

Pro Se

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CLASS CERTIFIED IN CHALLENGE TO HALT ACT IMPLEMENTATION

Three incarcerated individuals, on behalf of themselves and all similarly situated individuals, brought a hybrid Declaratory Judgment action and an Article 78 proceeding asking the Court to declare that DOCCS' disciplinary confinement policy is contrary to the provisions of the HALT Solitary Confinement Act (HALT Act). Specifically, the three Plaintiffs-Petitioners allege that DOCCS has been placing individuals in disciplinary confinement for more than three days without determining that the individual engaged in serious misconduct as defined in the HALT Act.

The case, captioned by Westlaw as *Fuquan F. v. Anthony Annucci*, * was filed as a class action for declaratory relief, meaning that the plaintiffs, in addition to challenging their individual disciplinary hearing results, have asked the Court to declare that DOCCS is violating the HALT Act's limits on extended disciplinary confinement. **The *Fuquan F.* action is not asking for money damages.**

Then-Commissioner Anthony Annucci opposed the Plaintiffs-Petitioners' motion for

class certification and moved to dismiss the action. On September 11, 2023, the Court granted the Plaintiffs-Petitioners' motion for class certification and denied the Defendant-Respondent's motion to dismiss. *Fuquan F. v. Annucci*, 2023 WL 6168327 (Sup. Ct. Albany Co. Sept. 11, 2023).

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2023 - THE YEAR IN PERSPECTIVE

A Message from the Executive Director, Karen L. Murtagh

As 2024 begins, I am dedicating this “Message” to a wrap-up of some of the highlights of 2023 – legislative and otherwise – of particular relevance to the readership.

FALSE POSITIVE DRUG TESTS

You may recall that in January 2022, NYS Inspector General Lucy Lang reported that, due to inaccurate results from a drug screening device made by manufacturer Microgenics Corp., incarcerated individuals in DOCCS custody had been wrongfully disciplined for using drugs.

See: [doccs-microgenics_2764.316.2019_alb_report_20220103.pdf \(ny.gov\)](#)

Another report by the same State IG, released on November 23, 2023 (2023 IG Report), found additional evidence that DOCCS relied on false positive drug test results of allegedly controlled substances that also adversely impacted individuals in DOCCS custody. See: [DOCCS Drug Testing Program Report \(ny.gov\)](#)

Specifically, the 2023 IG Report found, DOCCS unfairly punished more than 2,000 incarcerated individuals, when as a result of the use of inadequate drug testing procedures, DOCCS determined the individuals were in possession of illegal substances without a sufficient evidentiary basis for doing so. This resulted in the wrongful imposition of solitary confinement, the wrongful suspension of family visits and the wrongful cancellation of parole hearings.

As in the IG’s 2022 Report finding that DOCCS should have had its positive urinalysis test results confirmed by an outside lab before sanctioning incarcerated individuals for drug use, the 2023 Report found that DOCCS had failed to have the positive results from its testing of suspected contraband confirmed by an outside lab. The manufacturer of the NARK II contraband screening device that DOCCS was using, Sirchie Finger Print Laboratories, claimed that the results of its drug tests should be treated as preliminary and unconfirmed.

The 2023 IG Report also found that DOCCS had failed to follow the protocols meant to prevent the misidentification of contraband or the cross-contamination of samples. The Report recommended that DOCCS provide additional training to testing officers and require them to notify their supervisors when potential discrepancies arise. It also called for tracking drug test results through a central inventory of tests to monitor for any trends that may hint at future errors.

DOCCS raised the issue concerning the testing of suspected illegal substances with the state Inspector General in August 2020. Based on findings during the investigation, prison officials eventually reversed and expunged 704 disciplinary infractions based on the positive test results, according to the report. In an additional 2,068 Tier III hearings that involved drug possession as well as non-drug possession charges, DOCCS dismissed the drug possession charges.

Said IG Lang, "This investigation and the subsequent policy changes and record expungements represent one step closer to ensuring the level of integrity we should all expect and demand from the State."

By 2021, DOCCS had contracted an outside lab to provide confirmatory testing and also created a new position for a senior officer responsible to ensure drug testers follow appropriate instructions.

Said DOCCS Acting Commissioner Daniel F. Martuscello III, "While the detection and removal of these substances is imperative, it must be done with accuracy and fairness."

LEGISLATIVE HIGHLIGHTS

There are two recently enacted pieces of legislation of particular importance to our readership that I will highlight here. More information on these items can be found elsewhere in this issue of *Pro Se*.

(1) Affirmations have replaced affidavits in civil actions in NYS.

A5772/S5162 (chapter 559 laws of 2023) takes effect on January 1, 2024. The law now states that "statements of truth" in civil actions filed in New York State courts no longer require notarization. This means that when individuals submit such statements in civil actions – for example, Article 78 or habeas petitions – their signatures do not have to be notarized. An example of such an affirmation is provided on pages 7-8 in this issue of *Pro Se*.

(2) The "Clean Slate Act" is now the law in NYS.

S7551A/A1029C (chapter 631 Laws of 2023) takes effect on November 16, 2024. Pursuant to the new law, NYS will automatically seal misdemeanor and felony convictions after the passage of set periods of time. Convictions for sex offenses and Class A felonies, with the exception of Class A Drug felonies, are excluded from the sealing provisions. Again, more information on "Clean Slate" is provided in this issue of *Pro Se*.

The readership should take further note that while "Clean Slate" takes effect in November 2024, the law also gives the Office of Court Administration up to three years to implement the processes necessary to identify and seal all eligible records.

LITIGATION

Of the many cases summarized in this issue of *Pro Se*, I would like to highlight one.

