Pro Se

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Court of Appeals Rules on Untimely Notices of Appeal and Leave Applications

After a defendant is sentenced in New York State, his criminal defense attorney sometimes fails to timely file a notice of appeal and, after a criminal appeal is denied, an appellate attorney sometimes fails to file a leave application in the Court of Appeals. Recently, the Court of Appeals considered whether the failure of counsel to file either a timely notice of appeal or leave application was ineffective assistance of counsel, and if so, whether the remedy is to allow the defendant to file a notice of appeal or a leave application in spite of the deadlines for doing so having passed.

Background

New York State law requires that a defendant file a notice of appeal within 30 days of when he is sentenced. Criminal Procedure Law (CPL) § 460.10(1)(a). CPL § 460.30 permits the Appellate Division to excuse a defendant's failure to file a timely notice of appeal from a criminal conviction if the application is made within one year of the date that the notice was due. In People v. Syville, 912 N.Y.S.2d 477 (2010), the Court of Appeals looked at whether a *coram nobis* proceeding was available to afford relief to defendants who did not move within the 12-month grace period for leave to file a late notice of appeal because they were unaware that their lawyers had failed to comply with their requests to file notices of appeal. A successful *coram nobis* proceeding results in a court order correcting a previous error of the most fundamental character in order to achieve justice where no other remedy is available.

In Syville, the Court reviewed a case in which the notice of appeal was filed by the defendant's trial counsel, but well beyond the statutory deadlines, including the 12-month grace period.

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I Know Why the Caged Child No Longer Sings ~ How Solitary Confinement Thwarts Brain Development in Youths

A Message from the Executive Director - Karen L. Murtagh

On July 10, 2014, I joined numerous others in presenting comments at a briefing meeting convened by the New York Advisory Committee to the United States Commission on Civil Rights held at New York University Law School. The purpose of the briefing was to hear from government officials, advocates, academicians, citizens, and others to examine the use of solitary confinement for juveniles in New York.

I began with a brief history of the origins of solitary confinement in the U.S., which, as many of you know, can be traced to the Walnut-Street Penitentiary, in Philadelphia, in 1787. Although initially instituted as a rehabilitative tool – with the idea that prisoners, left alone with only their conscience and a Bible, would have time to reflect on their bad deeds, come to see the nature of their crimes and repent – the harmful effects of solitary confinement soon became obvious. First criticized by Beaumont and Tocqueville who found that solitary confinement, "does not reform, it kills," and then by Charles Dickens who described solitary as a "slow and daily tampering with the mysteries of the brain" that was "immeasurably worse than any torture of the body," solitary confinement was ultimately condemned by the U.S. Supreme Court in 1890 in the case of *In Re Medley*. In *Medley*, the Supreme Court set forth scientific evidence of the effects of solitary confinement, noting that: "A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community." As a result of these findings, solitary confinement was generally abandoned in America for over a century.

However, the use of solitary confinement was renewed in the mid-1900s, not as a rehabilitative measure, but as a prison management tool. Although it seems counterintuitive to adopt a prison management tool that has been proven to drive some individuals mad, make others "violently insane" and cause others to commit suicide, there we were, 124 years after the Supreme Court enunciated the enormous and permanent harm caused by solitary confinement to adults, addressing not just the general use of solitary confinement, but the idea of subjecting juveniles to such conditions.

My comments centered on modern scientific research which has conclusively found that the frontal lobes of an individual's brain, which are required for impulse control, are not fully developed until the age of 25. In addition, the brain structure of those under 25 is fundamentally and significantly different from that of adults. We also know that subjecting individuals under 25 to isolation negatively impacts their physiological development due to increased stress levels, lack of stimulation, lack of activities which develop fine motor skills such as playing games or musical instruments, and an inability to obtain adequate exercise through sustained aerobic activity. This thwarts the natural development of a youth's entire body, including his or her neuromuscular, musculoskeletal, cardiovascular, and digestive and nervous systems. Isolation also stunts a youth's psychological and social development as he/she is not permitted to participate in group activities and has no opportunities to interact with others in a meaningful way. The likely result is depression, self-destructive acts, aggression and substance abuse. In addition, younger individuals subjectively perceive time differently, such that a sanction of time in solitary is perceived by a youth as lasting much longer than that same sanction of time is perceived by an adult.

The recent settlement in *Peoples v. Fischer* does provide that 16 and 17-year-old individuals sentenced to solitary confinement shall be offered out of cell programming and outdoor exercise five hours a day during the week. However, this settlement is limited to 16 and 17-year-olds, is contingent on DOCCS' ability to secure the necessary funding, and is not required to be implemented for eighteen months. In addition, even after implementation, juveniles sentenced to solitary will be locked in their cells for 19 hours a day during the week and 23 hours a day during the weekend and as of now, there is no limit to the amount of time a juvenile can be sentenced to disciplinary housing.

In the correctional setting, there is no harsher punishment than solitary confinement. Punishing a youth whose brain is not fully developed, who perceives time differently, and who requires adequate social stimulation and exercise to maintain physiological and physical health and well-being, by placing him/her in solitary confinement for any length of time, violates our contemporary standards of decency and should be immediately stopped.

