Pro Se

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SECOND CIRCUIT: COMPLAINT SUFFICIENTLY STATES CLAIM FOR DELIBERATE INDIFFERENCE TO A SERIOUS MEDICAL NEED

In May 2021, Anthony Collymore filed a §1983 complaint against correctional nurses Myers, McPherson and Phillips, who had provided him treatment between 2019 and 2021.[1] The factual background for the complaint was that over the course of six years, Plaintiff Collymore had experienced a serious scalp condition that resulted in itching, irritation, open sores that became infected, and the formation of painful scabs and keloid scars.[2] The Plaintiff alleged that the Defendants were deliberately indifferent to his serious medical needs because they provided ineffective treatments and denied his requests to see a specialist. The complaint asked for compensatory damages and for an injunction ordering adequate medical care. See, *Anthony Collymore v. Krystal Myers*, 74 F.4th 22, 30 (2d Cir. 2023).

With respect to the years of treatment provided by the three Defendant Nurses, Plaintiff Collymore alleged:

- Nurse McPherson treated his scalp condition between May and August of 2019. At the first visit, the Plaintiff advised her the previously prescribed medicated shampoo was ineffective. During this period, Defendant McPherson examined his scalp, described the condition as a rash and did not mention the open sores, and prescribed the ineffective medicated shampoo and a cream.

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Also Inside . . .

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ANOTHER RIDE ON THE MERRY-GO-ROUND. . .

A Message from the Executive Director, Karen L. Murtagh

I'd venture to say that, by now, our readership knows the PLS mission as well as anyone: every day since PLS's creation in 1976 in response to the Attica uprising, we review matters brought to our attention by incarcerated individuals, their families and loved ones, judges, legislators and other elected officials (and their staffs) concerning conditions of confinement. These matters run the gamut: ensuring adequate health care, educational opportunities, religious freedoms and accurate sentence computations; preventing unnecessary placement in solitary; reviewing disciplinary determinations; and representing individuals in deportation hearings, to name just a few.

Over the last few years, and thanks to increased funding from the State, our work in the pre-release and reentry fields has expanded significantly, and our Pre-Release and Reentry Program (PREP) with it. Engaging in work relating to reentry, which, parenthetically, is recognized as a criminal justice goal by the Penal Law, has resulted in an increase in our knowledge of the parole appeal process and of the impact parole denials have on successful reentry efforts. It is indeed that topic, "Reducing Recidivism" on which our Annual PLS Statewide focuses this year, and to which I dedicate this issue's column.

There is one recurring issue on the parole front that has consistently been brought to our attention and cited as a contributing factor to the "D-rating" the State has received from the Prison Policy Initiative regarding its parole release system: What happens when parole is denied?
(see https://www.prisonpolicy.org/reports/grading_parole.html)

After a parole denial, depending on the decision of the Parole Board (Board), the parole applicant will be scheduled to see the Board again within the next 24 months. Between the parole denial and the next interview, the applicant has the right to file a judicial challenge to the denial, but before a judicial challenge may be filed, the applicant is required to exhaust all available administrative remedies.

To exhaust administrative remedies, the applicant has to file a notice of intent to file an administrative appeal. Once that notice is received by the Board, the applicant has four months to file a brief in support of their legal arguments.

The Board then has four months from the date of receipt of the applicant's administrative appeal brief to decide the administrative appeal. As many of our readers know, however, the Board often fails to issue a decision on the administrative appeal within that time frame. When that happens, the applicant is deemed to have exhausted their administrative remedies and pursuant to the New York Civil Practice Law and Rules (CPLR), may then file an Article 78 challenge to the denial of parole in New York State Supreme Court.

In many cases, by the time the Article 78 is decided, the parole applicant has already reappeared before the parole board and the judicial challenge to the previous hearing is deemed moot. For those individuals lucky enough to receive a court decision before they next appear before the Board, the only relief most judges believe they can order is a remittal. That is, the court sends the matter back to the Parole Board for a *de novo* release interview to reconsider its decision in light of the court's decision.

The problem with this entire process was recently and eloquently demonstrated by the petitioner in a judicial challenge to a parole denial known as *Matter of Jason Huntley v. Darryl Towns, Chairman, State Board of Parole,* 79 Misc.3d 1206(A), 188 N.Y.S.3d 920, 2023 WL 3831371 (Sup. Ct. Putnam Co. June 5, 2023). In the decision, Judge Grossman noted:

"Although a *de novo* release interview is the only relief for which Petitioner is eligible in this proceeding, he objects with some measure of justice that he is being subjected to 'another ride on the procedural merry-go-round devised by the Board' . . ."

Petitioner Huntley was sentenced to 17 years to life, had spent 32 years in prison and has appeared before the parole board 13 times, "including four (4) de novo interviews, three ordered by courts and one previously consented to by the Parole Board." After Petitioner Huntly filed an Article 78, the Parole Board, "in lieu of answering asked the Court to accept the Parole Board's consent to an order remanding the matter for yet another de novo release. . ."

Throughout his decision, Judge Grossman displayed his dismay and, quite frankly, confusion regarding the Parole Board's rationale for denying parole to Mr. Huntley.

The Board listed a dozen positive factors that would weigh in favor of Mr. Huntley's parole release, including:

- Personal growth;
- Programmatic achievements;
- Excellent institutional adjustment;
- Only one minor disciplinary violation 26 years ago;
- Low COMPAS risk assessment in nearly every category; and
- Work done to understand the root causes of the behavior that led to tragedy.

And then the Board cited four reasons supporting its denial of parole:

(1) the nature of the offense;
(2) the post-offense flight;
(3) insufficient rehabilitation; and
(4) official opposition to parole release.

However, as the Court correctly noted, none of the four reasons relied upon by the board, when analyzed, appeared to actually support a decision to deny parole.

The Board stated that the Petitioner shot and killed his friend by waving a rifle at him. The Court found that this description was more suggestive of recklessness than intentional killing. Thus, the Court found the record unclear as to why the Board deemed the nature of the offense to be an aggravating factor.

Unlike the Board, the Court found that the Petitioner's conduct after the shooting – he fled to another state to see his son following which he planned to kill himself – showed "overpowering remorse arising from his culpability over his friend's death." Thus, the Court concluded, it was unclear why the panel treated this conduct as an aggravating factor.

With regard to the Board's finding of "insufficient rehabilitation," the Court found just the opposite: the existence of multiple instances indicating Petitioner's remorse and empathy for the victim and his family.

Finally, with regard to the Board's reliance on "official opposition" justifying denial of parole, the Court found, again, the opposite to be true. No official opposition to petitioner's release on parole had been filed in over a decade.

What might happen next to ameliorate what appears to be a significant miscarriage of justice in cases like the Petitioner's is anybody's guess. Perhaps New York State Supreme Court judges should be given explicit authority to order petitioners released to parole when they grant Article 78 challenges to parole denials. Perhaps, to avoid the typical mootness argument, there should be a carve out for parole applicants, allowing them to bypass the usually futile administrative appeal process and get right into court.