In *Fuquan F.*, 2023 WL 6168327 (Sup. Ct. Albany Co. Sept. 11, 2023), a class action suit, three incarcerated individuals, on behalf of themselves and all similarly-situated individuals, sought a declaratory judgment from the Court that DOCCS' disciplinary confinement policy was contrary to the provisions of the Humane Alternatives to Long Term Solitary Confinement Act (HALT Act). Specifically, these three individuals alleged that DOCCS had been placing individuals in

disciplinary confinement for more than three days without determining that they engaged in serious misconduct as defined in the HALT Act.

The Court denied the Defendant-Respondent's motion to dismiss and granted the Plaintiffs-Petitioners' motion for class certification.

It is important for the readership to note that this lower State court decision is not a final determination of the Plaintiffs-Petitioners' claim, nor does it require DOCCS to immediately change its disciplinary policies or practices. The decision means that the plaintiffs-petitioners can move forward with the case and present evidence to prove the merits of their claims. Also, the *Fuquan F.* case is not seeking money damages.

A "THANK YOU" AND A CALL FOR ART SUBMISSIONS

Lastly, I want to thank all of our readers who took the time to respond to this year's 'call for submissions' for our Pro Bono Event which focused on reducing recidivism. The event was held on October 19, 2023 at Albany Law School and your submissions were instrumental in shaping the dialogue and providing inspiration and insight on a very complex and often misunderstood topic.

In preparation for our next Pro Bono Event, I encourage the readership to review our "Call for Submissions" highlighted in this issue of *Pro Se*. As you will see, for our October 2024 Pro Bono Event, we are calling for *art submissions* from people incarcerated in New York State prisons. We are hopeful that your submissions will be as generous and impactful as submissions from our readers have been in the past.

Our hope with this "Call" is threefold: (1) to educate the public; (2) to highlight the humanity of all people – behind and outside of prison walls; and (3) to assist PLS in recruiting attorneys to take cases pro bono.

And, on that note, I want to convey to the readership my best wishes for the holidays and a better new year.

... *Continued from Page 1*

This decision is not a final decision on the claims in the lawsuit, and it does not require DOCCS to immediately change its disciplinary policies or practices. The decision means that the Plaintiffs-Petitioners can move forward with the case and present evidence to prove their claims. If the court grants relief to the class later in the case, the court's decision will apply to:

“All individuals in DOCCS custody who are or will be placed in segregated confinement for more than three consecutive days, or six days in any 60-day period; a residential rehabilitation unit; or any other unit for which compliance with the requirements of [Correction Law §137(6)k(ii)] is required before placement.”

Individuals who fall within this definition are automatically members of the class and do not need to take any further action to be included in the class.

To more fully understand the Court's ruling, it is helpful to review how the HALT Act changed the procedures that DOCCS must use, and the written findings that must be made, prior to placing incarcerated individuals in “extended disciplinary confinement.”

The HALT Act prohibits segregated confinement – defined in Correction Law (CL) §2(23) as cell confinement in excess of 17 hours a day – for more than 15 days and strictly limits any disciplinary confinement – including confinement in a Residential Rehabilitation Unit (RRU) – for more than 3 consecutive days (or 6 days in any 30-day period). In this article, we refer to disciplinary confinement beyond 3/6 days as extended disciplinary confinement.

Correction Law §137(6)(k)(i) provides that before an incarcerated individual may be placed in extended disciplinary confinement, the criteria of CL §137(6)(k)(ii) must be met. Known as the (k)(ii) criteria, this section of the law both defines the types of misconduct that can lead to extended disciplinary confinement and sets forth the procedures DOCCS must use, and findings it must make, to support a determination that an incarcerated individual's conduct permits extended disciplinary confinement.

To meet the extended disciplinary confinement provisions set forth in CL §137(k)(ii), in addition to proving that an alleged act of misconduct falls within the types of misconduct with respect to which (k)(ii) permits extended disciplinary confinement, the DOCCS Commissioner or the Commissioner's designee must **make a written determination, based on specific objective criteria**, that the conduct was so **heinous** (evil) or destructive that housing the individual in general population creates a significant risk of imminent serious physical injury to staff or other incarcerated persons and creates an unreasonable risk to the security of the prison.

In *Fuquan F.*, the three Plaintiffs-Petitioners allege that DOCCS violated the HALT Act by imposing extended disciplinary sanctions on them without having made:

1. A written determination that their conduct fell within the type of misconduct for which extended disciplinary confinement may be imposed; and
2. A written determination that their misconduct was so heinous or destructive that their placement in

general population would create a significant risk of imminent serious physical injury to staff or other incarcerated individuals and creates an unreasonable risk to the security of the prison.

Rather than make these findings for each accused person, the Plaintiffs-Petitioners allege, DOCCS deems all Tier III disciplinary charges to qualify as k(ii) offenses whether the acts alleged actually meet the k(ii) criteria.

In reply, the Defendant-Respondent argued that the case should be dismissed on the merits because:

1. The HALT Act does not limit the length of the sanctions that can be imposed for misconduct; rather it defines where those sanctions can be served and limits the time an individual may be placed in segregated confinement; and
2. The written findings which the HALT Act requires are implicit and self-evident from the hearing records of the three Petitioners and thus the imposition of extended disciplinary confinement sanctions is legal.

The Court disagreed with the Defendant-Respondent's argument that the case should be dismissed on the merits, noting that in its motion to dismiss the Defendant-Respondent:

1. Failed to address the allegation that DOCCS has adopted a policy that essentially leads to an automatic classification of all Tier III offenses as meeting the criteria for extended disciplinary confinement; and

2. Did not dispute that DOCCS does not make case-by-case determinations, nor does DOCCS make findings of fact that are set forth in written decisions.

For these reasons, the Court denied the motion to dismiss on the merits.