I concluded my remarks with the following recommendations for the NYS DOCCS:

1. Engage in a multi-disciplinary review, including the participation of an outside, unbiased, child & adolescent psychiatrist, of all individuals under the age of 25 who are currently being held in solitary confinement and develop a transition plan for each to facilitate expeditious transfer to general population.
2. Make age (under 25 years) a per se mitigating factor in any disciplinary hearing.
3. Prohibit youths from being subjected to the imposition of solitary confinement as it currently exists in NYS.
4. Provide those individuals who are under the age of 25 with attorneys at any hearing that can result in in-cell confinement.
5. Severely limit the amount of time that individuals under the age of 25 can be placed in in-cell confinement.
6. During in-cell confinement, mandate that individuals under the age of 25 continue to receive adequate nutrition, education, vocational training, congregate religious services, exercise, contact with family through visits and packages, commissary buys, medical and mental health care and counseling.
7. Mandate a best-practices step-down program to allow individuals under the age of 25 to return to general population as quickly as possible.

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Syville applied for a writ of error *coram nobis* in the Appellate Division, seeking permission to file a late notice of appeal. Supporting affidavits from Syville and his attorney documented that Syville had asked his attorney to file a notice of appeal and that the attorney had intended to do so, but that the attorney had mistakenly thought that the notice could not be filed while some charges in the indictment remained unresolved and where the trial court had stayed execution of the sentence. The People consented to the *coram nobis* relief. Nonetheless, the Appellate Division denied the application.

In a companion case, People v. Council, the defendant requested that his lawyer file a notice of appeal; however the lawyer, due to law office failure, did not do so. Two years after the deadline for filing, the defendant hired another lawyer to perfect the appeal. The second lawyer determined that the first lawyer had failed to file the notice of appeal. The second lawyer applied for a writ of error *coram nobis*. Again, the People did not oppose the application, and again, the Appellate Division denied the application.

In the Syville decision, the Court agreed that a defendant who discovers after the expiration of the CPL § 460.30 grace period that a notice of appeal was not timely filed due to ineffective assistance of counsel has recourse through a *coram nobis* application. This, the Court found, is because the due process clause of the federal constitution requires that there be some avenue of relief in such a circumstance.

In Syville, the People argued that the defendants who seek *coram nobis* relief due to a failure to timely file a notice of appeal that results from defense counsel's ineffectiveness should be required to show that they acted with due diligence to protect their appellate rights, along with demonstrating that they had reasonably failed to discover within the one year grace period that a notice of appeal had not been timely filed. The Court acknowledged the importance of this issue, but found that it was not properly before the Court for review as the People had not raised it in the Appellate Division and had not suggested that the loss of appellate rights was caused by anything other than deficient performance by trial counsel.

People v. Andrews, People v. Kruger and People v. Patel, 2014 WL 2608455 (Jun. 12, 2014).

In these three cases, the Court of Appeals narrowed the situations in which it would grant *coram nobis* relief in cases relating to the failure to file timely notices of appeals or leave applications.

In Andrews, the defendant pled guilty and waived his right to appeal. After the period for filing a notice of appeal had lapsed, he abandoned a CPL 440 motion to seek *coram nobis* relief, arguing that his lawyer had been ineffective when she failed to file a notice of appeal. The Court ruled that the Appellate Division had properly denied defendant Andrews' application, noting that the Syville decision conditions *coram nobis* relief on a defendant's ability to demonstrate that appellate rights were lost as a result of ineffective assistance. Andrews, the Court found, had made only **perfunctory** (token) claims, which were disputed by his lawyer, that he had asked his lawyer to file a timely notice of appeal and had failed to explain why he had waited more than two years to seek relief.

In Kruger, the defendant applied for *coram nobis* relief after his appellate attorney failed to submit an application for leave to appeal to the Court of Appeals from the Appellate Division's denial of his appeal. Unlike an appeal as of right, the Court wrote, there is no federal constitutional right to legal representation on an application for an appeal to the State's highest court. Thus, the Court held, the failure to file a leave application does not establish that the defendant was deprived of effective assistance or due process and he is therefore not entitled to *coram nobis* relief.

Finally, in Patel, after pleading guilty and waiving his right to appeal, the defendant filed a timely motion to file a late notice of appeal. This motion was denied, following which he filed a *coram nobis* application, asserting that his lawyer had not advised him of his right to appeal and that he had instructed his lawyer to file a notice of appeal. In this instance, the Court found that the

Appellate Division had improperly granted defendant Patel's application for *coram nobis* relief. The holding of Syville – that a defendant may use *coram nobis* to assert a claim that appellate rights were lost as a result of ineffective assistance of counsel – is a narrow holding, the Court wrote. It was premised on the recognition that *coram nobis* relief is available only in rare cases when the defendant has no other procedural options to raise such an issue. Syville does not apply to defendant Patel's case, the Court held, because he (Patel) realized that his lawyer had not filed a notice of appeal in time to take advantage of the one year grace period. Thus, he was not without a remedy, a prerequisite to *coram nobis* relief; Patel had a remedy which he used, albeit unsuccessfully.

News and Notes

Court of Appeals Grants Leave to Appeal in Montane v. Evans

In the last issue of ***Pro Se***, we reported on the Third Department's decision in Matter of Montane v. Evans, 981 N.Y.S.2d 866 (3d Dep't 2014). In this decision, the Court found that the 2011 amendments to the Executive Law pertaining to the requirement that the Board enact written procedures incorporating a risk and needs assessment were satisfied by the Board's issuance of a memorandum addressing the amendments and providing guidance. The Court ruled that amendment did not change its prior finding that the parole board did not have to enumerate, give equal weight, or discuss every factor that it considered and was free to give great weight to the seriousness of the crime committed by the prisoner. For a more detailed discussion of the Montane decision, see *Pro Se*, Vol. 24, No. 3, June 2014.

