Eighth and Fourteenth Amendment rights, he did not know the identities of the DOCCS staff who were involved in the violations. The Court granted his motion for *in forma pauperis* (poor person's) relief and, pursuant to *Valentin v. Dinkins*, 121 F.3d 72, 77 (2d Cir. 1997), directed the Attorney General's (AG) office to identify the full names of the John and Jane Doe Defendants. The Court specified that the Defendants to be identified were:

- Wyoming C.F. officers who worked in the SHU between 2/23/2020 and 3/19/2020; and
- Wyoming C.F. Medical Staff Members who were aware of and supervised Mr. Johnson's medical needs and failed to respond to his repeated sick call requests.

The Defendants moved to modify the *Valentin* order, asking that the Court require the Plaintiff to provide additional identifying information about the officers. In deciding the motion, the Court noted that there is no obstacle to naming John Doe defendants and that incarcerated individuals routinely do so when they do not know the names of correctional officials whom they allege violated their rights.

Typically, when this issue arises, the court asks the New York State AG to figure out the defendants' identities. However, if the plaintiff does not provide enough identifying information to allow the AG to identify the defendants, the court may grant the plaintiff the chance to conduct discovery to learn the defendants' identities. Thus, the Court's order directing the AG identify the officers involved in the Plaintiff's Eighth Amendment claims.

The AG's motion asked the Court to require Mr. Johnson to provide additional identifying information. Mr. Johnson submitted an affidavit arguing that he could not identify the officers because they did not wear name tags; he was only at Wyoming C.F. for three weeks; and he suffered from a TBI after having two strokes and therefore had memory problems. While he could not remember the officers' names, he recalls that they were white, between the ages of 30 and 55,

wore light blue shirts and were assigned to C-Block. Mr. Johnson asked the Court to order the Defendants to produce photographs of the 58 officers identified by the AG as potential Defendants.

The Court agreed that Mr. Johnson should be required to provide additional information to help with the identification of the Defendant Officers, because without this information, the AG could not identify the intended Defendants. However, Mr. Johnson did offer a solution to the problem: he believes he could identify the Defendant Officers if he were to be shown photographs of the 58 possible officers.

The Court ordered the AG's Office to determine whether 1) Wyoming C.F. or DOCCS had photographs of the 58 officers identified in the log books as having worked in C-Block during the relevant period and/or surveillance videotape of the Block taken during the relevant period, and if so, 2) whether there were any security issues in having Mr. Johnson review the photos and/or videos. After the AG files its response, the Court "will address how it should proceed further with respect to the identification of the John Doe Defendants, including … appointing pro bono counsel for the limited purpose of conducting discovery to identify the corrections officers."

Following the issuance of the order, the AG advised the Court that DOCCS has photographs of the 58 officers and will arrange to show them to the Plaintiff.

In response to the AG's proposal, the Court issued an order appointing counsel for the Plaintiff for the limited purpose of assisting in the identification procedure.

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.*

FEDERAL COURT DECISIONS

Jury Awards $850,000 for Time Served on Unlawfully Imposed PRS

In 2012, Jesus Santiago filed a Section 1983 civil rights complaint in the Eastern District of New York (federal district court), alleging that then Department of Correctional Services (DOCS) Commissioner Brian Fischer, then DOCS Chief Counsel and now Acting Commissioner Anthony Annucci, and then Division of Parole (DOP) Chief Counsel Terrence Tracy violated his Constitutional rights when they unlawfully incarcerated him due to a violation of administratively imposed post-release supervision (PRS). In 2017, the Court granted the Plaintiff summary judgment against the three Defendants for their failure "to take reasonable steps to relieve Plaintiff of the

burdens of the unlawful term of [PRS] …"* The Court also set the duration of the unconstitutional conduct – the period that the Plaintiff spent in custody for the PRS violation – as the 204-day period between July 12, 2007 and February 6, 2008.

The Plaintiff having been granted summary judgment on the issue of liability, in November 2022, the case was tried before a jury on the "the narrow issue" of whether the Plaintiff should be awarded any damages for the Defendants' violations of his constitutional rights. After trial, the jury awarded the Plaintiff $100,000.00 in compensatory damages and $250,000.00 in punitive damages against each Defendant. The total award was $850,000.00.