The Defendant-Respondent also argued that the action should be dismissed because the claims are for declaratory relief and government actions – such as decisions in Tier III hearings – must be challenged in Article 78 proceedings. The Court disagreed with the argument that the declaratory judgment portion of the action should be dismissed. “[I]nsofar as Petitioners seek review of an allegedly continuing policy,” the Court wrote, “a declaratory judgment action is appropriate.”

Turning to the issue of whether the Plaintiffs-Petitioners' proposed class definition meets the criteria for class certification, the Court first set forth those criteria. To be certified as a class, the party proposing the class must establish that:

1. The class is so numerous that joinder of all members, whether otherwise required or permitted is **impracticable** (impossible to do in an effective way);
2. Common questions of law or fact predominate over any questions affecting only individual members;
3. The claims of the representative parties are typical of the claims of the class;
4. The representative parties will fairly and adequately protect the interests of the class; and

5. A class action is superior to other available methods for the fair and efficient adjudication of the controversy.

In *Fuquan F.*, the Court found that “while the facts and circumstances and **alleged transgressions** (charged misconduct) of each Petitioner are distinct, the fundamental issue that they all raise is the same,” that is to say, they each claim that:

- The Respondent is obligated to make case-by-case determinations regarding the specific misconduct;
- The HALT Act requires the Respondent to make written findings of fact and DOCCS has failed to do so; and
- The policy the Respondent is following is not in compliance with the HALT Act.

The Court then found that the Plaintiffs-Petitioners’ proposed class met the remainder of the criteria for class certification.

Based on the analysis set forth above, the Court denied the Defendant-Respondent’s motion to dismiss and granted the Plaintiffs-Petitioners’ motion for class certification.

* The caption in the pleadings filed in the Supreme Court, Albany County, identified the three plaintiffs by name. In order to assist our readers in getting copies of the decision, we reference the case by its Westlaw caption.

Prisoners’ Legal Services of New York and the New York Civil Liberties Union represent the Plaintiffs-Petitioners in this combined Declaratory Judgment action and Article 78 proceeding.

NEWS & NOTES

Affirmations Have Replaced Affidavits in Civil Actions in NY

Statements of truth in civil actions filed in New York State courts no longer require notarization. This means that when individuals submit such statements in civil actions – for example, Article 78 or Habeas petitions – their signatures do not have to be notarized. This change is found in Civil Practice Law and Rules (CPLR) 2106. As of January 1, 2024, the revised rule, entitled “Affirmation of Truth of Statement,” states:

“The statement of any person wherever made, subscribed and affirmed by that person to be true under the penalties of perjury, may be used in an action in New York in lieu of and with the same force and effect as an affidavit. Such affirmation shall be in substantially the following form:

I affirm this ____ day of _____, _____, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law.

(Signature)

Because the language of the sample affirmation in CPLR 2106 is intended to be used by individuals whose lawyers draft the documents for their clients’ signatures, *pro se*

plaintiffs and petitioners should consider substituting the following language:

I affirm this ___ day of _____, _____, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document will be filed in an action or proceeding in a court of law.

(Signature)

The change in the law does not affect requirements with respect to the written statements of defendants in criminal proceedings. In criminal proceedings in New York State, defendants (and their witnesses) must continue to submit notarized statements known as affidavits.

CLEAN SLATE ACT

Effective November 16, 2024, New York will automatically seal the criminal misdemeanor and felony convictions after the passage of set periods of time. Sex offenses and Class A felonies – with the exception of Class A drug offenses – are excluded from the sealing provisions.

Misdemeanor convictions will be sealed three years after the defendant’s release from jail if a sentence was imposed or three years from the date of conviction if no jail sentence was imposed.

Felony convictions will be sealed eight years after 1) the defendant was last released where they were serving a sentence for the conviction and the defendant is no longer under probation or parole supervision relating to the conviction that they are

seeking to have sealed or 2) the conviction if no sentence of incarceration was imposed; and provided the convicted person maintains a clean record.

Certain felony convictions are excluded from the sealing provisions, including:

- A conviction for an offense defined as a sex offense or a sexually violent offense under Correction Law §168-A;
- A conviction for a Class A felony offense EXCEPT for a Class A felony offense defined in Penal Law Article 220 (Drug Offenses).

Speaking in support of the law after the governor signed it into law, Tompkins County District Attorney Matthew Van Houten explains the purpose of the law and its value, “... [W]e should recognize that people who have made mistakes in the past or committed crimes due to systemic inequities should not be punished for the rest of their lives. Individuals who have remained stable and law abiding should be given the opportunity to seek jobs, housing and education, which would otherwise be unavailable due to criminal justice involvement from years ago.”

While the law is effective in November 2024, it also gives the Office of Court Administration up to three years to implement the processes necessary to identify and seal all eligible records.

CALL FOR SUBMISSIONS

HELP PRISONERS' LEGAL SERVICES CELEBRATE NATIONAL PRO BONO WEEK

National Pro Bono Week (October 20 – 26, 2024) is a time to celebrate and recognize the dedicated work of *pro bono* volunteers, as well as to educate the community about the many legal and other issues faced by incarcerated New Yorkers. PLS is happy to announce that this year we will again be celebrating National Pro Bono Week with an event highlighting our commitment to serving the incarcerated community.

This will be our 13th year celebrating National Pro Bono Week, and we are excited to announce that we will be hosting an art exhibit at the Albany Public Library, featuring artwork created exclusively by people incarcerated in New York State prisons.

Inspired by the artwork that has been shared with PLS throughout the years, we are seeking art submissions from incarcerated people which display their talent and abilities and give them an opportunity to express themselves through their art.