On May 13, 2014, the Court of Appeals granted the petitioner's motion for leave to appeal in Montane. On April 30, 2014, The Court of Appeals also granted leave to appeal in a Third Department case known as Matter of Linares v. Evans, 975 N.Y.S.2d 930 (3d Dep't 2013). In Linares, the Third Department reversed a lower court decision affirming a denial of parole, holding that the petitioner was entitled to a new hearing because the Board had failed to use a COMPAS Risk and Needs Assessment instrument, a document created and intended to bring the Board into compliance with the same amendments to the Executive Law as were under scrutiny in Montane. We will keep you informed of further developments in Montane and Linares as they occur.

Health Services Policy Manual 1.31: Gender Dysphoria

On May 12, 2014, DOCCS issued a new policy regarding Gender Dysphoria. See Health Services Policy Manual (HSPM) 1.31. This policy recognizes Gender Dysphoria as a mental health diagnosis as defined by the Diagnostic and Statistical Manual, Fifth Edition (DSM-V). (The DSM-V is published by the American Psychiatric Association and is a manual of the classification of mental disorders.) The Gender Dysphoria policy in HSPM 1.31 replaces the previous DOCCS policy entitled Gender Identity Disorder. Under the previous policy, female transgender prisoners were permitted access to bras, while male transgender prisoners were not permitted access to any gender-specific items. Under the new policy, both male and female transgender prisoners will be permitted access to either underwear (for female transgender prisoners) or undershorts (for male transgender prisoners). Female transgender prisoners continue to have access to bras. To request either underwear or undershorts, you must make a request to the facility health unit, who will help facilitate your request. Under the new policy, prisoners are still not permitted to receive undergarments through the package room or through personal purchase.

New Procedures: Prisoners' Requests for Legal Materials

DOCCS provides legal assistance services to prisoners who are unable to do their own legal work. The DOCCS Law Library Program and the Inmate Legal Resources Program (ILRP) assist inmates with their legal work. DOCCS has directed

that as of July 14, 2014, prisoners must consult the prison law library or general library for assistance with the ILRP.

DOCCS has instructed the public library systems that participate in the Public Library Systems Services to State Correctional Facilities State Aid Program to return requests for legal materials that prisoners send directly to local libraries or the public library systems.

Rights at Tier III Hearings

"Rights at Tier III Hearings" is a new column that will appear periodically in *Pro Se*. The column will summarize the law with respect to a particular right that a prisoner has at a Tier III hearing. This column focuses on the "right to be present at the hearing," also known as "the right to appear" and "the right to attend."

The Right to Be Present

Prisoners have a federal due process and state regulatory right to attend their prison disciplinary hearings. Wolff v. McDonnell, 418 U.S. 539 (1974); 7 N.Y.C.R.R. § 254.6(a)(2); see also Matter of Jihad v. Mann, 553 N.Y.S.2d 235 (1990) (noting a fundamental right to be present); Matter of Rush v. Goord, 770 N.Y.S.2d 191 (3d Dep't 2003) (same). Under certain circumstances, a prisoner's right to be present can be trumped by institutional safety or correctional goals, see Matter of Barnes v. Prack, 971 N.Y.S.2d 359 (3d Dep't 2013), forfeited, see Matter of Cowart v. Pico, 623 N.Y.S.2d 948 (3d Dep't 1995), or waived, see Matter of Watson v. Fischer, 950 N.Y.S.2d 818 (3d Dep't 2012). When a prisoner is properly excluded, willfully refuses to attend or waives his right to attend, he waives any procedural objections that occurred in his absence. Matter of Johnson v. Racette, 723 N.Y.S.2d 414 (3d Dep't 2001). Where a prisoner is wrongfully excluded from a hearing, or where it is not clear that he knowingly and intelligently waived his right to attend, the remedy is annulment of the hearing and expungement of the charges. Weiss v. Coughlin, 604 N.Y.S.2d 654 (3d Dep't 1993).

Exclusion Due to Threat to Institutional Safety or Correctional Goals

A hearing officer may exclude a prisoner from a disciplinary hearing if the hearing officer determines that the prisoner's presence threatens institutional safety or correctional goals. Matter of Holmes v. Drown, 804 N.Y.S.2d 823, 824 (3d Dep't 2005); Matter of Bernier v. Goord, 770 N.Y.S.2d 795 (3d Dep't 2004). When a hearing officer excludes a prisoner from a hearing, the record must show that the hearing officer determined that the exclusion was necessary to promote institutional safety or correctional goals, i.e., the prisoner's presence at the hearing would constitute a threat to safety or correctional goals. Matter of Holmes v. Drown, 804 N.Y.S.2d 823. Matter of Boodro v. Coughlin, 530 N.Y.S.2d 337 (3d Dep't 1988); see also 7 N.Y.C.R.R. § 254.6(a)(2) (providing that a prisoner accused of misbehavior "shall be present at the hearing unless he is excluded for reasons of institutional safety or correctional goals"). Violent, unruly, argumentative or otherwise disruptive conduct can justify the exclusion or removal of an inmate from a hearing. See Matter of Bunting v. Fischer, 926 N.Y.S.2d 206 (3d Dep't), lv. denied, 17 N.Y.3d 712 (2011); Matter of Bernier v. Goord, 770 N.Y.S.2d 795 (3d Dep't 2004).