Post-Verdict Motions

After the verdict, the Defendants renewed their motion under Rule 50 of the Federal Rules of Civil Procedure (FRCP) for judgment as a matter of law with respect to the award of punitive damages, or, in the alternative, under FRCP 59 for a new trial. The Court denied both motions. *Jesus Santiago v. Brian Fischer*, 12-CV-2137(KAM)(SLT), 2023 WL 2974201 (E.D.N.Y. April 16, 2023) (*Jesus Santiago*). This article discusses only the Court's analysis of the Rule 50 argument.

FRCP 50(a) allows a party to move for judgment as a matter of law after the party has been fully heard and before the case is submitted to the jury. If the motion is denied and the jury finds in favor of the other party, the losing party may renew its motion under Rule 50(b).

In considering a Rule 50(b) motion, the court must draw all inferences in favor of the non-moving party, in this case Plaintiff Santiago, and may not redetermine credibility issues or the weight the jury gave to the evidence. "[A]lthough the court should review the record as a whole, it must disregard all evidence favorable to the moving party [here the Defendants] that the jury was not required to believe." *Jesus Santiago*, at *7.

With respect to the standard of review, the Court noted that a Rule 50(b) motion may be granted "only if the record contains such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture or [where there is] … such an overwhelming amount of evidence in favor of the movant that reasonable and fair-minded jurors could not arrive at a verdict against it."

The Defendants' Arguments

The Defendants raised three arguments in support of their motion for a directed verdict with respect to the punitive damages award:

1. The Plaintiff conceded at trial that Defendants had not shown any malicious intent or evil motive;
2. The record does not support a finding that any Defendant acted with "reckless or callous disregard" of the Plaintiff's rights;
3. The punitive damages award most likely flowed from a conclusion on the jurors' part that but for the Defendants' inaction in referring Plaintiff back to the sentencing court, the Plaintiff never would have been imprisoned in New York for having violated the terms of his PRS.

Id. at *5.

The Court's Analysis

Absence of Malicious Intent

The Court made short work of the Defendants' first argument that the Plaintiff had conceded that the Defendants had not shown malicious intent or evil motive. At the

pre-trial conference, the Court had ruled, without objection from the Defendants, that in order for the jury to award punitive damages, there need not be evidence of evil motive or intent on the Defendants' part; rather, evidence that the Defendants acted with reckless or callous disregard was sufficient. *Id.* at 8. Accordingly, the Court ruled, it would only focus on whether the jury had sufficient evidence to find that the Defendants acted or failed to act with reckless or callous disregard for the Plaintiff's rights.

Reckless or Callous Disregard

With respect to the Defendants' second argument, the Court ruled that there was sufficient evidence of each Defendant's reckless or callous disregard of the Plaintiff's rights, as evidenced by the Defendants' testimony at trial and their admitted failures to comply with the *Earley v. Murray decision* – holding that the DOCS' administrative imposition of PRS was a nullity and violated the Constitution – to support the jury's award of punitive damages against the Defendants.* *See*, *Earley v. Murray*, 451 F.3d 71 (2d Cir. 2006) (*Earley I*), *reh'g denied*, 462 F.3d 147 (2d Cir. 2006) (*Earley II*). In support of this conclusion, the Court pointed to specific testimony from each Defendant.

Defendant Annucci's Testimony

Within a month of the Second Circuit's issuance of *Earley I*, Defendant Annucci understood the decision and what he had to do to comply with it but decided not to do so. He knew there were roughly 8,000 individuals upon whom DOCS may have unlawfully imposed PRS and that he left it up to these individuals to determine whether they were serving unlawfully imposed PRS and to advocate for their own release. He did not explain why neither DOCS nor DOP could not have **excised** (cut) the illegally imposed PRS rather than placing the burden on incarcerated individuals to seek relief.

Even though Defendant Annucci knew that people under administratively imposed PRS could end up locked up, he did not act more quickly because DOCS did not have complete records "in every case." He did not notify the District Attorneys' offices or do anything else to **rectify** (fix) the situation besides responding to letters from incarcerated individuals about wrongfully imposed PRS. *Santiago,* at *11.

Defendant Tracy's Testimony

Defendant Tracy became aware of the *Earley I* decision in the latter part of 2006. Although he knew that the decision would have a big impact on a large number of people, he did nothing to change DOP's policies, knowing that his delay and lack of action would lead to illegal incarceration.

Defendant Tracy knew that the information for determining whether unlawful PRS had been imposed was available electronically, but testified that it was DOCS' responsibility to compute sentences, not DOP's. In addition to disclaiming responsibility for checking the electronic data before issuing a parole revocation warrant, he neither coordinated or discussed the *Earley I* decision nor did he instruct DOP officials to determine whether PRS information they had was accurate before issuing extradition warrants for parolees violating PRS.