Unlike past years where our Pro Bono Event has focused on specific topics such as solitary confinement, immigration, or recidivism, this year's event is not focused on a particular aspect of prison life; instead, we are focusing on how incarcerated people choose to express themselves artistically. Our goal is to give every incarcerated New Yorker a chance to contribute and visually express themselves. We are seeking artwork from individuals with all levels of experience, from beginners

to advanced artists. We are aware not everyone who is incarcerated has access to art supplies, and will be accepting submissions of all shapes and sizes, whether made with pen, pencil, or specialized art supplies.

Selected works of art will be displayed in a month-long art exhibit, beginning at a 'to-be-determined' time in October 2024, at one of the branches of the Albany Public Library in Albany, New York. We will notify selected artists before the art exhibit takes place, so that family and friends will have an opportunity to view the exhibit. Please note, the artwork for our event must be appropriate for all ages to view.

Works of art should be mailed to: Pro Bono Director, Prisoners' Legal Services of New York, 41 State Street, Suite M112, Albany, New York 12207, **no later than June 28, 2024.**

We regret we will not be able to return any artwork submitted to us, whether or not it is selected for the exhibit.

By sharing the artwork of incarcerated people, we hope to educate the public, highlight the humanity of those who are incarcerated, and recruit attorneys to take cases *pro bono*, thus increasing access to justice for indigent incarcerated persons across New York State. While we cannot guarantee that each piece will be included in our art show, we encourage all submissions and will do our best to integrate as many as possible into the show.

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

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

- I authorize PLS to display my submission at their 2024 Pro Bono Event.
- PLS may display my real name on or near my submission.
- I authorize PLS to use my submission on their website, in *Pro Se*, and/or for other informational purposes.
- My submission can be used again by PLS after the event.

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, are not required to register as a sex offender, and are returning to one of the five (5) boroughs of New York City or to one of the following counties: Dutchess, Erie, Genesee, Monroe, Niagara, Orange, Orleans, Putnam, Rockland, Sullivan, Ulster, Westchester or Wyoming. 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

In this issue of *Pro Se*, the PREP spotlight shines on **RISE**, the workforce development program of FeedMore WNY. **RISE** stands for **R**eading **I**ndividuals for **S**uccess and **E**mployment. **RISE** offers a free 10-week training program to prepare you for a career in warehousing and logistics. Participants will have access to earning their Certified Logistics Associate (CLA) and Certified Logistics Technician (CLT) certifications, ServSafe Food Handler's training, OSHA training, and construction training and certification. **RISE** participants receive free child care and financial assistance with training-related transportation costs.

If you are returning to Erie County, you may contact RISE before you leave prison by writing to RISE c/o Feedmore WNY at 100 James E. Casey Dr., Buffalo, NY 14206. After your release from prison, you can apply to RISE by visiting Feedmore WNY at the address above or by calling the organization at (716) 822-2025 x3032.

PRO SE VICTORIES!

Matter of Jessie J. Barnes v. Michael Ranieri, Index No. 2020-500 (Sup. Ct. Franklin Co., Aug. 15, 2023). In July and August, 2020, in four separate Freedom of Information Law (FOIL) requests, Jessie Barnes requested the following records:

Request 1: The 12/17/19 memo from D. Wilcox, IGPs to Barnes, J. and any grievances or letters annexed that this memorandum is based on.

Request 2: A copy of the 12/9/2019 letter to Donna Wilcox from J. Barnes and any response from D. Wilcox.

Request 3: The 1/22/2020 memo from D. Wilcox, IGP to IGRC related to Jessie Barnes; and

Request 4: Any “Routing Slip”: for incident involving J. Barnes 6/18/19, 8/6/19, 5/18/20, and 6/21-22/18.

In response to Requests 1, 2 and 3, the FOIL Officer advised Mr. Barnes that the records could not be located as described and that he should be more specific. Attached to the responses was a two-page document labelled Inmate Grievance Summary which listed 112 grievances filed by Mr. Barnes from 1/2/2019 through 8/10/2020. In response to Request 4, the FOIL Officer wrote: Record does not exist.

Mr. Barnes appealed the responses to Requests 1-3, arguing that they were obscure and the grievance summary was irrelevant and not the requested document. In his

appeal of the denial of Request 4, Mr. Barnes argued that the routing slips must exist because that are required to be attached to every use of force report and every unusual incident report.

After the denials were administratively affirmed, Mr. Barnes filed an Article 78 challenge, arguing that the responses were arbitrary and capricious because he had been the subject of five use of force incidents and the denial of information relating to these incidents is a violation of due process and his state and federal constitutional rights.

The Respondent argued that with respect to Requests 1-3, FOIL requests must reasonably describe the records sought, which the Respondent argued, the records requested by Mr. Barnes’ were not, and, with respect to Request 4, the agency cannot produce records that do not exist.

The Court began its consideration of the issues raised by Requests 1-3 by noting that Public Officers Law §89(3) requires that where the requested records are reasonably described, agencies must make the records available within five days of receiving a request. Further, the Court noted, the Committee on Open Government (COOG) has interpreted this portion of the statute to mean that “information sufficient to reasonably describe the records sought” requires the applicant to provide sufficient detail to enable agency staff to locate the record. See COOG AO 11543.

The Court then turned to *Matter of Konigsberg v. Coughlin*, 68 N.Y.2d 245 (1986). In *Konigsberg*, the Court of Appeals held that records requested from state agencies need only be described in a manner that permits the agency to locate the records. Applying the *Konigsberg* standard, the *Barnes* Court did not

agree that the records requested in Requests 1-3 were insufficiently described and found that DOCCS had failed to establish that the descriptions were insufficient for the purposes of identifying and locating the documents.