Conduct which merely irritates or annoys the hearing officer does not constitute a threat to institutional safety of correctional goals. For example, in Matter of Cornwall v. Fischer, 911 N.Y.S.2d 239 (3d Dep't 2010), where the prisoner's inability to properly form questions for his witness was an irritation to the hearing officer, the Court found that the prisoner's conduct had not created a threat to the safety or institutional goals and that the hearing officer wrongfully excluded the prisoner. Similarly, where the record showed only that the prisoner slowed the hearing process by asking questions about information that he thought could vindicate him, the Court found that exclusion was improper because there was no indication in the record that the prisoner's conduct posed a threat to institutional safety or correctional goals. Matter of Holmes v. Drown, 804 N.Y.S.2d 823.

Prior to excluding a prisoner from a Tier III hearing based on disruptive conduct, the hearing officer must advise the prisoner that if he continues to engage in the conduct which the hearing officer has determined to be disruptive, the hearing officer will exclude the prisoner and conduct the hearing in the prisoner's absence; if the prisoner continues the conduct, he can be excluded. Matter of Rupnarine v. Fischer, 986 N.Y.S.2d 716 (3d Dep't 2014); Matter of Canty v. Fischer, 939 N.Y.S.2d 142 (3d Dep't 2012), lv. denied, 939 N.Y.S.2d 142 (2012); Matter of Jackson v. Fischer, 873 N.Y.S.2d 765 (3d Dep't 2009); Matter of Applewhite v. Goord, 853 N.Y.S.2d 444 (3d Dep't 2008).

A prisoner can also be excluded from a hearing based on his behavior while being escorted to the hearing. See Matter of Berrian v. Selsky, 763 N.Y.S.2d 111 (3d Dep't 2003) (finding that where the prisoner refused direct orders to stop being loud while being escorted to the hearing and continued his disruptive behavior while waiting to begin his hearing, thereby disrupting other hearings that were in progress, the prisoner was properly excluded). Note also that in cases where the record supports a finding that the hearing officer excluded a prisoner based on his conduct at a hearing that was conducted earlier on the same day before the same hearing officer, and on his assaultive conduct during the previous several months, the court may find the exclusion proper even where it appears that no warning was given prior to excluding the prisoner from the second hearing. See, Matter of Barnes v. Prack, 971 N.Y.S.2d 359 (3d Dep't 2013); see also Alexander v. Ricks, 779 N.Y.S.2d 606 (3d Dep't 2004); see, Matter of Boodro v. Coughlin, 530 N.Y.S.2d 337 (3d Dep't 1988) (finding conduct at another prisoner's hearing before the same hearing officer and on the same day to be insufficient basis for excluding the prisoner from his own hearing later that day).

Summary: Exclusion

A prisoner should not be excluded from his hearing in the absence of evidence showing that 1) he disrupted the hearing and upon being specifically advised that if he does not stop engaging in the disruptive behavior, the hearing will be conducted outside his presence or 2) his behavior while being escorted to the hearing is disruptive or threatening.

Waivers and Willful Refusals

A waiver of a constitutional right must be voluntary, knowing and intelligent. Matter of Jihad v. Mann, 553 N.Y.S.2d 235 (3d Dep't 1990). At a minimum, the prisoner must be informed in some manner of the nature of the right to be present and the consequences of waiving that right. People v. Parker, 454 N.Y.S.2d 967 (1982), cited in Matter of Jihad v. Mann. In the context of a prison disciplinary hearing, a prisoner cannot be said to have knowingly and voluntarily waived his right to attend unless he has been informed that the hearing will be held in his absence, and that by not attending he is giving up the opportunity to present a defense. Matter of Rush v. Goord, 770 N.Y.S.2d 191 (3d Dep't 2003).

Willful Refusal

The right to attend is conditioned on the prisoner's willingness to accept the opportunity to attend his hearing. Matter of Cowart v. Pico, 623 N.Y.S.2d 948 (3d Dep't 1995). Where a prisoner has willfully refused to attend his hearing, the court will find that he forfeited his right to attend. See Matter of Weems v. Fischer, 906 N.Y.S.2d 122 (3d Dep't 2010); Matter of Alicea v. Selsky, 819 N.Y.S.2d 202 (3d Dep't 2006). The right to attend terminates whether the inmate expressly refuses to attend the hearing or refuses to follow prison procedures that would facilitate attending the hearing. In Sanders v. Coughlin, 564 N.Y.S.2d 496 (3d Dep't 1990), the court found that where the prisoner would not comply with required frisk and restraint policies, he understood that he would not be able to move to the location of his hearing and therefore refused to attend his hearing. Where warnings are given that the failure to follow procedures will result in the hearing being held in the prisoner's absence, some decisions characterize the refusal to follow procedures as a waiver of the right to be present. Matter of Jihad v. Mann, 553 N.Y.S.2d 235 (3d Dep't 1990).