Defendant Fischer's Testimony

Defendant Fischer was aware of *Earley I's* impact on DOCS' PRS policies and understood that the administrative imposition of PRS was a nullity and unconstitutional. Nonetheless, he testified, he made the decision to keep PRS in place with respect to those individuals upon whom DOCS had already imposed it.

Although he understood that the *Earley I* decision was a court order requiring that he find a process to correct the problem, he took no steps in Mr. Santiago's case to do so, knowing that individuals like the Plaintiff may have been sent back prison based on violations of illegally imposed PRS.

Based on the testimony set forth above, the Court found that there was sufficient evidence for the jury to have found that the three Defendants' disregard for Plaintiff Santiago's constitutional rights was callous or reckless and that compensatory and punitive damages were warranted. Thus, the Court denied that portion of the Defendants' motion seeking a judgment notwithstanding the verdict as to the award of punitive damages.

Excessiveness of Punitive Damages

Finally, the Court reviewed the amount of punitive damages imposed on the three Defendants. The Court first noted that in *BMW of North America v. Gore*, 517 U.S. 559, 574-75 (1996), the Supreme Court "identified three guideposts for determining whether an award of punitive damages should be vacated or reduced:

- The degree of **reprehensibility** (blameworthiness);
- The disparity between the harm and the punitive damages award (proportionality); and
- The differences between the remedy and civil penalties in comparable cases.

Reprehensibility

The jury found that the Defendants had intentionally enforced, instead of rescinding, the null and void PRS sentence they had illegally imposed on the Plaintiff. When they did this, the Defendants were aware of the *Earley I* decision, deliberately failed to ameliorate the Plaintiff's PRS, and allowed the unconstitutional incarceration of the Plaintiff and 8,000 others to continue. The Court found that this evidence reflected reprehensible conduct by the each of the Defendants.

Disparity Between the Compensatory and Punitive Damages

In deciding this question, *Gore* directs courts to consider whether there is a reasonable relationship between the compensatory damages and the punitive damages. Because compensatory damages are "joint and several," that is all the Defendants are responsible for paying this amount, while the punitive damages are individual, that is each Defendant is responsible only for the punitive damages awarded specifically against him, the Court found that a 2.5:1 ratio of punitive damages to compensatory damages was not unreasonable under the Constitution. Even if the ratio was 7.5:1, the Court wrote, given the constellation of intentional misbehavior by the Defendants, the ratio would not be unreasonable.

Comparable Civil Penalties

The Court noted that the jury verdict reflects what a reasonable juror could have found based on the evidence of Defendants' failure to excise PRS or seek resentencing, a failure which ultimately led to the Plaintiff's reincarceration for violating unlawfully imposed PRS. The jury could have found, the Court continued, reprehensible conduct and callous disregard in:

- The Defendants' failure to comply with *Earley I*;
- The Defendants' attempt to shift the burden for rectifying their illegal acts or omissions to the Plaintiff, including testimony that inmates could have

gone to the prison law library and sought relief; and

- The Defendants' attempt to minimize the harm the Plaintiff described while he was wrongfully incarcerated, including Defendant Annucci's testimony that the prison environment is like "a small college in upstate New York, except for the secure perimeter fencing."

Thus, the Court found, "the jury's punitive damages awards reflect the jury's rejection of the Defendants' testimony seeking to deflect and minimize their conduct."

The Court then compared the award in Plaintiff Santiago's case with awards in cases involving false arrest, wrongful imprisonment, and malicious prosecution; claims in cases which share characteristics similar to those presented by Plaintiff Santiago's case. After doing so, the Court concluded that the Plaintiff's 240-day incarceration, which resulted in both a loss of liberty as well as physical and emotional harm, justified the jury's award of $100,000.00 in compensatory damages against all three Defendants and $250,00.00 in punitive damages against each Defendant.

Because the damages awarded in Plaintiff Santiago's case were comparable to the damages in the cases to which the awards were compared, the Court found that the awards do not shock the judicial conscience.

After conducting the *Gore* analysis, the Court found that punitive damage award against each Defendant was not excessive.

*For a longer discussion of the Second Circuit and federal district court decisions discussing the unconstitutionality of the administrative imposition of PRS, see *Pro Se*, Vol. 33, No. 3, May 2023. The relevant articles are entitled, "*Second Circuit Remands PRS Damages Case to District Court*" and "*Third Attempt to Derail Trial for Unlawfully Imposed PRS Fails*."