With respect to Requests 1, 2 and 3, the Court found that Mr. Barnes had provided the type of document sought, the date of the document, the document's author and the addressee. That additional information might be helpful, the Court wrote, is not the test of whether a document has been reasonably described. All of the records were created in the near past, and there was no showing that the author did not have copies of them. Based on this analysis, the Court ordered DOCCS to produce the records described in Requests 1-3.

The Court found that the records requested in Request 4 were exempt from disclosure under the intra-agency exemption. Intra-agency documents are those that are circulated among the employees within an agency. Public Officers Law §87(2)(g) provides that only the intra-agency materials listed below are available to the public:

- i. Statistical or factual **tabulations** [facts put into a table] or data;
- ii. Instructions to staff that affect the public;
- iii. Final agency policy or determinations;
- iv. External audits, including but not limited to audits performed by the comptroller and the federal government.

While the Court of Appeals takes a narrow view of the records that are statutorily exempt from disclosure, the Court in the *Barnes* case concluded that the requested records are not subject to disclosure under FOIL. The Court also wrote that there was “no

reason not to believe the Respondent's consistent response that the records simply do not exist.”

If you are interested in more information about the process for obtaining records from DOCCS, please request the PLS memo, “Access to Records” from the PLS office that provides services to the incarcerated individuals at the prison where you are reside.

***Pro Se Victories!** features summaries of successful pro se administrative advocacy and unreported pro se litigation and. In this way, we recognize the contribution of pro se jailhouse litigants. We hope that this feature will encourage our readers to look to the courts for assistance in resolving their conflicts with DOCCS. The editors choose which unreported decisions to feature from the decisions that our readers send us. Where the number of decisions submitted exceeds the amount of available space, the editors make the difficult decisions as to which decisions to mention. Please submit copies of your decisions as Pro Se does not have the staff to return your submissions.*

STATE COURT DECISIONS

Disciplinary and Administrative Segregation

Tier III Hearing Challenge Yields Mixed Results

Jerome Mack was charged with refusing a direct order, making threats, creating a disturbance, harassing an employee and being out of place. The misbehavior report alleged that after twice being told to hang up

the telephone (because his time had expired) and lock in, Mr. Mack first refused to get off the phone, and when he did terminate the call, Mr. Mack subjected the officer to a profanity laced tirade and verbally attacked the officer's character.

The hearing officer found Mr. Mack guilty of all the charges. After he had received a decision denying his administrative appeal, Mr. Mack filed an Article 78 challenge to the hearing. In his petition, Mr. Mack argued that:

1. Substantial evidence did not support the charges of making threats and creating a disturbance;
2. There was a misunderstanding about the time Mr. Mack was permitted to use the phone; and
3. Mr. Mack was improperly denied access to an employee assistant.

In *Matter of Mack v. Annucci*, 193 N.Y.S.3d 760 (3d Dep't 2023), the Court considered each of these arguments. With respect to the substantial evidence argument as it applied to the charges of threats and creating a disturbance, the Court ruled that the charges were not supported by substantial evidence. The Respondent conceded this point. The Court found that determinations of guilt with respect to the remaining charges were supported by substantial evidence.

The Court rejected the defense that there was a misunderstanding about the time Mr. Mack was permitted to use the phone. The Court found that misunderstanding or not, Mr. Mack was required to obey the officer's order to terminate the phone call. Thus, the Court found, the misunderstanding was not a defense to the charges.

Finally, the Court held that because Mr. Mack was not in pre-hearing confinement, he was not entitled to an employee assistant and thus, the failure to provide an assistant did not violate 7 NYCRR 251-4.1(a), the regulation controlling when an incarcerated individual accused of violating one or more of the rules set forth in the Standards of Incarcerated Individual Behavior is entitled to an assistant.

Jerome Mack represented himself in this Article 78 proceeding.

Parole

Court Gives Advice to Board of Parole

Everton Hibbert was convicted of murder in the second degree and sentenced to 20 years to life for killing the mother of his 2 year-old child. In *Matter of Hibbert v. New York State Division of Parole*, 219 A.D.3d 1038 (3d Dep't 2023), Mr. Hibbert challenged the Board of Parole's decision denying release to parole supervision. The Article 78 challenge followed an unsuccessful administrative appeal of the denial of parole made at his second parole hearing.

The Court began its decision by reviewing the law pertaining to challenges to Parole Board denials of release to parole supervision. First, the Court pointed out, "parole release decisions are discretionary and will not be disturbed as long as the Board complied with the statutory requirements set forth in Executive Law §259-j." Second, the law requires the Board to determine whether "if the applicant is released, there is a reasonable

possibility that the incarcerated individual will live and remain at liberty without violating the law” and whether release to parole supervision “is not incompatible with the welfare of society and will not so deprecate the seriousness of the crime as to undermine respect for the law.”

In making the determinations discussed in preceding paragraph, the Court wrote, the Board must consider, among other statutory factors:

- the individual’s institutional record – including program goals and accomplishments, academic achievements vocational education and training and work assignments;
- The individual’s post-release plans;
- The seriousness of the underlying crime;
- The individual’s criminal record; and
- The COMPAS Risk and Needs Assessment instrument.

The Board is not, the Court noted, required to discuss or give equal weight to each factor.

Applying this analysis to the hearing transcript and the Board’s written decision, the Court found that the Board had considered the statutory factors and recognized the Petitioner’s low score on the COMPAS assessment. However, the Court wrote, the Board was “troubled by” the Petitioner’s refusal to enroll in substance abuse and anger management programs.

The Board also considered the Petitioner’s sentencing minutes, the letters from the District Attorney, Petitioner, and Petitioner’s supporters, and the existence of a deportation order to Jamaica.