Waiver of Right to Attend

Where a prisoner provides a statement of inability to attend the hearing and signs a form acknowledging that he understands that the hearing will be completed in his absence, a court is likely to conclude that he waived his right to attend. See, e.g., Matter of Watson v. Fischer, 950 N.Y.S.2d 818 (3d Dep't 2012). In Watson, the prisoner signed a form stating that he did not want to attend the hearing. The form stated that he had been informed that the hearing would be conducted in his absence. While the prisoner wrote on the form that he could not attend because his back hurt, there was testimony that he had been observed participating in recreation on the day of the hearing and had climbed many stairs to do so. In addition, a nurse who treated the prisoner testified that he had been given a painkiller on the morning of the hearing and should have been able to walk to the hearing. Under the circumstances, the court found the prisoner had waived his right to attend.

But, where there is insufficient evidence in the record to refute a prisoner's explanation that he is unable to attend the hearing, the courts will not find that the prisoner forfeited his right to attend. For example, in Matter of Alicea v. Selsky, 819 N.Y.S.2d 202 (3d Dep't 2006), where the prisoner wrote on the waiver form that he could not attend his hearing because of back pain, the Court wrote that to constitute a waiver, a prisoner's refusal must be willful. Alicea told the escort officer that he could not attend his hearing because of back pain. The hearing officer asked the nurse on duty whether there was a medical reason for Alicea to be absent from the hearing; she answered in the negative despite not having personally treated Alicea. The Third Department held that the flawed investigation was an insufficient basis for concluding that the inmate had *willfully* refused.

Thus, where a prisoner claims to be **unable** to attend his disciplinary hearing, prior to finding a willful refusal to attend, there must be evidence in the record refuting the prisoner's asserted reason for not attending the hearing. Such evidence can either be generated by investigation or by reference to other evidence in the hearing record from which the hearing officer might reasonably conclude that the prisoner willfully refused to attend the hearing and thus it is proper to continue in his absence. See, e.g., Matter of Brooks v. James, 963 N.Y.S.2d 462 (3d Dep't 2013) (finding that evidence did not support the hearing officer's conclusion that the prisoner willfully refused to attend where prisoner claimed that he could not wear one of his shoes because of an injured toe); Matter of Alicea v. Selsky, 819 N.Y.S.2d 202 (3d Dep't 2006) (finding that hearing officer's conclusion that the prisoner willfully refused to attend the hearing where the prisoner claimed that he was unable to attend because he could not walk).

Summary: Willful Refusal and Knowing and Voluntary Waiver

In the absence of a willful refusal to attend, see Matter of Watson v. Fischer, 950 N.Y.S.2d 818 (3d Dep't 2012), or a knowing and voluntary waiver of an inmate's right to be present, see Matter of Rush v. Goord, 770 N.Y.S.2d 191 (3d Dep't 2003), conducting a hearing when the prisoner is not present violates his right to attend the hearing.

Ambiguous Intent

Where there is insufficient evidence to support a finding of willful refusal and where a prisoner writes statements which are inconsistent with an intention to waive his right to be present on a document labeled a waiver of the right to be present, courts have been reluctant to conclude that the prisoner has made a knowing, voluntary and intelligent waiver. See, Matter of Rodriguez v. Fischer, Index No. 2883-12 (Sup. Ct., Albany Co. July 19, 2012); Matter of Hakeem v. Coombe, 650 NYS2d 819 (3d Dep't 1996). Thus, where **ambiguities** (doubts about meaning) are created by a prisoner's statements on the waiver form, the form may not be a sufficient basis for concluding that the prisoner knowingly and voluntarily waived his right to be present. Id.

Where there is an ambiguity in a prisoner's waiver, the hearing officer must take action to determine whether there has been a knowing, voluntary, and intelligent waiver. See e.g., Matter of Brooks v. James, 963 N.Y.S.2d 462 (3d Dep't 2013)

(holding that a prisoner's signed waiver was ambiguous and required investigation where the prisoner claimed an injury precluded his wearing shoes, and the escort officer told him that unless he wore shoes he could not go to the hearing). And, where the prisoner wrote an explanation on a refusal form, and "the Hearing Officer summarily determined that [prisoner's] conduct was tantamount to a refusal," the Third Department held that without additional evidence of knowing and voluntary waiver, there was no rational basis for the hearing officer's decision to continue the hearing in the prisoner's absence. Matter of Hakeem v. Coombe, 650 N.Y.S.2d 819 (1996). In Matter of Rodriguez v. Fischer, Index No. 2883-12 (Sup. Ct, Albany Co. July 19, 2012), a trial court extended these principles one step further, holding that where the hearing officer resolves an ambiguity against the prisoner, the prisoner must be informed prior to continuing the hearing in his absence, of the results of the hearing officer's investigation and be informed that if he does not attend the hearing, it will be concluded in his absence.

Summary: Ambiguity

The decisions in Brooks, Hakeem and Rodriguez make clear that where the accused prisoner annotates the waiver form in a manner that casts doubt on the conclusion that he intends to waive his right to attend, prior to concluding that the prisoner has waived his right to attend, the hearing officer must either investigate the accused's stated reason for not attending or point to other evidence in the record that undercuts the accused's reason for not attending. And, if the hearing officer concludes that the prisoner's refusal was willful, according to Matter of Rodriguez v. Fischer, that conclusion must be communicated to the prisoner before the hearing officer is justified in concluding that he waived a fundamental right. In the absence of an investigation into the reason given for the written excuse, a hearing officer may not summarily conclude that a prisoner intended to waive the right to be present when a waiver form has been altered.