Whatever the answer, what PLS is seeing from our perch is a body of increasingly-mounting evidence that the parole appeal process is broken and needs overhauling and that both changing the process of challenging a parole denial and giving judges discretion to release petitioners following successful Article 78 rulings need to be seriously considered.

As always, PLS offers information to our readership in the fulfillment of our obligations to the State to share what we're hearing at the ground level, to encourage others to share their stories with us and remediate problems wherever and whenever possible. It is axiomatic that successful reentry is a common goal for those behind and outside of prison walls, and any administrative procedures that impede that goal are worthy of our full attention.

Merry-go-rounds aren't always fun; they always need attention and they often need to be fixed.

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- Nurse Myers treated the Plaintiff's scalp condition between October and December 2019. Although the Plaintiff asked to see a specialist and Defendant Myers said that she would put him on the list, she did not do so. Her report downplayed the seriousness of his scalp condition describing it as "slightly red." She gave the Plaintiff enough antibiotics for a few days and refused to schedule a doctor appointment.

- The Plaintiff sent three letters to Nurse Phillips in February and March 2020 advising her that due to his worsening condition, he needed to see a doctor. She provided no treatment but said that he would be seen by a dermatologist. In September 2020, the Plaintiff wrote to Defendant Phillips again, asking to go to the hospital for treatment. She responded that he was on the list to see a dermatologist. She repeated this assurance in December 2020 when he reported that the pain and inflammation kept him from sleeping. In May 2021, the Plaintiff reported that scalp pain continued to prevent him from sleeping and was told he was being added to the list to see the doctor.

- As a result of the inadequate treatment, the Plaintiff feels like his scalp is on fire, and the scalp condition causes him intolerable pain and has resulted in infections, scabbing and painful keloid scars.

After service on the Defendants, an amended version of the complaint was dismissed on the grounds of qualified immunity when the district court concluded there was no United States Supreme Court (U.S. Supreme Court) or Second Circuit decision holding that a scalp condition is a serious medical condition. The Plaintiff appealed the dismissal to the Second Circuit, which appointed counsel to handle the appeal.

Qualified Immunity

Qualified immunity protects state actors from liability for damages when they could not reasonably have known that their conduct violated the constitution (or a federal statute). The **rationale** (basis) for applying the doctrine is that state actors should not be required to pay money damages when they could not reasonably have known that their conduct was unconstitutional. In making the determination of what a state actor in the defendant's position would reasonably have known, the courts look to the U.S. Supreme and Circuit Court decisions. In New York, Connecticut and Vermont, if it is clear from either a U.S. Supreme Court or Second Circuit decision that a state actor's conduct was unconstitutional, the court will find the defendant is not entitled to qualified immunity.

Qualified immunity does not extend to claims for injunctive relief. *See, Sudler v. City of New York*, 689 F.3d 159, 177 (2d Cir. 2012). Injunctive relief consists of orders to take – or desist from (stop) taking – a specified action. When a claim for damages is dismissed because the defendant is entitled to qualified immunity and the plaintiff is also seeking injunctive relief, the claim can go forward to the extent that if the plaintiff is successful, the court has the authority to order the injunctive relief.

The Second Circuit Decision

In reviewing the Plaintiff's appeal, the Second Circuit noted that dismissal orders based on findings that the complaint fails to state a cause of action are reviewed *de novo*. *Anthony*

Collymore v. Krystal Myers, 74 F.4th 22, 30 (2d Cir. 2023). Reviewing an issue *de novo* means that the reviewing court does not have to defer to the findings made by the court below. That is, the reviewing court is permitted to analyze the issues without regard to the lower court's analysis.

In analyzing whether a complaint was properly dismissed, the reviewing court is required to accept all allegations as true. *Id.* The reason for this is that a complaint should only be dismissed for failure to state a claim when, even if the plaintiffs are able to prove their allegations, the alleged misconduct would not violate the constitution.

In order to establish an Eighth Amendment claim relating to the failure to provide adequate medical care, an incarcerated individual must prove "deliberate indifference to a serious medical need." The district court, finding that there is no U.S. Supreme Court or Second Circuit decision recognizing that a scalp condition causing painful open sores is a serious medical need, held that the complaint failed to allege a serious medical need recognized by the U.S. Supreme Court or the Second Circuit.

The Second Circuit disagreed with the district court's analysis. With respect to the issue of whether the Plaintiff had sufficiently alleged a serious medical need, the Court first noted, citing *Rodriguez v. Manenti*, 606 F. App'x 25, 26 (2d Cir. 2015), that "Eighth Amendment claims for the deprivation of medical care are not analyzed on a body-part by body-part basis … " *Collymore*, at 30. The Court went on to explain, "a leg can be infected by gangrene as well as athlete's foot, but only one is serious." *Id*.

Thus, the question the lower court should have addressed is whether the Plaintiff plausibly alleged a condition that produces "severe and unmanaged pain." *Id*. "The absence of **precedents** [prior decisions] involving scalp infections," the Court continued, "does not mean that [Plaintiff] Collymore cannot plausibly allege chronic and substantial pain that is important and worthy of comment or treatment, and which significantly affects daily activities. *Id.* (internal quotation marks and citations omitted).

Expanding further on this issue, the Court cited to *Chance v. Armstrong*, 143 F.3d 698 (2d Cir. 1998). In *Chance*, the Court drew the distinction between serious and non-serious conditions, noting that dental conditions, like other medical conditions, vary in severity. The difference between a serious and a non-serious condition is that a serious condition is a condition of urgency that may result in degeneration or extreme pain. The Court went on to note that conditions causing pain falling somewhere between annoying and extreme can be serious medical conditions; to be a serious condition, the condition need not be life-threatening and the pain need not be at the limit of human ability to bear. *Collymore*, at 31.

In *Collymore*, the Court concluded that the Plaintiff sufficiently stated a serious medical need where he alleged that his scalp condition:

- causes intolerable pain that felt like his scalp was on fire;
- repeatedly becomes infected and required antibiotics;
- produces scabs that ooze pus;
- interferes with the Plaintiff's daily life and his ability to sleep;
- results in the formation of painful keloid scars; and
- is degenerative and has been resistant to treatment for years.

Based on this analysis, the Court found that the district court erred in dismissing the amended complaint for failure to satisfy the objective component of the Eighth Amendment deliberate indifference standard. (The objective component of the deliberate indifference medical standard is showing the existence of a serious medical need.) Accordingly, the Court vacated the judgment of the district court and remanded the Eighth Amendment claims.

1. The original complaint, which did not identify as defendants the three nurses who are named defendants in the May 2021 complaint, was filed in March 2021 and identified three prison administrators as defendants. When the district court *sua sponte* (in the absence of a motion by a party) dismissed the March 2021 complaint, it gave the Plaintiff leave to amend only as to the medical providers. In the decision discussed in this article, the Court also found that the district court's dismissal of the prison administrators was improper. This article does not discuss the Second Circuit's resolution of the issues relating to the district court's dismissal of the prison administrators.

2. The facts presented in the article are taken from the Second Circuit's decision in *Collymore v. Myers*, 74 F.4th 22 (2d Cir. 2023).