The Court concluded it could not say that the Board’s decision showed “irrationality bordering on impropriety.” For this reason,

the Court affirmed the lower court’s decision dismissing the petition.

Everton Hibbert represented himself in this Article 78 proceeding.

Sentence and Jail Time

Sentence Reduced Based on DVSJA

In 2017, Theresa G. was arrested for stabbing her boyfriend and charged with attempted murder in the second degree. In early 2019, she pled guilty to assault in the first degree and was sentenced to eight years and five years post-release supervision.

Recently, Ms. G. moved for resentencing under Criminal Procedure Law (CPL) §440.47. This section of the CPL is known as the Domestic Violence Survivors Justice Act (DVSJA). When certain criteria are met, the law allows a sentencing court to resentence a domestic violence survivor whose sexual, psychological or physical abuse contributed to the conviction.

CPL §440.47 allows a court to reduce the sentence when the court determines:

1. The defendant was the victim of an abusive relationship at the time of the offence;
2. Abuse was a significant contributing factor in the commission of the offense; and

3. The sentence is unduly harsh considering the circumstances of the crime and the character of the defendant.

In *People v. Theresa G.*, 2023 WL 2764721 (Sup. Ct. Kings Co. Mar. 31, 2023), the Court found that Defendant G. had met the criteria for a sentence reduction. First, the People conceded that the Defendant met the first criterion: the Defendant was in an abusive relationship at the time of the offense, was the victim of domestic violence and was subjected to substantial physical and psychological abuse inflicted by her boyfriend, the victim in the case.

At the hearing, a forensic psychologist who had examined the Defendant testified that she had been the victim of “extreme abuse” by her partner (the victim). The witnesses whom the psychologist had interviewed had witnessed the victim beating, choking and burning the Defendant. The Defendant’s daughter testified to the abuse that she had witnessed and the photographs that she had taken of the Defendant’s injuries were entered into evidence.

The Defendant also testified about the physical and psychological abuse the victim had inflicted, including on the day of the offense, when she “came home to an angry boyfriend, entering an apartment of physical and psychological tumult.”

Thus, the Court found, the Defendant had established that the victim’s abuse was a significant contributing factor to the Defendant’s criminal behavior.

With respect to the third factor – whether the sentence was unduly severe in light of circumstances of the crime and the character of the defendant – the Court made the following findings:

- Prior to the incident, the Defendant had lived crimefree for 43 years;
- Despite suffering childhood abuse, the Defendant had a long and steady employment history with one employer;
- The Defendant had the support of her daughters and many friends; and
- While in prison, the Defendant had no disciplinary violations and had taken advantage of programming.

Thus, the Court concluded the Defendant had met the third statutory criterion.

Having found that the Defendant met the statutory criteria for a reduction in sentencing, the Court vacated the sentence, found the Defendant had served sufficient time and imposed a determinate sentence of four years and two and half years of post-release supervision.

Courtney Crosby, Esq., Appellate Advocates, New York, New York, represented Theresa G. in this Criminal Procedure Law §440.47 proceeding.

Statute Requires Sentences to Run Consecutively

In 1997, Rashid Rahman, who had been convicted in 1989 of murder in the second degree was re-sentenced to 15 years to life. After he was released to parole supervision, Mr. Rashid was convicted of burglary in the second degree and several other offenses, and in 2014, he was sentenced as a second felony offender to 15 years and 5 years post-release supervision (PRS). When he was returned to

DOCCS custody, DOCCS computed his 2014 sentence to run consecutively to his 1997 sentence. The 2014 sentencing minutes were silent with respect to the relationship between the two sentences.

In *Matter of Rahman v. Annucci*, 219 A.D.3d 1040 (3d Dep't 2023), Mr. Rahman challenged DOCCS' determination that the two sentences should run consecutively. He argued that because the sentencing minutes were silent as to the relationship between the two sentences, Penal Law (PL) §70.25(1)(a) provides that the sentences must run concurrently.

The Court disagreed. First, the Court noted, while Penal Law §70.25(1)(a) requires that when the sentencing order is silent as to the relationship between sentences, those sentences run concurrently, Penal Law §70.25(2-a) provides that when a defendant is sentenced as a second violent felony offender pursuant to Penal Law §70.04 for a crime committed after the imposition of the first sentence, as Mr. Rahman was, the sentences must run consecutively.

In reaching this result, the Court relied on the Court of Appeals decision in *People ex rel. Gill v. Greene*, 12 N.Y.3d 1 (2009). In *Gill*, the Court held that such sentences run consecutively even if the sentencing court did not expressly pronounce the manner in which the sentence is to run. Based on this analysis, the Court held that the lower court had correctly dismissed the petition.

Rashid Rahman represented himself in this Article 78 proceeding.

Court of Claims

Appellate Court Dismisses Failure to Protect Claim

Alleging that he was stabbed by another incarcerated person due to the negligence of DOCCS employees, Kevin Armwood filed a claim for damages in the Court of Claims. The trial court denied the State's motion for summary judgment, whereupon the State appealed.

In *Armwood v. State of New York*, 219 A.D.3d 970 (2d Dep't 2023), the Appellate Court reversed the lower court's decision. The Court began its analysis by noting that “[h]aving assumed physical custody of [incarcerated individuals], who cannot protect themselves in the same way as those at liberty can, the State owes a duty of care to safeguard [incarcerated individuals], even from attacks by fellow [incarcerated individuals].”

However, the Court continued, the State is not an insurer of the safety of incarcerated individuals. Thus, negligence cannot be established by evidence that shows only that an incarcerated individual was assaulted by another incarcerated individual. Liability for injuries resulting from an attack by another incarcerated individual is limited to assaults that are reasonably foreseeable.