Robert Rickner and Stephanie Panousieris, Rickner PLLC, New York, New York, and Joel Wertheimer, Wertheimer LLC, New York. New York, represented Jesus Santiago.

Court Denies Motion to Dismiss Claim that DOCCS Wrongfully Altered the Plaintiff's Court Ordered Sentence

In 2015, while under parole supervision, Michael Matzell was sentenced to four years of imprisonment for a drug-related offense. The sentencing court also ordered that he be enrolled in the Shock Incarceration Program (SIP). The sentence made Mr. Matzell eligible for SIP roughly 2½ years after he entered DOCCS custody. However, when Mr. Matzell asked about his Shock enrollment date, Acting Commissioner Annucci and five facility staff members denied him admission to SIP because of findings of guilt relating to charges made at prison disciplinary hearings on an undischarged previously imposed sentence.

After exhausting his administrative remedies, Mr. Matzell filed an Article 78 proceeding challenging DOCCS' determination that he was not eligible for SIP. Roughly a year later, the Court ruled that DOCCS was required to enroll Mr. Matzell in Shock because "the controlling statutes do not permit DOCCS to administratively bar an [incarcerated individual] from entering the shock program when shock has been judicially ordered. To do so was an administrative alteration of a sentence and was not permitted." *Matter of*

Michael Matzell v. Anthony Annucci, 2019 WL 12498103 (Sup. Ct. Albany Co. Mar. 7, 2019), *aff'd*, 183 A.D.3d 1 (3d Dep't 2020).

Following the lower court's decision, and 506 days after he actually became eligible, DOCCS placed Mr. Matzell in SIP, then transferred him to an alternative program for health reasons, and released him to community supervision in December 2019.

Mr. Matzell then filed a class action Section 1983 case in the (federal) District Court for the Northern District of New York alleging that Defendant Annucci and the five Staff Member Defendants had violated, as relevant here, his (and the other class members) Fourteenth Amendment right to substantive due process.

The Relevant State Laws

SIP is a six-month rehabilitation program which, if successfully completed, allows an incarcerated individual to be released to community supervision significantly earlier than they would otherwise be released. Eligible individuals include people who are either within 3 years of parole eligibility – if they are serving an indeterminate term – or of conditional release – if they are serving a determinate term. Correction Law §867.

Additional requirements include:

- The individual is under 50 years old; and
- The individual has not been convicted of:
  - a violent felony committed when the individual was between the ages of 16 and 50 and upon which their present sentence is based;
  - an A-I felony offense;
  - any homicide offense as defined in Penal Law Article 125;
  - any felony sex offense as defined in Penal Law Article 130;
  - any escape or absconding offense as defined in Penal Law Article 205.

Id.

In 2009, as part of the Drug Law Reform Act (DLRA), Penal Law (PL) §60.04 was amended to give sentencing judges the power to sentence defendants to SIP. Formerly, only DOCCS had the authority to determine who would be assigned to SIP. The law now provides that: "The court may issue an order directing that DOCCS enroll the defendant in [SIP] …" PL §60.04(7)(a). This section of the law goes on to state: "any defendant to be enrolled in such program … shall be governed by the same rules and regulations promulgated by DOCCS, including without limitation those rules and regulations establishing requirements for completion and such regulations governing discipline and removal from the program. *Id.*

Correction Law §867(2-a) provides that state officials may only screen out people who are judicially sanctioned to Shock when they have "a medical or mental health condition that would prevent successful completion of the program." When someone is screened out due to a medical or mental health condition, DOCCS must propose an alternative program. PL §60.04(7)(b)(i) - (ii).

Defendants' Motion for Judgment on the Pleadings

The Defendants moved for judgment on the pleadings, arguing that they are entitled to qualifiedly immunity. "Qualified immunity shields government officials from liability for money damages for violation of a right under federal law if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would

have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

The district court denied the motion, holding that "in light of the Defendants' awareness of the DLRA, the plain language of the DLRA, existing Second Circuit precedent and earlier state court decisions," Plaintiff Matzell had plausibly alleged that in refusing to enroll him in SIP, the Defendants had violated clearly established law. *Matzell v. Annucci*, 566 F. Supp.3d 154, 162 (N.D.N.Y. 2021). The Defendants appealed this decision to the Second Circuit Court of Appeals.