Lauren E, Matlock-Colangelo and Omar A. Khan, of Wilmer Cutler Pickering Hale and Dorr LLP, New York, New York, represented Anthony Collymore in this appeal.

NEWS & NOTES

Articles on State Supreme and Federal District Court Decisions

Typically, *Pro Se* reports on **judicial** (court) decisions from the state and federal *appellate* courts. We do this because appellate decisions have "precedential value." When a decision has precedential value, it is binding on the lower courts which fall within the appellate court's **purview** (authority). Decisions that have precedential value have **greater utility** (are more useful) to **litigants** (people who file and/or defend cases filed in court) because their analysis of the law, as it relates to the facts of the case before the court that wrote the decision, is binding on the lower courts from which the appellate court receives appeals.

The New York State appellate courts are known as First, Second, Third and Fourth Departments of the Appellate Division and the New York State Court of Appeals. The federal appellate courts, the decisions of which are binding on the federal district courts in New York, are the Second Circuit Court of Appeals and the United States Supreme Court (U.S. Supreme Court). The decisions of these courts have precedential value and are binding on the lower courts from which the appellate court accepts appeals.

Recently, *Pro Se* has begun reporting on more state and federal trial court decisions. In the last issue of *Pro Se*, the frontpage article focused on an Albany County Supreme Court decision, *Matter of Pernell Griffin v. Anthony Annucci*, analyzing DOCCS' application of the HALT Act to a Tier III hearing. In this issue, we

discuss an Albany County Supreme Court decision, *Matter of Gerald Gibson v. Anthony Annucci*, analyzing whether an incarcerated individual received legally adequate notice of Tier III charges. We also discuss a federal district court decision, *Brandon v. Kinter*, explaining how the court arrived at the amount of punitive damages that it awarded to an incarcerated plaintiff.

We have started reporting on more trial court decisions because these decisions tend to include more of relevant facts and discuss the court's reasoning in greater detail than do appellate decisions. These trial court decisions can be useful to readers who are interested in seeing which facts the courts find most relevant and how a court applies the law to the facts.

Precedential and Persuasive Value

There is however, an important distinction between lower court decisions and appellate court decisions: appellate court decisions have precedential value, while trial court decisions have only persuasive value.

In the context of court decisions, the term "precedential value" means that lower courts within the appellate court's purview must follow the interpretation of the law as it was applied in the appellate court decision. An appellate court's purview is set by statute, typically based on geographic and case distribution concerns. For example, the First Department of the Appellate Division hears appeals from the Bronx and New York County. The Second Department hears appeals from 10 counties, including Nassau, Suffolk, Kings, Dutchess and Westchester. The federal appellate court, the Second Circuit Court of Appeals, hears appeals from the federal district courts in New York, Connecticut and Vermont. The U.S. Supreme Court hears appeals from all of the federal circuit courts of appeal.

In contrast, no court, even the court that issued the decision, is required to apply a trial court decision to any other case. Trial court decisions can, however, be cited in briefs or memoranda of law to demonstrate how another court applied the law to a set of facts that you think are similar to the facts of your case. While you cannot argue that a trial court decision *requires* that the court reach the same result or that the court *must* follow the analysis used by the trial court, you can explain why you think the court hearing your case should apply the decision.

PREP SPOTLIGHT

Jill Marie Nolan

PLS' PREP program is a therapy-based pre-release and re-entry program. Our primary purpose is to help individuals conduct the personal work necessary to avoid returning to prison, achieve true independence, and reach their maximum potential. Participants graduate from PREP three years after they return home. You are eligible to apply to PREP 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, Erie, Orange, Putnam, Rockland, Sullivan, Ulster, or Westchester County. Participants must be motivated to do the work necessary to be their best self, achieve their goals, and be a positive member of their community. 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 Buffalo Employment and Training Center (BETC).** BETC offers multiple specialized employment programs for individuals impacted by the justice system. They offer a variety of free vocational services including career counseling, vocational training, resume and job interview preparation, and workshops customized to prepare you for your individual vocational needs.

If you are returning to Erie County, you can visit BETC at 77 Goodell Street Buffalo, New York 14203. They are open Monday-Friday from 9am to 5pm.

STATE COURT DECISIONS

Disciplinary & Administrative Segregation

Inadequate Notice Results In Expungement of Charges

In July 2022, while Gerald Gibson was incarcerated at Elmira C.F., an officer charged him with conspiracy to assault incarcerated individuals, conspiracy to assault staff, threats, bribery/extortion, conspiracy to engage in violent conduct and engaging in gang activity. The misbehavior report failed to give any specifics, beyond the general allegations that Mr. Gibson was the leader of the Gorilla Gang that was active at Elmira C.F.

According to the misbehavior report, members of the Gorilla Gant extorted money from incarcerated individuals and threatened that if the individuals did not pay, they would be assaulted. The report also alleged, "multiple confidential interviews resulted in information regarding multiple incidents involving staff and incarcerated individuals that threatened their safety and security."

At his hearing, Mr. Gibson tried to pin down the substance of the allegations, explaining to the hearing officer that he needed to know what he was being accused of so that he could prove what he was actually doing on the dates and times. He asked that he be allowed to give the hearing officer questions to ask the confidential informants. The hearing officer denied the request, saying she would determine whether the confidential information was credible.

When the officer who wrote the misbehavior report testified, he refused to provide any testimony on the substance of the report, stating that all of the testimony was confidential. Mr. Gibson objected, asking, how can he "defend himself against this, when Officer Piasecki [the officer who wrote the report], can come into a hearing and say nothing?"

When the hearing officer asked if he had any witnesses, Mr. Gibson replied, "Witnesses to what? … who can I call?" After this exchange, Mr. Gibson refused to respond to the hearing officer's questions about whether he had any further objections, claims or defenses. The hearing officer then excluded him from the hearing, following which she found him guilty of the charges.

In her statement of disposition rendered, the hearing officer found that the evidence established that assaults had occurred which involved weapons and resulted in injuries to multiple parties.

After the hearing decision was administratively affirmed, Mr. Gibson filed an Article 78 challenge to the hearing, alleging, among other claims, that he had not received adequate notice of the charges.

In *Matter of Gerald Gibson v Anthony Annucci*, Index No. 901454-23 (Sup.Ct. Albany Co. June 26, 2023), the Court agreed that Petitioner Gibson had not received adequate notice of the charges.

The Court began its analysis of the notice issue by stating that while "due process does not demand 'notice that painstakingly details all facts relevant to the date, place and manner of the charged inmate misconduct,' it does require notice with 'sufficient factual specificity to permit a reasonable person to understand what conduct is at issue so that he may identify relevant evidence and present a defense."[1]

Applying this standard to the charged misconduct, the Court noted that the misbehavior report failed to state:

- The number of the acts of misconduct the Petitioner was accused of and which charges applied to each instance of misconduct;
- Where the alleged misconduct occurred;
- The dates and times of the alleged acts of misconduct;
- The identity of any of the targets or victims; and
- Any of the words, actions or means employed by the Petitioner when he was engaged in the alleged misconduct.