In *Armwood*, the Appellate Court agreed with the lower court's finding that the risk of harm – that is the assault – was not reasonably foreseeable. The facts supporting this conclusion included:

- Mr. Armwood did not know his assailant;
- The assailant unexpectedly engaged in a surprise attack against Mr. Armwood; and
- DOCCS requires every incarcerated individual who goes into the yard where Mr. Armwood was attacked to go through a magnometer and does random pat frisks – presumably to find weapons that would not be detected by the magnometer.

The Court rejected Mr. Armwood’s argument that the failure to use a particular magnometer – presumably a magnometer that is more effective than that used by DOCCS – rendered the assault reasonably foreseeable. Rather, the Court found, DOCCS is “vested with broad discretion in their formulation of security related policies.”

In a dissenting opinion in which Justice Dowling concurred, Justice Braithwaite Nelson noted that foreseeability is not limited to knowledge that the claimant was particularly vulnerable to attack. Rather, the dissenting justice wrote, foreseeability includes “the State’s constructive notice – what the State reasonably should have known – for example, from its knowledge of risks to a class of [incarcerated individuals] based on the institution’s expertise or prior experience, or from its own policies and practices designed to assess such risks.”

Thus, Justice Braithwaite Nelson wrote, for the State to be granted summary judgment in a failure to protect case, “there must be only one conclusion that can be drawn from the undisputed facts – that as a matter of law, injury to the claimant was not reasonably foreseeable.”

Turning to the facts in *Armwood*, the dissenting justices noted that at his deposition, a captain testified that prison staff knew that incarcerated individuals used stainless steel weapons which are not detectable to the prison magnometers when the weapons were sheathed. The same captain also testified that DOCCS knew that there were magnometers that were able to detect such weapons. This evidence, which according to the dissenting judges, “established that the State was aware that incarcerated individuals used stainless steel blades which could not be detected by the security measure in place on the day of the incident, failed to establish as a matter of law that the injury to the claimant was not reasonably foreseeable.”

Based on this analysis, the dissenting justices would have affirmed the decision of the lower court.

Andrew F. Plasse & Associates LLC, Flushing, New York, represented Kevin Armwood in this Court of Claims action.

Miscellaneous

Court Finds Official’s Basis for Denying Sneakers to Be Arbitrary and Capricious

A pair of sneakers sent to Anthony Arriaga was rejected by the prison mail room when a DOCCS employee determined that the sneakers were worth over \$80.00, the maximum value permitted for clothing at the time that the sneakers were received. In

response, Mr. Arriaga filed a grievance arguing that the sneakers were within the value outlined in Directive 4911. The Incarcerated Grievance Review Committee (IGRC) denied the grievance, finding that the sneakers were valued at more than \$80.00. On appeal, the Central Office Review Committee (CORC) upheld the decision. Mr. Arriaga then filed an Article 78 petition arguing that the denial was arbitrary and capricious. The Supreme Court, Albany County, dismissed the petition and Mr. Arriaga appealed.

In *Matter of Arriaga v. Quick*, 2023 WL 7028299 (3d Dep't Oct. 26, 2023), the Third Department noted that "judicial review of the denial of an incarcerated individual's grievance is limited to whether such determination was arbitrary and capricious, irrational or affected by error of law." The Court then turned to Directive 4911. At the time that this matter arose, Directive 4911 permitted incarcerated individuals to receive articles of clothing, including sneakers, that did not exceed a value of \$80.00. (the amount is now \$90.) The Court noted, however, that for the purposes of the Directive, the value of the article "shall be the actual purchase price, not including any tax, shipping or handling." See, Directive 4911, § III(A)(4).

Here, the Court continued, an internet search conducted by DOCCS personnel revealed that the retail price for the sneakers sent to Mr. Arriaga was between \$110.00 and \$140.00. The Petitioner (Mr. Arriaga) presented a sales receipt showing that the sneakers sent to him had been purchased for \$71.00.

In resolving the issue of the value of the sneakers, the Court noted that while DOCCS is authorized to conduct internet searches to determine value, the "determinative factor" in assessing the value of an article of clothing

is its purchase price." In reaching this conclusion, the Court wrote, "[M]any factors may influence an item's purchase price and items are routinely purchased for less than the suggested retail price." In the Court's view, while the internet showed a retail price of at least \$110.00, the difference between that price and the actual purchase price (\$71.00), was not a rational basis for determining that the receipt was inauthentic. Thus, the Court concluded that the denial of the Petitioner's grievance was arbitrary and capricious.

Anthony Arriaga represented himself in this Article 78 proceeding.

FEDERAL COURT DECISIONS

Permanent Injunction Issued in Case Challenging DOCCS' Treatment of Pain

In *Pro Se*, Volume 33, Number 5, we reported on the issuance of a preliminary injunction in *Peter Allen v. Carl Koenigsmann*. *Allen v. Koenigsmann* is a class action challenge to DOCCS' treatment of incarcerated individuals who suffer from chronic pain conditions. The *Allen* complaint alleges that "DOCCS medical providers are deliberately indifferent to the Plaintiff Class members' serious medical need of treatment for chronic pain and neuropathies." *Peter Allen v. Carl Koenigsmann*, 1:19-cv-08173 LAP, 2023 WL 8113230, at *1 (S.D.N.Y. Nov. 22, 2024).