The Second Circuit Analysis

The Second Circuit began its analysis by noting that to survive a motion for judgment on the pleadings, a complaint must set forth enough facts, that if those facts are accepted as true, the complaint would state a plausible claim for relief. *Matzell v. Annucci*, 64 F.4th 425, 433 (2d Cir. 2023) (*Matzell 2d Circuit*). Here, Plaintiff Matzell alleged that the Defendants had violated his Eighth and Fourteenth Amendment rights by denying his judicially ordered enrollment in SIP. Ultimately, the Court concluded that Plaintiff Matzell's rights under the Eighth Amendment were not clearly established when the Defendants' failed to enroll him in SIP; for that reason, this article focuses on the Court's analysis of his Fourteenth Amendment claim.

Qualified Immunity

"Qualified immunity," the Second Circuit wrote, "bars a plaintiff's claim unless (1) the official violated a statutory or constitutional right, and (2) that right was clearly established at the time of the challenged conduct." *Matzell 2d Circuit,* at 434. Turning to the issue of the alleged Fourteenth Amendment violation, the Court noted that "[i]n addition to prohibiting the states from depriving any person of life, liberty, or property without due process of law, the amendment covers a substantive sphere … barring certain government actions regardless of the fairness of the procedures used to implement them." *Id.* at 436. This is known as the right to "substantive due process."

Thus, there are two parts to a substantive due process claim. The plaintiff must 1) identify the constitutional right involved; and 2) show that the defendant's conduct shocks the conscience.

Constitutional Right Involved

Here, the Court found, the Defendants' conduct affected the Plaintiff's liberty interest in freedom from detention. *Id.* at 438. "This liberty interest is implicated not only when a court initially sentences someone, but also when prison officials interpret and implement the sentence that the trial court has imposed." *Id.* In *Francis v. Fiacco*, 942 F.3d 126 (2d Cir. 2019), the Second Circuit stated that "… [DOCCS's] decision to implement an inmate's sentence in a manner that **diverged** [differed from] from the sentence pronounced by the sentencing court implicated a liberty interest of the highest order."

In *Francis*, the sentencing court had imposed the plaintiff's sentence to run concurrently with a yet to be imposed federal sentence. Because the law in New York State does not permit a sentence to run concurrently with a sentence which has not yet been imposed, DOCCS computed the sentences as running consecutively. The court held that DOCCS was constitutionally required to compute the sentence as it was imposed by the sentencing court.

In *Matzell*, the Court found, the Plaintiff alleges he was sentenced to enrollment in SIP and the Defendants denied his enrollment despite provisions in New York law that explicitly took away their authority to deny admission when enrollment was court ordered. *Matzell 2d Circuit*, at 438. Assuming the truth of the allegations, the Court wrote, "Defendants' decision to disqualify Matzell from enrolling in Shock diverged from the sentencing court's order and **implicated** [involved] his liberty interest in having his sentence implemented in a manner consistent with law and the sentencing court's order." *Id.* Thus, the Court found, the Plaintiff had plausibly alleged the violation of a substantive due process right.

Did the Defendants' Conduct Shock the Conscience?

The Court summarized the Defendants' wrongful conduct as having "repeatedly refused to enroll Matzell in Shock even though the amendment of PL §60.04 gave sentencing courts the authority to sentence defendants to Shock and limited DOCCS' screening authority to determining whether an individual has a disqualifying medical or mental health condition." *Id.* As a medical or mental health condition was not among the reasons upon which the Defendants decision to exclude Plaintiff Matzell from Shock was based, the Court concluded, they exceeded and abused their authority by 1) not implementing the sentence imposed by the trial court and 2) ignoring the DLRA's plain language. *Id.*

As a result of the Defendants' refusal to enroll Plaintiff Matzell in SIP, the Court noted, he was deprived of the opportunity to be released 506 days earlier than he was actually released and his four-year sentence was increased by almost a third. *Id.* Under these circumstances, "Matzell plausibly alleged that the Defendants' actions rose to the level of deliberate indifference in violation of his substantive due process rights." *Id.*

The Court went on to find that because there were three state court determinations rejecting the Defendants' argument that PL §60.04(7)(a) gave them the authority to exclude from SIP individuals with judicial Shock orders, the Defendants' justification for excluding Plaintiff Matzell from Shock was objectively unreasonable.