And, the Court continued, the misbehavior report was missing any notice that the hearing officer would be considering allegations that 1) actual assaults connected to the charged misconduct had occurred; 2) weapons were used in the assaults; and 3) the assaults resulted in injuries.

The Court found that the complete absence of notice of even the most basic facts relating to the charges prevented the Petitioner from understanding what conduct was at issue and from presenting a defense. Accordingly, the Court held, the Respondent violated the Petitioner's right to notice of the charges against him.

The Court granted the petition, ordered the disposition reversed and vacated, and because the right to adequate notice is a fundamental right, ordered the Respondent to expunge all entries to the hearing and disposition from the Petitioner's records.

1. *Quoting from Samuels v. Selsky*, 166 Fed. App'x. 552, 554 (2d Cir. 2006).

Prisoners' Legal Services of New York represented Gerald Gibson in this Article 78 proceeding.

Parole

Court Gives Thoughts on Parole Denial Even Though Respondent Agrees to New Hearing

Jason Huntley is a 67-year-old incarcerated individual who in 1991 was convicted of murder in the second degree – his first felony conviction – and sentenced to 17 years to life for killing his friend. As of 2023, Mr. Huntley had served 32 years – 15 years beyond the mandatory minimum term of his sentence – and had been interviewed by the Parole Board 13 times, including 3 court-ordered *de novo* interviews and one consented to re-interview.

According to the Parole Board decision denying Parole, Mr. Huntley:

- had made an excellent adjustment to DOCCS custody;
- had only one Tier III violation, and that was 26 years ago;
- had appropriate case goals and had satisfied his programming requirements; and
- is at low risk on the COMPAS Risk Assessment.

Nonetheless, the Board denied parole release because of:

- the nature of his offense;
- the fact that following the offense, Mr. Huntley fled to Maine where he intended to visit his son and then kill himself; and
- the Board's concern that despite the significant amount of work Mr. Huntley had done to understand the root causes of the behaviors that led to the murder, the Board thought that he displayed limited remorse for the person he killed and their family.

Acknowledging Mr. Huntley's statement that he believed justice had been done by his incarceration, the Board found this "sentiment to be erroneous, in that [Mr. Huntley] has yet to develop the empathy necessary to be considered rehabilitated." The Board also noted that there was official opposition to Mr. Huntley's release. For these reasons, the Board concluded that Mr. Huntley's release would be "inappropriate as it would so **deprecate** [undercut] the seriousness of his crime and undermine respect for the law."

In an unusual development, even after the Respondent chose not to contest the petition challenging the parole denial and agreed to re-interview the Petitioner – the only remedy that the Court had the authority to order – a New York State supreme court justice in Putnam County decided to discuss the problems that he saw with Respondent's parole denial.

The significance of the Court's decision to set forth its observations should not be overlooked. Because courts cannot decide cases where there is no "case or controversy," under the circumstances presented by this case, most judges would have simply declared the case moot and dismissed it. In *Matter of Jason Huntley v. Darryl Towns, Chairman, State Board of Parole*, 2023 WL 3831371 (Sup. Ct. Putnam Co. June 5, 2023), however, the Court, noting that the decision to deny parole was "flawed and irrational," decided to issue a decision "since the Court's view of the matter may be of assistance to the parties" at the *de novo* release interview.

In order to give the parties the benefit of its views on the parole denial, the Court first noted that it was struck by the fact that the decision of the panel of the Parole Board which interviewed Mr. Huntley was in many respects positive. The positive aspects of his progress, the Court wrote, "collectively weighed," militate strongly in favor of parole release. Thus, it was critical to examine the negative factors identified by the Panel:

- The nature of the offense;
- The post-offense flight;
- The Petitioner's insufficient rehabilitation; and
- The official opposition to release.

The Court then addressed each negative factor to determine its validity.

<u>Nature of the Offense</u>

With respect to the nature of the offense, the Panel stated, "[Y]ou shot and killed your friend while waving a rifle at him." This

description, the Court noted, "is more suggestive of recklessness than an intentional killing." For this reason, the Court stated, it is unclear why the Panel deemed the nature of the offense to be an aggravating factor warranting denial of parole.

Fleeing to Maine

With respect to fleeing to Maine to see his son and then kill himself, the Court viewed this conduct as showing "overpowering remorse arising from culpability for his friend's death." Thus, the Court wrote, "it is unclear why the Panel deemed it be an aggravating factor warranting denial of parole."

Petitioner's Remorse

Turning to the question of the Petitioner's remorse, the Court disagreed with the Panel's conclusion with respect to Petitioner's statement that he understood the victim's family's desire for his continued incarceration despite his own conviction that the ends of justice had been served. While disagreeing with the victim's family's assessment, the Court noted, the Petitioner acknowledged that the victim's family continued to be adversely affected by what he had done. Contrary to the Panel's conclusion that the statement showed "limited remorse," the Court thought the statement showed both empathy and remorse.

Official Opposition

Finally, the Court noted, there had been no official opposition submitted to the Parole Board since 2011, when a district attorney had submitted a letter opposing parole release. Thus, the Court noted, there has been no official opposition to releasing Petitioner to parole for over 10 years.

The Court gave the Respondent 45 days to conduct a new interview. The decision was dated June 5, 2023. According to the DOCCS Website, Incarcerated Individual Lookup, as of October 17, Mr. Huntley has neither been released to parole nor does he have an open date.

Jason Huntley represented himself in this Article 78 proceeding.

FEDERAL COURT DECISIONS

Second Circuit Affirms Reduction of Punitive Damages Award

In 2019, Nicholas Magalios filed a complaint alleging that in September 2017, he was subjected to excessive force by officers at Fishkill C.F. and that other officers deliberately failed to intervene or stop their fellow officers' actions despite the fact that they had reasonable opportunities to do so. The Defendants' actions, the complaint alleged, were taken under color of state law, were sadistic and malicious and thus violated the Eighth Amendment prohibition against cruel and unusual punishment. Plaintiff Magalios asked the Court to award him compensatory and punitive damages for the serious injuries inflicted on him, including an injury to his shoulder that was surgically repaired.

The Defendants denied the allegations, claiming that no use of force had occurred.

At the April 2021 jury trial, the Plaintiff testified that during a prison visit with his wife, Defendant Peralta, a correction officer who was supervising the visiting room, verbally harassed him and that due to the tension this caused, the Plaintiff ended the visit. When he presented himself for the post-visit strip frisk, Officers Peralta and Bailey violently assaulted him while Officer Blount watched.

Further, according to the district court judge, the evidence showed that:

- The Defendants targeted the Plaintiff without justification;
- The Defendants removed potential witnesses from the room in advance of the assault; and
- Defendant Bailey held the Plaintiff down as Defendant Peralta and unidentified others brutally kicked and punched him while Defendant Blount looked on and did nothing.

Magalios v. Peralta, et al., Case 7:19-cv-06188-CS, 2022 WL 407403 (S.D.N.Y. Feb. 10, 2022) (District Court 2022 Decision).