Violation of Right to Be Present: Remedy

Because the failure to give a prisoner an opportunity to appear at his hearing violates the prisoner's constitutional right to attend his hearing, the mandated remedy for a violation of this right is annulment and expungement. Weiss v. Coughlin, 604 N.Y.S.2d 654 (3d Dep't 1993).

This article was written by Elizabeth Watkins Price, an attorney in the Ithaca Office of PLS.

LETTERS TO THE EDITOR

Dear Editors of *Pro Se*

Please accept this small donation, which I wish could be more. PLS has been extremely helpful to me and assisted me in prevailing in courts, upon challenging DOCCS' refusal to credit me with 7 years under the Richardson case. As a result, I was eligible for parole 7 years before I would otherwise have been.

I am also very thankful to PLS for its assistance when I was confined to SHU. We got a full reversal of a 1 year SHU sanction as well as a 6 month modification of an 18 month SHU sanction.

I can't convey the sincere gratitude and appreciation I feel for the services that everyone at PLS provides to prisoners across the State. I also wish that more efforts be made in the form of donations, regardless of the amount.

Once again, much gratitude and keep up the great work

Sincerely and Respectfully,

Gilberto Hernandez (98 A 4471)

Letters to the editor should be addressed to ***Pro Se***, 114 Prospect Street, Ithaca, NY 14850, ATTN: Letters to the Editor.

Please indicate whether, if your letter is chosen for publication, you want your name published. Letters may be edited due to space or other concerns.

Pro Se Victories!

Matter of Eddie Ortiz v. Brian Fischer, Index No. CA 2013-001415 (Sup. Ct. Oneida Co. April 4, 2014). Eddie Ortiz successfully challenged a Tier III hearing at which the hearing officer, rather than calling the evidence control officer as the petitioner requested, testified that he was in charge of the general contraband locker and therefore knew that when food is a contraband item the contraband can be disposed of after photographing it.

The court ruled that the evidence control officer's testimony would have been relevant and material and that it was error for the hearing officer to both give testimony on evidence collection procedure and adjudicate the case. Doing so, the court found, deprived the petitioner of a fair hearing by an impartial hearing officer.

Matter of Aaron Hand v. HO Gerald Gardner, Index No. 13-3992 (Sup. Ct. Ulster Co. April 28, 2014). At a Tier III hearing on the charge that contraband was recovered during a random cell search, Aaron Hand argued that the Directive required that where a prisoner is in his cell when the search occurs, he must be taken to one of two specific locations. Finding that the respondent had not produced proof to rebut Mr. Hand's testimony that he was in his cell but was not taken to either of the locations, the court found that the search did not comply with the Directive and ordered the hearing reversed.

At the hearing, a member of the security staff testified that Mr. Hand was at recreation at the time of the search, but the documents introduced allegedly to prove this fact were unclear and thus did not establish that the petitioner was not in his cell. The petitioner noted this at his hearing but the error was not corrected. Nor, the court noted, was an affidavit explaining the evidence supplied in response to the Article 78 petition. Finding the terms of the Directive had been violated, the court ruled that the Department must adhere to its own regulations or the determination must be annulled and the matter expunged from the petitioner's disciplinary records.

Matter of Dupree Harris v. Joseph Smith, Index No. 13-3912 (Sup. Ct. Ulster Co. April 9, 2014). After service of the petition, the respondent moved to dismiss this Article 78, arguing that the petitioner had not filed the case within the 4 month statute of limitations. The court denied the motion, finding that the respondent had not shown that more than 4 months had passed between when petitioner *received* the notice that his appeal had been denied and when he commenced the Article 78. Article 78 of the CPLR provides that the deadline for filing an Article 78 begins to run on the date that the prisoner receives the notice that the determination of guilt was upheld on administrative appeal. The respondent has the burden of showing that the petitioner received the decision more than 4 months before he commenced the Article 78**.** Here, the court found, the respondent did not introduce evidence showing on what date the petitioner had received the decision. Thus, the court held, the respondent failed to meet his burden of establishing that petitioner had received notice more than 4 months before commencing the action.

Matter of Guillermo Torres v. Brian Fischer, Index No. 2013-1560 (Sup. Ct. Chemung Co. May 29, 2014). Following a decision reversing a Tier III hearing and ordering that the charges be expunged, the respondent moved for leave to re-argue that portion of the judgment ordering expungement of the charges. The court denied the motion, holding that it had not overlooked or misapprehended a matter of fact or law when it determined that expungement rather than remittal (for a re-hearing) was, under the circumstances, the appropriate remedy for the violation of petitioner's right to call witnesses. While the respondent argued that the similarities of the charge, the victim and the circumstances of the due process violation between those in the instant matter and those in Matter of Saez v. Fischer, 978 N.Y.S.2d 473 (3d Dep't 2014) mandated the same relief granted in Saez (remittal), the court noted that in its decision, it had considered the result in Saez, but had concluded that the equitable factors considered in Matter of Allah v. LeFevre, 522 N.Y.S.2d 321 (3d Dep't 1987) − where in spite of the serious nature of the charges, the court concluded that the

petitioner's completion of a significant portion of the SHU sanction, the passage of time and the release of potential witnesses militated against a re-hearing – were also present in the instant case and warranted the same relief as had been granted in Allah.