Finally, the Court wrote, "[g]iven the liberty interest at stake and the clarity of the statutory law, we hold that Matzell plausibly alleged that Defendants' actions were egregious, shocking to the conscience, and unreasonable and, thus, we concluded that Matzell plausibly alleged that Defendants violated his Fourteenth Amendment substantive due process rights." *Id.*

Was the Law the Defendants Violated Clearly Established?

To impose monetary damages on the Defendants, in addition to pleading a constitutional violation and having to allege facts that if proven, would show that the Defendants' conduct "shocked the conscience," the law that the Defendants violated must have been clearly established at the time of the violation. In making this determination, the Court considered *Hill v. United States ex rel. Wampler*, 298 U.S. 460 (1936) (holding that any administrative alteration to a judicially imposed sentence is invalid); *Earley v. Murray*, 451 F.3d 71 (2d Cir. 2006) (holding that the administrative imposition of post-release supervision on prisoners who had not been so sentenced judicially is a nullity); and *Vincent v. Yelich*, 718 F.3d 157 (2d Cir. 2013) (holding that it was clearly established in 2006 that administrative imposition of post-release supervision on individuals who had not been so sentenced

judicially violated federal due process guarantees).

In looking at whether the statutory law prohibiting DOCCS from altering judicially imposed sentences was clearly established at the time that DOCCS refused to enroll Plaintiff Matzell in SIP, the Court first noted that in 2018, the DLRA's "plain language" clearly set forth the Defendants' limits with respect to judicially ordered Shock, concluding that PL §60.40(7)(a) and (b) and Correction Law §867(2), and (2-a), read together, clearly provide that individuals judicially sanctioned to Shock may only be excluded from SIP because of medical or mental conditions that would negatively impact their ability to complete the program. *Id.* at 438. The parties agreed that Plaintiff Matzell's exclusion was not based on a medical or mental condition.

The Defendants argued that neither *Wampler* or *Earley* clearly established that all administrative **deviations** (differences) from the sentence actually imposed violate due process. The Court rejected this argument, finding that Second Circuit **precedent** (prior decisions) – citing specifically, *Earley v. Murray* and *Vincent v. Yelich* – clearly established that "any alteration of the court's sentence was unconstitutional. *Id.* at 439.

Based on the above analysis, the Court held that Plaintiff Matzell had plausibly alleged that his Fourteenth Amendment "substantive due process right to have his sentence implemented consistent with the sentencing court's order was clearly established and that this right was violated when Defendants essentially extending his sentencing by refusing to enroll him in Shock when he was eligible."

For these reasons, the Second Circuit affirmed the district court's decision to deny the Defendants' motion for a judgment on the pleadings.

Debra Greenberger, Emery Celli Brinckerhoff Abady Ward & Matzell, LLP, New York, New York represented Michael Matzell in this Section 1983 action.

IMMIGRATION MATTERS
Nicholas Phillips

This month's immigration column focuses on *Matter of Pougatchev*, 28 I. & N. Dec. 719 (BIA 2023), a precedential decision by the Board of Immigration Appeals ("the Board") which considers the immigration consequences of a New York State conviction for burglary in the second degree under New York Penal Law ("NYPL") §140.25(1)(d). *Pougatchev* was litigated by the Immigration Unit of Prisoners' Legal Services of New York ("PLS"), with Yuriy Pereyaslavskiy of the PLS Newburgh office serving as lead counsel in the case.

Pougatchev concerns a type of immigration offense known as an "aggravated felony," which is "a category of crimes singled out for the harshest deportation consequences." *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 566 (2010). Aggravated felonies have a wide variety of negative consequences under the Immigration and Nationality Act, the federal statute which governs United States immigration law. For example, an aggravated felony renders a noncitizen subject to mandatory detention without bond during his or her removal proceedings; bars a noncitizen from almost all forms of relief from removal, including asylum, cancellation

of removal, and voluntary departure; renders a noncitizen permanently ineligible for citizenship; and permanently bars a noncitizen from reentering the United States after deportation.

With some minor exceptions not applicable here, IJs are bound to apply something called the "categorical approach" when determining if a state conviction is an aggravated felony. Under the categorical approach, an IJ must first analyze the noncitizen's statute of conviction in the abstract to ascertain 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). The IJ must then determine 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, however, the state offense encompasses a broader range of conduct than the generic federal offense, so that one could commit the state offense in a way that would not fall within the federal offense, then the state offense is "overbroad" compared to that federal offense and there is no categorical match.