The jury found the three officers liable and awarded compensatory damages in the amount of $50,000.00 and punitive damages in the amount of $350,000.00 against Defendant Peralta; $350,000.00 against Defendant Bailey; and $250,000.00 against Defendant Blount (a total of $950,000.00 in punitive damages). The Defendants moved to set aside the verdict as excessive.[1] In response, the district court reduced the punitive damages to $500,000.00. The Plaintiff appealed, arguing that the reduction, known as **remittitur**, was an abuse of discretion.

Background Information on Awarding Punitive Damages

"Punitive damages are available in §1983 actions when a defendant's conduct is shown to be motivated by evil motive or intent or when it involved reckless or callous indifference to the federally protected rights of others." *Thomas v. Kelly*, 903 F.Supp.2d 237, 265 (S.D.N.Y. 2012). A district court may reduce a punitive damage award when it is "so high as to shock the conscience and constitutes a denial of justice." *Id.,* at 265-266. In assessing whether a punitive damages award is excessive, the district court must be guided by the purpose of the award: "to punish the defendant and deter them and others from such conduct going forward." *Anderson v. Osborne*, No. 17-CV-539, 2020 WL 6151249, at *7 (S.D.N.Y. Oct. 20, 2020).

The Magalios Decision

The appeal was decided by the Second Circuit Court of Appeals on February 10, 2022. *See, Nicholas Magalios v. C.O. Mathew Peralta, et al.*, Nos. 22-519-pr (L), 22-541-pr (XAP), 2023 WL 4618349 (2d Cir. July 19, 2023). Citing *Payne v. Jones*, 711 F.3d 85, 168 (2d Cir. 2011), the Court began its analysis of the Plaintiff's argument by noting that when "a challenge to punitive damages is not made on constitutional grounds but rather for 'mere excessiveness,' [the court] review[s] the district court's remittitur ruling for abuse of discretion."

In reviewing whether the district court's remittitur decision was an abuse of discretion, the Court continued, the appellate court should consider three factors:

- The degree of reprehensibility of the defendant's conduct;
- The disparity between the harm and the punitive damages award;
- The difference between the punitive damages award and the civil penalties authorized or awarded in comparable cases.

See, BMW of North America, Inc. v. Gore, 517 U.S. 599 (1996).

In *Magalios*, the Court noted, the district court found that there was a high degree of reprehensibility and therefore, a substantial punitive damages award was warranted. When it turned to the question of the "disparity of harm," the district court looked at the ratio between the punitive damages award and the compensatory damages award:

- Defendants Peralta and Bailey: 7:1
- Defendant Blount: 5:1

In reducing the award, the Court found, the district court did not undervalue the significance of the reprehensibility of the Defendants' conduct while overvaluing the significance of the disparity between the punitive damages and the compensatory damages.

Nor, the Court continued, was it contradictory for the district court to find both that substantial punitive damages were warranted and that the amount awarded by the jury was excessive. Rather, the Court concluded, the district court acted reasonably when it considered the comparable criminal penalty of $250,000 – the maximum penalty that may be imposed for a federal criminal civil rights violation under 18 USC §§241, 242 and 3571. Two of the punitive damage awards in this case exceeded this amount, and the award imposed on the defendant whom the jury found to be less culpable was equal to this amount.

Further, the Court found, the district court did not use a "bright-line test" in deciding whether the punitive damages awards were excessive. Courts impose bright-line tests when they impose pre-set ratios of compensatory to punitive damages on the awards they are examining, for example, concluding that the proper ratio of damages is 1:4.

Based on this analysis, the Court found that the district court's remittitur of punitive damages from $950,000.00 to $500,00.00 was not an abuse of discretion.

1. The Defendants also challenged several of the trial court's evidentiary rulings. These challenges were rejected by both the trial and the appellate courts.

Edward Sivin and Clyde Rastetter of Sivin, Miller & Roche, LLP, New York, New York represented Nicholas Magalios in this §1983 action.

Court Awards Punitive Damages

In *Chamma K. Brandon v. Suzanne Kinter*, 9:12-cv-00939, 2023 WL 3687426 (N.D.N.Y. May 26, 2023), the Plaintiff brought a complaint against the officials responsible for the violation of his constitutional rights at the Clinton County jail. The complaint alleged that when the Plaintiff filed grievances relating to Lieutenant (Lt.) Laurin's failure to provide him with a pork free diet, Healthcare Coordinator (HC) Kinter retaliated against him by revoking his medical diet. In doing so, the complaint alleged, these Defendants violated the Plaintiff's First Amendment rights to free exercise of religion and to free speech.

After a bench trial, the Court found that the Plaintiff had proven his allegations and awarded $7,400.00 in compensatory damages for the retaliation (free speech) claim and $3,000.00 in compensatory damages for the free exercise claim. The Court also awarded punitive damages on the Defendants in the following amounts:

- Lt. Laurin: $3,000 on the free exercise claim and $3,700 on the retaliation (free speech) claim.
- HC Kinter: $3,700 on the retaliation (free speech) claim.

In toto (altogether), the Court awarded the Plaintiff $17,800.00 in damages.

In determining the amount of punitive damages to award, the Court, not surprisingly – see immediately preceding article on *Magalios v. Peralta*, – relied on *BMW of North America, Inc. v. Gore*, 517 U.S. 599 (1996). The *Gore* analysis led the *Brandon* Court to consider three factors in

determining the amount of punitive damages to impose:

- The degree of reprehensibility of the defendant's conduct;
- The disparity between the harm (as reflected in the compensatory damages award) and the punitive damages award;
- The difference between the remedy and the civil penalties authorized or awarded in comparable cases.

In addressing these factors, the Court wrote, quoting from *Gore*, "reprehensibility is perhaps the most important consideration in assessing the reasonableness of an award of punitive damages." In assessing reprehensibility, the Court continued, there are "certain aggravating factors that are associated with particularly reprehensible conduct and contribute to the sense that some wrongs are more blameworthy than others." Among these aggravating factors are:

- Whether the harm caused was physical as opposed to economic;
- Whether the conduct at issue evinced an indifference to or reckless disregard of the health or safety of the others;
- Whether the target of the conduct had financial vulnerability;
- Whether the conduct involved repeated actions or was an isolated incident; and
- Whether the harm was the result of intentional malice, trickery or deceit or mere accident.

<u>The Reprehensibility of the Defendants' Conduct</u>

Right to Free Exercise

The Court first looked at reprehensibility of Lt. Laurin's violation of the Plaintiff's right to free exercise of his religion. When Lt. Laurin learned that the Plaintiff had filed grievances with respect to the failure to provide pork-free meals, he told the Plaintiff he would fix the problem. And that, the Court wrote, would have been a simple task. All Lt. Laurin had to do was write the Plaintiff's name on a one-page "Special Diet Notification" slip, circle "Religious," write "Muslim No pork or pork products," and sign his name.