Matter of Keith Waters v. State of New York, Motion No. M-84754 (Court of Claims May 1, 2014). Keith Waters won an Article 78 challenge to a prison disciplinary hearing and as a result, was released from SHU on May 31, 2013. After missing the deadline for filing a notice of intention, but within the one year statute of limitations for a claim of excessive confinement, Mr. Waters asked the court to allow him to file a late claim. The court found that because five of the six factors listed in § 10(6) of the Court of Claims Act weighed in Mr. Waters' favor, the remedial purposes of the statute would be furthered by allowing Mr. Waters to file his claim. The court found that these five factors weighed in Mr. Waters' favor: 1) The defendant had notice of the essential facts; 2) the defendant had opportunity to investigate the circumstances; 3) the defendant was not substantially prejudiced (hurt) by the failure to timely file; 4) the moving party did not have another remedy available; 5) the claim has the appearance of merit, in this case, an allegation that Mr. Waters was wrongfully held in SHU for 4½ months based on a misbehavior report which did not comply with the Department's regulations (7 N.Y.C.R.R. § 351-3.1(a): "Every incident of inmate misbehavior involving danger to life, health, security or property must be reported, in writing, as soon as practicable."). The court found that while Mr. Waters did not have a reasonable excuse for not filing on time, because the preponderance of the six factors weighed in Mr. Waters' favor, the court granted the motion to file a late claim and ordered that Mr. Waters file a proposed claim within 45 days.

Matter of Anthony Medina v. Eastern Correctional Facility, Index No. 13-4006 (Sup. Ct. Ulster Co. May 29, 2014). The court reversed Anthony Medina's hearing, finding that his right to call witnesses was violated. The court remitted the matter for a new hearing.

Anthony Medina was charged with attempting to hold his cell door open when an officer was trying to close it automatically. Mr. Medina, who is blind, testified that he was in a psychotic state when he heard the cell door begin to make noise and open and shut. Believing that officers and their imaginary pet octopus were about to come into his cell and assault him, he held the cell door open so that any incident would take place in the doorway and would be on videotape. He further asked that a facility maintenance worker be called to testify that the door was opening and closing on its own and that his OMH clinician and the facility pharmacist be called to testify about his mental state, which had been adversely affected by the synergistic effect of his medications. The hearing officer denied these witnesses and found him guilty of the charges.

The court held that Mr. Medina had not waived his request to call the maintenance worker to testify about whether the door had been tampered with or had a mechanical defect and did not agree that the testimony of the clinician and the pharmacist was either not relevant or redundant to the testimony of an OMH staff person who could only testify to events that preceded the incident by three weeks; that staff person's testimony could not substitute for the testimony of his primary clinician who had advised Mr. Medina that she could explain his state of mind regarding the octopus and the synergistic effects of the medications.

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STATE COURT DECISIONS

Disciplinary and Administrative Segregation

Court Rules Determination of Guilt Is Not Supported by Substantial Evidence

In Matter of Elder v. Fischer, 982 N.Y.S.2d 237 (4th Dep't 2014), the petitioner argued that the determination that he had forged another prisoner's name on certain disbursement forms was not supported by substantial evidence. Acknowledging that a misbehavior report alone can constitute substantial evidence of guilt, the Court noted that in this case, the report was based on the reporting officer's belief that the petitioner had forged another inmate's signature. However, the misbehavior report did not establish that the charging officer had shown the disbursement forms to the other inmate or that the other inmate claimed that the signature was not his, nor was such evidence presented at the hearing. Due to these deficiencies of proof, the Court ordered the hearing reversed and directed that all references to the charges be expunged from the petitioner's record.

Jarvis Elder was represented in this Article 78 action by Wyoming County – Attica Legal Aid Bureau.

Testimony Taken When Accused Was Not Present Leads to Reversal

At a Tier III hearing, the accused requested the testimony of the prison's nurse administrator. The hearing officer recorded the nurse's testimony but failed to place a reason for taking her testimony outside the presence of the accused. In Matter of Trapani v. Fischer, 984 N.Y.S.2d 722 (4th Dep't 2014), the respondent conceded that by doing so, the hearing officer violated the petitioner's regulatory right under 7 N.Y.C.R.R. § 254.5(b). Title 7 N.Y.C.R.R. § 254.5(b) provides:

> Any witness shall be allowed to testify at the hearing **in the presence of the inmate** unless the hearing officer determines that so doing will jeopardize institutional safety or correctional goals. Where an inmate is not permitted to have a witness present, such witness may be interviewed out of the presence of the inmate and such interview tape recorded. The recording of the witness' statement is to be made available to the inmate at the hearing unless the hearing officer determines that so doing would jeopardize institutional safety or correctional goals.

Because the respondent agreed that the hearing officer failed to honor the accused's right to be present when a witness testifies, the Court annulled the hearing and ordered the charges expunged.

Damian Trapani was represented in this Article 78 action by Wyoming County – Attica Legal Aid Bureau.