Pougatchev arises from the removal proceedings of a lawful permanent resident who was convicted in 2017 of burglary in the second degree in violation of NYPL §140.25(1)(d). While the Respondent was incarcerated, the Department of Homeland Security initiated removal proceedings against him by issuing a Notice to Appear ("NTA"), which charged that his burglary conviction constituted (1) an aggravated felony burglary or theft offense, and (2) an aggravated felony crime of violence. In removal proceedings, the Respondent denied both charges on the grounds that his conviction was not a categorical match to the corresponding federal offenses. After briefing, the IJ concluded that the Respondent's conviction was an aggravated felony burglary offense but declined to reach the question of whether it was also a crime of violence.

On appeal, the Board reversed the IJ's determination that the Respondent's conviction was an aggravated felony burglary offense. Looking first at the federal generic definition, the Board observed that under the Supreme Court's decision in *United States v. Stitt*, 139 S. Ct. 399, 405–07 (2018), the federal generic offense of burglary encompasses breaking and entering into "vehicles or structures customarily used or adapted for overnight accommodation," but does *not* encompass breaking and entering into "ordinary" vehicles or structures which have not been adapted for overnight accommodation, such as "railroad cars . . . filled with cargo, not people."

Turning to the Respondent's statute of conviction, the Board noted that under NYPL §140.25(1)(d), a person is guilty when he or she "knowingly enters or remains unlawfully in a building with intent to commit a crime therein" and when he or she, or another participant in the crime, "[d]isplays what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm" during the course of the crime. The Board noted that the term "building" is defined by NYPL §140.25(1)(d) to include "any structure, vehicle or watercraft used for overnight lodging of persons, or used by persons for carrying on business therein, or used as an elementary or secondary school, or an inclosed motor truck, or an inclosed motor truck trailer." Reviewing New York's caselaw,

the Board found that "New York law treats [inclosed motor trucks] as 'buildings' even if used only for storage or recreation, as opposed to residential or business purposes." 28 I. & N. Dec. at 722 (citing *People v. Thompson*, 714 N.Y.S.2d 264, 264–65 (N.Y. App. Div. 2000)). The Board concluded that, since New York law encompasses breaking and entering into vehicles that are *not* used for overnight accommodation, the Respondent's statute of conviction is broader than the federal definition and therefore not an aggravated felony burglary offense. The Board also found that NYPL §140.25(1)(d) is not an aggravated felony theft offense—an alternative charge contained in the NTA which the IJ did not reach—because New York burglary does not require that the burglar take property or otherwise exercise control of property without consent, as required by the federal generic definition of theft.

However, the Board continued to find that the Respondent's conviction *was* an aggravated felony crime of violence, which is defined by 18 U.S.C. §16(a) as "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another." In so holding, the Board focused on a fact that a defendant must "[display] what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm" to be convicted under NYPL §140.25(2). Looking to New York caselaw, the Board found that "[u]nder New York law, in order to display what appears to be a listed weapon, another person must be present to witness it." 28 I. & N. Dec. at 726 (citing *People v. Baskerville*, 60 N.Y.2d 374, 380-381 (N.Y. 1983)). The Board reasoned that "[t]he display of what appears to be a firearm while committing second degree burglary is essentially a criminal threat of force or violence" and therefore brings the conviction within the scope of an aggravated felony crime of violence. *Id.* at 728.

Concurring and dissenting, Temporary Appellate Immigration Judge Denise G. Brown agreed that the Respondent's conviction was not an aggravated felony burglary or theft offense but took issue with the Board's crime of violence determination for two reasons. First, Judge Brown expressed concern that the Board had reached a legal issue which had not been decided by the IJ, thus calling into question whether the Board was properly "reviewing" questions of law as required by 8 C.F.R. §1003.1(d)(3)(iii). Second, Judge Brown disagreed that NYPL §140.25(1)(d) requires a witness to see the displayed weapon and argued that the Board's holding to the contrary was founded in robbery caselaw which is inapplicable in the burglary context. For Judge Brown, "[i]n the absence of an element that requires the presence of a person, the majority's conclusion that this offense is a crime of violence is unavailing." 28 I. & N. Dec. at 730.

WHAT DID YOU LEARN?

Brad Rudin

1. **The purpose of the lawsuit in *Fields v. Annucci* is to obtain a court order:**
   a. abolishing SHU for all purposes.
   b. reversing the HALT Solitary Law.
   c. requiring DOCCS to implement the k(ii) criteria of the HALT Solitary Law.
   d. declaring the unconstitutionality of Correction Law 137(6).