Inexplicably (oddly and without an obvious explanation), Lt. Laurin did not submit the Special Diet Notification for 10 days. In failing to promptly submit the Notification, the Court found, Lt. Laurin "acted in reckless disregard of the Plaintiff's physical well-being and religious practice, forcing Plaintiff to choose between forgoing approximately six meals during the 10-day period or committing the high sin of eating pork." Further, the Court found, Lt. Laurin's conduct was particularly reprehensible because the Plaintiff, as an incarcerated individual, was completely dependent on the jail for his meals and thus physically vulnerable.

Right to Free Speech

The Court then turned to the reprehensibility of the Defendants' conduct with respect to his right to file grievances without retaliation. The Court found "particularly reprehensible" Lt. Laurin's involvement in the retaliatory cessation of the Plaintiff's medical diet. To induce HC Kinter to discontinue the medical diet, he falsely informed her that he had observed the Plaintiff buying commissary items that were inconsistent with the diet. Lt. Laurin then denied 18 grievances in which the Plaintiff complained that he was receiving meals with items that either caused him severe acid reflux or were harmful to his cardiovascular health. This conduct was particularly reprehensible because unlike a one-time act, its consequences continued over time.

With respect to HC Kinter, the Court found that her conduct was also especially

reprehensible because the effects of discontinuing the Plaintiff's medical diet continued over time. When the Plaintiff noted that tomatoes induced acid reflux, HC Kinter replied that because he had not complied with the doctor's orders regarding commissary buys, removal from the diet was his own fault.

And, the Court noted, HC Kinter's conduct was a "particularly vicious action" because she, as well as Lt. Laurin, knew how concerned the Plaintiff was about his health and diet. Like the deprivation of proper religious meals, the discontinuance of Plaintiff's medical diet impacted the Plaintiff's physical well-being as it led to his receipt of food items that presented him with the choice of eating, and knowing that the meals would cause severe acid reflux or possibly harm his health, or not eating, knowing that his caloric intake would be below that which was necessary for his health.

The Ratio of Actual Harm to the Punitive Damages Award

The Court found that a 1:1 ratio of punitive to compensatory damages reflected its assessment of the reprehensibility of the Defendants' conduct and the fact that the compensatory damages, while not substantial, were not insignificant.

Comparison to Civil and Criminal Penalties

Neither party identified any comparable civil or criminal penalties.

Punitive Damages Awards in Similar Cases

One of the most persuasive forms of evidence in setting punitive damages is the amount of punitive damages ordered in other similar cases. Here the Court found that the amount of punitive damages it awarded, and the 1:1 ratio it used, was well within the range of other punitive awards found to be reasonable.

For example, in *Arroyo Lopez v. Nuttall*, 25 F.Supp.2d 407, 410 (S.D.N.Y. 1998), a case involving a correction officer's violation of the Plaintiff's right to practice his religion, the court awarded $2,000.00 in compensatory damages and $5,000.00 in punitive damages for the disruption of one prayer session.

And in *Nolley v. County of Erie*, 802 F.Supp. 898, 911 (W.D.N.Y. 1992), a case involving "near constant emotional and physical trauma" of an incarcerated individual who was deprived of access to the law library and prevented from attending church services, the court found that the award of $132,000.00 in compensatory damages and $20,000.00 in punitive damages was reasonable.

As neither party filed an appeal from the Court's May 26, 2023 decision, it appears that this aspect of the case is now concluded.

William S. Nolan, Gabriella R. Levine, and Jennifer M. Thomas, Whiteman Osterman & Hanna LLP, Albany, New York represented Chamma Brandon in this §1983 action.

SPECIAL FEATURE

"April's Law" Offers Incarcerated Parents the Opportunity to Transfer to a Prison Near Their Minor Children

A relatively new law known as "April's Law," allows parents incarcerated in New York State prisons to request a transfer to the state prison that is closest to where their minor children are living, which accepts individuals with their security classification and meets their programming requirements and health needs. DOCCS refers to this as a "Proximity to Minor Child" transfer. This article discusses the impetus for the law, the law's provisions and DOCCS' implementation of the law.

The need for April's Law was identified by the Osborne Association's Youth Action Council (YAC), a group of young advocates whose parents are incarcerated. In 2011, YAC members shared their experiences and ideas for reforms with now-retired State Senator Velmanette Montgomery. During one of their meetings, April movingly shared how the distance between her home and her mother's facility made it close to impossible to visit her mother. April suggested that the State adopt a law giving incarcerated parents the opportunity to transfer to prisons that are located near to where their children live, thereby allowing for increased visitation between these parents and their children.

Over the course of the next eight years, the Proximity to Minor Children Act (PMC), was introduced in the both houses of the state legislature (the Senate and the Assembly) but did not make it out of committee in either house. Throughout this period, YAC, the Osborne Association, families of incarcerated people and other advocates for the rights of incarcerated persons educated the public and advocated for the law. In 2020, their efforts succeeded. In a bill sponsored by Senator Montgomery, April's Law was finally passed and went into effect on December 23, 2021.

When the bill was signed into law by then Governor Cuomo, Senator Montgomery said:

> "Children should not be deprived of the opportunity to have a relationship with their parents because of incarceration. [April's Law] will support vulnerable families by placing incarcerated parents at facilities closest to their children. I thank my colleagues, the advocates and especially [April] who shared with me how deeply affected she was by her mother's incarceration and proposed this legislation."

See, Former Senator Montgomery's website, Jan. 2, 2021, Senator Montgomery's Proximity Bill (April's Bill) Signed Into Law | NYSenate.gov

How does April's Law work?

April's Law, codified at Correction Law §72-C, provides that when choosing a prison for an incarcerated person, "whenever practicable" DOCCS must choose the prison which is located in closest proximity to the primary residence of the incarcerated person's minor child or children (children under the age of 18), provided that the prison is "suitable and appropriate, would facilitate increased contact between such person and his or her child or children, is in the best interest of such child or children, and the incarcerated parent gives his or her consent to such placement." (Going forward in this article, the term "children" may also be read as "child").

Thus, as part of the initial assessment screening that takes place at the first general confinement facility to which an individual is assigned, DOCCS must determine whether an incarcerated individual is the parent of minor children, and, if so, whether or not the individual is interested in being placed in a correctional facility as close as possible to where the children are living. See, DOCCS report, *"Proximity to Minor Children Legislative Report - 2022,"* (PMC Report - 2022) available on the DOCCS website and through FOIL. If the individual expresses interest in a PMC placement, DOCCS initiates a transfer referral and determines 1) whether the transfer is in the best interest of the children and 2) whether a transfer is practicable.

PMC Eligibility

Though the majority of parents in DOCCS custody are eligible for a PMC transfer, under some circumstances, otherwise eligible parents will be excluded. Incarcerated parents are excluded from eligibility for PMC transfers when:

- They have been convicted of a crime against the children in question; or
- There is an active order of protection involving the children and/or **the custodial parent or guardian** (custodian/guardian) of the children.

See, DOCCS Directive 4024, Proximity to Minor Child, p. 1.