Accused Cannot Be Found Guilty at Rehearing of Charges Dismissed at First Hearing

At his first hearing, Stephen Scott was found guilty of gang activity and not guilty of violent conduct and creating a disturbance. His first hearing was reversed following his administrative appeal. At his second hearing, Mr. Scott was found guilty of the charges that had been dismissed at the first hearing. His administrative appeal of these determinations of guilt was not successful. However, after he filed an Article 78 challenge to the hearing, see Matter of Scott v. Prack, 985 N.Y.S.2d 770 (3d Dep't 2014), the respondent conceded, and the Court agreed, that having been found not guilty at the first hearing of the charges of violent conduct and creating a disturbance, the finding of guilt following the rehearing were

improper. In support of this finding, the Court, citing Matter of Hartje v. Coughlin, 523 N.Y.S.2d 462 (1987), wrote:

> "[I]nasmuch as the evidence with respect to the dismissed charges was found to be insufficient in the [first] hearing and DOCCS has a full opportunity to prove its case against petitioner with respect to those charges at that time, it was improper for the Department to take a second opportunity to present those charges at the rehearing."

The Court ordered the determinations of guilt annulled and the charges expunged from the petitioner's institutional records.

Stephen Scott represented himself in this Article 78 proceeding.

To Preserve Issues for Judicial Review, Prisoner Must Raise in an Administrative Appeal

In Matter of Echevarria v. Fischer, 984 N.Y.S.2d 527 (3d Dep't 2014), the petitioner challenged his Tier III hearing based on 1) the hearing officer's failure to review certain evidence and 2) the absence of pre-hearing employee assistance. The Court found that because he had not raised these issues in his administrative appeal, he had failed to exhaust his administrative remedies and the Court did not have the authority to reach them.

Court Rules that a Five Year SHU Sanction is Not Excessive

In Matter of Rogers v. Prack, 987 N.Y.S.2d 710 (3d Dep't 2014), the petitioner was charged with violently attacking an officer and striking him with closed fist punches in the face and head, and when a second officer came to the first officer's assistance, striking the second officer. After petitioner was found guilty, the hearing officer imposed a 60 month SHU sanction. The petitioner asked the court to reduce the sanction, arguing that it exceeded DOCCS' dispositional guidelines for assaults. The Court found that an unusually harsh sanction was supported by petitioner's unprovoked and violent attack on an officer which the hearing officer found to be well planned and pre-meditated, noting that the Court had upheld similarly lengthy penalties in cases involving escape, fighting and other dangerously violent behavior and holding that the penalty was not so disproportionate to the offense as to be shocking to one's sense of fairness.

Eric Rogers represented himself in this Article 78 proceeding.

Inadequate Employee Assistance Leads to New Hearing

In Matter of Rupnarine v. Prack, 986 N.Y.S.2d 716 (3d Dep't 2014), the petitioner asked his employee assistant to produce the "injury report." While the hearing officer stated that he would look into this request, the record does not reveal that petitioner was either provided with the form or told that it did not exist. Under these circumstances, the Court wrote, it could not say on this record that such an **omission** (failure to do something, here, either to produce the document or to say that it did not exist) did not **prejudice** (hurt) the petitioner's defense. For that reason, the Court ordered the hearing annulled but, because there was substantial evidence of guilt, remitted the matter for a new hearing.

The petitioner was represented by the Law Office of Tom Terrizzi.

There was Insufficient Evidence to Support Determination of Unauthorized Possession of Medication

The DOCCS Standards of Inmate Conduct provide that an inmate shall not possess outdated or unauthorized types or quantities of medication. In Matter of Pine v. Fischer, 988 NYS2d 283 (3d

Dep't 2014), the petitioner testified that the medication which he allegedly wrongfully possessed was vitamin D pills that he had purchased at the commissary. He asked the hearing officer to call staff from the commissary to confirm his testimony. The hearing officer denied his request.

The evidence in support of the charges was the testimony of the officer who found the pills that the medical staff had not been able to identify. The pills were not tested or otherwise identified. In his statement of evidence relied upon, the hearing officer recognized that the pills could be vitamins.

In assessing the sufficiency of the evidence, the Court first noted that the rule prohibiting possession of unauthorized medication does not clarify whether vitamins are considered medicine within the terms of the rule. Given the absence of evidence establishing the types of pills found or petitioner's authorization to possess them, the Court wrote, it was error not to call the commissary employees or other witnesses to resolve these disputed issues. In the absence of such evidence, the Court found that the decision was not supported by substantial evidence and ordered the determination annulled and references to the charge expunged.

James Pine represented himself in this Article 78 proceeding.

Rehearing is Appropriate Remedy When Commissioner Reverses Hearing

In Matter of Hughes v. Bedard, 984 N.Y.S.2d 887 (3d Dep't 2014), the petitioner argued that when the Commissioner reversed his hearing because it had not been properly recorded, the remedy should have been annulment and expungement of the charges. Instead, the Commissioner had ordered a new hearing. The Court rejected the petitioner's argument, concluding that where DOCCS has yet to issue a final determination, it is entirely proper for the Commissioner to order a rehearing upon his administrative review. The Court also noted that in Matter of Stephens v. Goord, 711 N.Y.S.2d 363 (3d Dep't 2000), and in Matter of Higgins v. Selsky, 811 N.Y.S.2d 470 (3d Dep't 2006), it had held that it was proper for the Commissioner to order a rehearing upon his administrative review of an inmate disciplinary hearing even where an error requiring the reversal is of constitutional dimension (as opposed to only being a violation of a regulatory right).

Michael Hughes represented himself in this Article 78

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