2. DOCCS is entitled to extend the 3/6-day-limit in SHU confinement if the DOCCS Commissioner finds that the incarcerated person:
   a. presents a threat to the orderly administration of the facility.
   b. is attempting to cause serious physical injury to another person.
   c. requires psychiatric attention.
   d. has a history of disobeying DOCCS rules and regulations.

3. The Plaintiffs in the *Fields* case and DOCCS differ with respect to the application of the HALT Act when it comes to the:
   a. steps that must be taken before extended SHU confinement is authorized.
   b. constitutionality of the HALT Act.
   c. interpretation of regulations governing non-violent Tier III offenses.
   d. role of the Office of Mental Health in determining whether a person can be confined in SHU beyond the 3/6 day limit.

4. A "putative class action" is a class action lawsuit that:
   a. has been rejected by the court.
   b. has yet to be certified as a class action.
   c. does not require certification by the court.
   d. requires the approval of a majority of the class members**.**

5. In their complaint, the Plaintiffs in *Fields* claim that DOCCS has:
   a. rigidly applied the SHU eligibility requirements set forth in Correction Law §137[6][k][ii].
   b. applied Correction Law 137[6][k][ii] in such a way that dangerous incarcerated persons may threaten the facility population.
   c. ignored the established criteria for what constitutes a Tier III violation.
   d. failed to apply the SHU confinement required by Correction Law 137[6][k][ii].

6. In *Matter of Sterling Stevens v. Anthony Annucci*, DOCCS reversed the hearing officer's disciplinary determination because:
   a. the Court ordered DOCCS to do so;
   b. DOCCS determined that the hearing should be reversed.
   c. the Inspector General advised DOCCS that the hearing should be reversed.
   d. the hearing officer asked DOCCS to reverse the hearing.

7. The doctrine of qualified immunity protects government officials from personal liability for constitutional violations if:
   a. such violations involve the Eighth Amendment.
   b. the officials did not intend to violate the constitution.
   c. the government official was merely following the orders of a superior.
   d. the officials did not violate any "clearly established law."

8. In the case of *Steele Warrick v. Microgenics Corporation*, DOCCS Central Office Staff were named as Defendants because the Department:
   a. developed a flawed urinalysis device that replaced the valid test invented by Microgenics.
   b. unlawfully and without permission used technology originally developed by Microgenics.
   c. relied upon the clearly flawed urinalysis results produced by the Microgenics test devices.

d. conspired with Microgenics to develop a flawed urine testing device that would incriminate most test subjects.

9. The *Steele Warrick* Court allowed the lawsuit to go forward against five DOCCS Defendants because the Plaintiffs' allegations, if accepted as true, show these Defendants' actions or failure to act with respect to the use of the Indiko Plus Analyzer:

a. constituted "cruel and unusual punishment" in violation of the Eighth Amendment.
b. violated the Plaintiffs' substantive due process right to be free from arbitrary confinement.
c. showed a criminal intent to inflict punishment on incarcerated individuals.
d. all of the above.

10. The Court's decision in *Victor E. Johnson, Sr. v. A. Rodriguez* recognizes the right of an incarcerated plaintiff in a federal civil rights complaint to have DOCCS' assistance in the identification of correction officers alleged to have violated the plaintiff's constitutional violations by:

a. arranging lineup identification of such officers.
b. ordering State Police investigation of the incident.
c. agreeing to a deposition in which possible defendant officers would testify about their presence at the time and place of the incident underlying the lawsuit.
d. requiring the Department to ascertain the existence of photographic evidence that might assist the plaintiff.

Answer Key:

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

Your Right to an Education

- Are you under 22 years old with a learning disability?
- Are you an adult with a learning disability?
- Do you need a GED?
- Do you have questions about access to academic or vocational programs?

If you answered "yes" to any of these questions, for more information, please write to:

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

Pro Se
114 Prospect Street
Ithaca, NY 14850

PLS OFFICES

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

PLS ALBANY OFFICE: 41 State Street, Suite M112, Albany, NY 12207
Adirondack • Altona • Bare Hill • Clinton • CNYPC • Coxsackie • Eastern • Edgecombe • Franklin Gouverneur • Great Meadow • Greene • Hale Creek • Hudson • Marcy • Mid-State • Mohawk Otisville • Queensboro • Riverview • Shawangunk • Sullivan • Ulster • Upstate • Wallkill • Walsh Washington • Woodbourne

PLS BUFFALO OPFFICE: 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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