Applying for a Proximity to Minor Children Transfer

In order for a PMC transfer review to proceed, the following is required:

- The children's and the custodian/guardian's information must be provided to the incarcerated parent's Offender Rehabilitation Coordinator (ORC);
- The Questionnaire for Proximity to Child Transfer Response must be completed by the custodian/guardian and returned to the incarcerated parent's ORC;
- The children must reside in New York State or in a state that borders New York;
- The incarcerated parent must not be currently serving a disciplinary confinement sanction;
- The incarcerated parent must not be in a specialized treatment program (e.g., SOCTP, CASAT, DWI treatment); and
- The incarcerated parent must be more than five months from a scheduled Parole Board appearance or release.

To begin the PMC transfer process, ask your ORC for a PMC Transfer. According to DOCCS Directive 4024, the ORC will then record in the Interview and Assessment System (IAS) the following information:

- the name, relationship, living status, and date of birth of each child;
- the incarcerated individual's desire to be considered for a proximity transfer with respect to each child;
- the contact information (name, address, county, and telephone number) for the individual with whom each child resides; and
- the custodian/guardian of each child, and a method of contact for each child.

The ORC is required to ensure PMC information is reviewed and updated in the IAS during the scheduled case plan interview or subsequent Initial Interview.

If no exclusionary factors exist, the ORC will send a "Questionnaire for Proximity to Child Transfer" (Form #4024A) to each child's custodian/guardian for completion. This form must be returned to the guidance department at the incarcerated parent's

current correctional facility before a request for a PMC transfer will be considered.

Alternatively, if your children are in foster care a "Questionnaire for Proximity to Child Transfer," (Form #4024B), will be sent to the social services agency that has custody of each of your minor children, to be completed by the agency and returned to the your ORC. Requesting a PMC transfer can be important for permanency planning for children in foster care because such transfers typically make visitation easier for the children and caseworkers. Thus, as soon as you request a PMC transfer, you should write to the foster care agency that has custody of your children, tell them you have requested a PMC transfer, and ask the agency to return Form #4024B as soon as possible.

Notification of Determination

Once all the necessary information is received, DOCCS will decide if the requested PMC transfer is in the best interest of the children involved. After this determination is made, the incarcerated parent will receive written notification of DOCCS' determination.

If the PMC transfer is approved, the facility to which the incarcerated parent is transferred "must be deemed suitable and appropriate, taking into consideration: security classification, mental health status, medical needs, facility bed space, and movement availability." *See, PMC Report – 2022,* p.2.

A transfer request can be approved, denied, or canceled after the initial determination is made by DOCCS. Any incarcerated parent that receives a PMC transfer can be transferred back to their previous facility, or to a different facility, if the incarcerated parent does any of the following:

- Refuses to participate in any mandatory program;
- Has two negative removals from the same mandatory program;
- Receives a sanction of 30 days or more disciplinary confinement within a one-year period;
- Receives two Tier III hearing guilty findings within a one-year period; or
- Receives four Tier II hearing guilty findings within a one-year period.

DOCCS Directive 4024, p. 3. An incarcerated parent who is transferred from their PMC facility for any of the above reasons will be ineligible for another PMC transfer for at least one year. *Id.*

Appealing a PMC Transfer Decision

There is no statutory or regulatory process for appealing a PMC transfer decision. If you qualify for a PMC transfer but your request was denied by your ORC based on a finding that a transfer would not be in the best interest of your children, you can submit a grievance to the Incarcerated Grievance Committee.

You can also write to the Deputy Superintendent for Programs (DSP) at your current facility, explain why your transfer would be in the best interest of your children, and ask the DSP to approve your request.

If the DSP denies or does not respond to your request, you can write to Jeff McCoy, Deputy Commissioner, NYS Department of Corrections and Community Supervision, Harriman State Campus, Building 4, 1220 Washington Avenue, Albany, NY 12226. However, as there is no administrative appeal process, neither of these individuals is required to respond to your request.

You can reapply for a PMC transfer at a future quarterly review with your ORC, or if the circumstances that caused your denial change.

If you believe your PMC transfer request was improperly denied, PLS's Family Matters Unit may be able to advocate to DOCCS on your behalf. You can write to the Family Matters Unit at: Prisoners' Legal Services of New York, Family Matters Unit, 41 State Street, Suite M112, Albany, NY 12207.

IMMIGRATION MATTERS
Nicholas Phillips

This issue's immigration column focuses on *Peguero Vasquez v. Garland*, 80 F.4th 422 (2d Cir. 2023), a recent precedential decision by the Second Circuit Court of Appeals which was litigated by the Immigration Unit of Prisoners' Legal Services of New York together with the Crimmigration Clinic of Harvard Law School.

Peguero Vasquez concerns the removal proceedings of Jose Ramon Peguero Vasquez, a native and citizen of the Dominican Republic who was admitted to the United States as a lawful permanent resident in 2012. In 2017, he pleaded guilty to criminal possession of a forged instrument in the third degree, a Class A misdemeanor. At the time of his guilty plea, the maximum sentence for a Class A misdemeanor in New York was one year of imprisonment. However, in 2019, the New York State legislature enacted New York Penal Law ("NYPL") §70.15(1-a), a statute which reduced the maximum possible sentence for Class A misdemeanors from one year to 364 days. The statute was designed to apply retroactively, such that the sentence reduction "shall apply to all persons who are sentenced before, on or after the effective date of this subdivision, for a crime committed before, on or after the effective date of this subdivision." NYPL §70.15(1-a)(b).

In 2020, the Department of Homeland Security commenced removal proceedings against Peguero Vasquez on the grounds that his forged instrument conviction was a crime involving moral turpitude ("CIMT"). For an offense to constitute a removable CIMT, the crime must be one "for which a sentence of one year or longer may be imposed." 8 U.S.C. §1227(a)(2)(A)(i)(II). In removal proceedings, Peguero Vasquez argued that his forged instrument offense was not a CIMT because the 2019 enactment of NYPL §70.15(1-a) retroactively reduced the maximum sentence for his crime to 364 days. After the immigration agency rejected his argument, Peguero Vasquez petitioned for review by the Second Circuit.

Over a strong dissent by Judge Robinson, the Second Circuit denied Peguero Vasquez' petition and found that his offense was a CIMT notwithstanding NYPL §70.15(1-a). Writing for the majority, Judge Jacobs concluded that "[t]here is no doubt that the federal removal statute is backward-looking." 80 F.4th at 430. Judge Jacobs acknowledged that some of the statutory text spoke in the present tense, for example, by referring to crimes "for which a sentence of one year or longer may be imposed." *Id.* (quoting 8 U.S.C. §1227(a)(2)(A)(i)(II)). But Judge Jacobs found that the statute ultimately requires a person to have been "convicted," a provision which Judge Jacobs read to "unambiguously direct[] the agency to the historical fact of an alien's conviction." *Id.* at 431. Citing the Supreme Court's decision in *McNeill v. United States*, 563 U.S. 816, 820 (2011), Judge Jacobs concluded that the question of removability is "concerned with convictions that have already occurred, and the only way to assess whether a past conviction makes an alien removable is to consult the law that applied at the time of

that conviction." *Id.* (internal quotation marks omitted).

Judge Jacobs found support for this conclusion in several places. First, Judge Jacobs observed that "[r]etroactive application of state sentencing law to federal immigration proceedings is a principle with absurd ramifications." *Id.* For example, if a state legislature could retroactively increase or decrease criminal sentences, "no alien could foresee, and no judge or defense counsel could confidently advise of, the future immigration consequences of a criminal conviction or plea." *Id.*

Second, Judge Jacobs concluded that denying retroactive application to NYPL §70.15(1-a) would be consistent with federal immigration law's treatment of post-conviction relief. Judge Jacobs noted that under Board of Immigration Appeals precedent, "a conviction remains as a predicate for removal notwithstanding any retroactive state court relief that is given for rehabilitative purposes, or to avoid such collateral consequences as deportation." *Id.* at 432 (citing *Matter of Thomas*, 27 I. & N. Dec. 674, 675 (2019)). Judge Jacobs found a similar attitude embodied in the 1996 amendments to the Immigration and Nationality Act ("INA"), which "broaden[ed] the scope of the definition of 'conviction' in order to counteract the myriad provisions for ameliorating the effects of a conviction used in the various States." *Id.* at 432 (internal quotation marks omitted) (quoting H.R. Conf. Rep. 104-828, at 223–24 (1996)).

Dissenting, Judge Robinson agreed that the immigration statute was backward-looking to the sentence at the time of conviction, but concluded that "[w]e look to New York law to answer that question, and New York law tells us that the maximum sentence was 364 days." *Id.* at 436. In Judge Robinson's opinion, the majority's conclusion that the maximum sentence was one year was "legally incorrect" because retroactive statutes such as NYPL §70.15(1-a) "establish the applicable law at a *past* time, legally erasing any prior understanding of the law in effect at that time" and creating "a time-traveling legal fiction of sorts[.]" *Id.* (emphasis in original).

Judge Robinson also contested the relevance of Supreme Court's decision in *McNeill v. United States*. In Judge Robinson's opinion, *McNeill* is inapposite because it dealt the question of whether, for federal sentencing purposes, a court should look to the maximum sentence at the time of *conviction*, or to the maximum sentence at the time the defendant was *sentenced* for that conviction—an entirely different legal question than the one present in Peguero Vasquez' case. Indeed, noted Judge Robinson, the *McNeill* Court specifically stated that its decision "does not concern a situation in which a State subsequently lowers the maximum penalty applicable to an offense and makes that reduction available to defendants previously convicted and sentenced for that offense." *Id.* at 438 (quoting *McNeill*, 563 U.S. at 825 n.1).

Finally, Judge Robinson rejected the majority's argument that the denial of retroactive application to NYPL §70.15(1-a) would be consistent with immigration law's treatment of post-conviction relief. In Judge Robinson's view, "[t]he INA does not establish a single, universal rule regarding the effect of state actions that retroactively impact a state law conviction[.]" *Id.* at 440–41. Rather, "[u]nder the INA, the effect on a noncitizen's removability resulting from a state law action with retroactive effect turns on the specific language of the federal statute in question, and the specific nature of the state law action in question." *Id.* at 441. In this case, Judge Robinson concluded that the

statutory language "a sentence of one year or longer" unambiguously provides that federal immigration law should give full effect to statutes such as NYPL §70.15(1-a) which, by their own terms, retroactively adjust the sentences for state criminal offenses.

WHAT DID YOU LEARN?
Brad Rudin

1. **In the *Collymore* case, the Second Circuit noted that qualified immunity protects state actors in a Section 1983 civil rights complaint seeking compensatory damages:**

   a. in any case in which the complainant experienced harm.
   b. when the state actors were merely following the orders of their superiors.
   c. when the state actors could not reasonably have known that their conduct violated the constitution.
   d. when the complainant experienced serious harm that a reasonable person would recognize.

2. **In a complaint alleging "deliberate indifference to a serious medical need," a lower court will find that a "serious medical need" has been adequately alleged when:**

   a. an appellate court has recognized a specific medical disorder as one constituting a "serious medical need."
   b. a federal district court or any state trial court within the Second Circuit has previously issued an opinion holding that a medical disorder is treatable.
   c. the complainant plausibly alleges suffering chronic and substantial untreated pain.
   d. the state's experts acknowledge that the complainant's medical disorder could be successfully treated.

3. **When writing a brief or memorandum of law, discussing trial court decisions is important because such decisions:**

   a. are binding on other trial courts.
   b. present facts and legal reasoning useful to the court.
   c. typically result in the reversal of appellate court decisions.
   d. allow litigants to ignore appellate court decisions.

4. **The highest state court in New York State is the:**

   a. Second Circuit Court of Appeals.
   b. Supreme Court, Albany County
   c. Supreme Court of the United States.
   d. New York State Court of Appeals.

5. **In the *Gibson* case, the Supreme Court, Albany County reversed the disciplinary finding against the Petitioner because the Respondent failed to provide the Petitioner:**

   a. notice of the facts that would allow a reasonable person to understand what misconduct was alleged.
   b. the opportunity to retain counsel to prepare for the hearing.
   c. a misbehavior report that painstakingly detailed all facts relevant to the date, place and manner of the charged inmate misconduct.
   d. notice of the rights an incarcerated person has at a disciplinary hearing.

6. The Second Circuit Court of Appeals affirmed the district court's reduction of the award of punitive damages in the *Magalios* case on the ground that:

a. the evidence did not warrant any monetary sanction beyond that of compensatory damages.
b. the Court of Appeals was without power to reverse the reduction ordered by the district court.
c. the case law governing Eighth Amendment claims imposed a $50,000 limit on punitive damages when compensatory damages are deemed reasonable.
d. the reduction was reasonable in light of the maximum criminal penalty that may be imposed for federal criminal civil rights violations.

7. In awarding punitive damages, the *Brandon* Court reiterated the principle that reprehensibility of the defendant's conduct should:

a. not be considered if compensatory damages are also awarded.
b. be the primary factor in determining whether punitive damages are warranted.
c. never be considered if the harm caused was merely psychological.
d. always be considered where the right to the free exercise of religion is involved.

8. In framing a request for punitive damages, the plaintiff in a federal civil rights case relating to the conduct of DOCCS employees should:

a. omit any reference to punitive damages awarded in similar cases.
b. present proof about the financial needs of their family.
c. refer to the measures that DOCCS could have taken to avoid or minimize the harm suffered.
d. emphasize the accidental nature of the official acts that resulted in physical or mental harm suffered by the plaintiff.

9. April's Law, codified at Correction Law §72-C, gives incarcerated persons the opportunity to request a transfer to the correctional facility in closest proximity to:

a. the residence of their minor children.
b. the court in which the criminal trial was conducted.
c. the incarcerated person's address at the time of conviction.
d. the home of the incarcerated person's parents or spouses.

10. The benefits of April's Law are available to the incarcerated parents of minor children except those parents:

a. who have been convicted of a crime against the children whom they wish to live near.
b. against whom there is an active order of protection involving the children or their custodian or guardian.
c. Who are currently serving a disciplinary sanction.
d. all of the above.

Answers

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