Specifically, the Plaintiffs allege, DOCCS policies, customs, and practices deny, or allow the discontinuance of, pain medications without medical justification. *Id.* Finding that the plaintiffs were likely to succeed on the merits, on March 31, 2023, the Court certified

the class for the purposes of injunctive relief (but not for damages) and granted a preliminary injunction. *Id.*, at *2

The Court defined the *Allen* class as: “All incarcerated individuals who are or will be in the care and custody of the [NYS DOCCS] who suffer or will suffer from chronic pain and/or neuropathies who require individualized assessments of medical need for treatment with MWAP [medications with abuse potential] medications.” *Id.*

Having granted a preliminary injunction that due to limitations imposed by the Prisoner Litigation Reform Act [PLRA] could only remain in effect for 90 days, the Court scheduled a trial on the merits of the claim for injunctive relief. Following the trial, on October 31, 2023, the Court converted the preliminary injunction into a permanent injunction. *Id.*

Among the terms of the permanent injunction are the requirements that 1) the DOCCS Chief Medical Officer (CMO) order the Facility Health Services Directors (FHSDs), primary care physicians (PCPs), and relevant medical staff, to comply with Health Services Policy (HSP) 1.24A. HSP 1.24A, voluntarily adopted by the Defendants after the *Allen* complaint was filed, and 2) PCPs prescribe appropriate pain medications for incarcerated patients who suffer from chronic pain.

Since February 8, 2021, when this HSP 1.24A went into effect, officially, an incarcerated patient’s need for pain medication has been determined by their PCP; there is no other approval requirement for any additional approvals for the prescription of pain medication. Under the prior Health Services Policy, no medications with abuse potential

could be prescribed for people in DOCCS custody without the approval of the regional medical director.

Following the recent trial, the Court found that in spite of the revised policy, “DOCCS policies and customs still exist pursuant to which DOCCS providers fail to provide [incarcerated individuals] with reasonable pain medication without individualized assessments of their need for such medications.” *Id.* The Court also found:

- Plaintiffs have succeeded on the merits of an Eighth Amendment deliberate indifference claim and established they had suffered irreparable harm as a result of such deliberate indifference;
- The balance of equities tips in the Plaintiffs’ favor; and
- A permanent injunction would be in the public interest.

Thus, the Court found, it was necessary to incorporate the terms of HSP 124A into an enforceable injunction.

According to permanent injunction in *Allen v. Koenigsmann*, compliance with HSP 1.24A includes the following requirements:

- Giving DOCCS patients with chronic pain conditions the Problem Code 338 “Pain Management;”
- Allowing a PCP to prescribe any medication deemed appropriate for treatment of a patient’s chronic pain condition;
- Ordering Specialty consultations as indicated for the evaluation of chronic pain patients;
- Where the PCP rejects a Specialist’s recommendation, the PCP must:

- Document the reason for rejecting the Specialist’s recommendation in the patient’s AHR [ambulatory health record];
- Call the Specialist to clarify that the Specialist understands the pertinent details of the patient’s situation;
- If after speaking to the Specialist the PCP still does not accept the Specialist’s recommendation, the PCP will discuss the case with another DOCCS provider, FHSD, or the Regional Medical Director;
- Document the discussion in the patient’s AHR; and
- Make all treatment decisions.
- Discontinuing pain management medication only after a provider has met with the patient, discussed the issues regarding the use of medication, analyzed the patient’s situation, and subsequently determined that it is in the patient’s best interest for the medication to be discontinued;
- Recording the discussion with the patient regarding the continuance of pain medication and the reason for discontinuance of pain medication in the patient’s ambulatory health record (AHR);
- Ensuring that all patients with the pain medication designation Code 338 are seen by a PCP at least every 90 days; and
- Ensuring that each PCP meet with each patient at least annually to discuss the patient’s treatment plan.

After the injunction has been in effect for two years, the parties will individually inform the Court of their respective positions on whether

the terms of the injunction should continue or terminate.

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

IMMIGRATION MATTERS
Nicholas Phillips

This issue’s column focuses on *Paucar v. Garland*, 84 F.4th 71 (2d Cir. 2023), a precedential decision issued by the Second Circuit Court of Appeals on October 10, 2023. *Paucar* concerns the removal proceedings of Juan Pablo Paucar, a native and citizen of Ecuador who unlawfully entered the United States in 1999 when he was seventeen years old. In 2005, he married an Ecuadoran woman, and together they had two children, J.P. and S.P. In 2012, Mr. Paucar filed an application for asylum with the U.S. Citizenship and Immigration Services (“USCIS”), which denied his application and referred him for removal proceedings in the New York City Immigration Court.

In proceedings, Mr. Paucar applied for a form of relief from deportation known as Cancellation of Removal for Certain Non-Permanent Residents, often colloquially called “Non-LPR Cancellation.” To qualify for Non-LPR Cancellation, a noncitizen must demonstrate that:

1. he or she has been physically present in the United States for a

continuous period of not less than ten years prior to filing the application;

2. he or she has been a person of good moral character during that period;
3. he or she has not been convicted of a disqualifying criminal offense; and
4. the noncitizen's deportation "would result in exceptional and extremely unusual hardship to the [noncitizen's] spouse, parent, or child, who is a citizen of the United States or [a noncitizen] lawfully admitted for permanent residence." 8 U.S.C. § 1229b(b)(1).

In his application, Mr. Paucar sought to prove that his deportation would cause exceptional and extremely unusual hardship to his two U.S. citizen children, J.P. and S.P., who were seven and six years old respectively at the time of their immigration court hearing. Through his attorney at the Thomas T. Hecht Law Firm ("the Hecht Law Firm")—the same law office that represented Mr. Paucar in his asylum application before USCIS— Mr. Paucar submitted evidence of hardship which consisted largely of outdated letters from J.P.'s pediatrician describing her asthmatic condition, as well as various medical records from four to five years' prior to the hearing. The Immigration Judge ("IJ") denied Mr. Paucar's application, finding that while he satisfied the first three required elements for Non-LPR Cancellation, he had failed to prove that his deportation would cause

exceptional and extremely unusual hardship to a qualifying relative.

Represented by new counsel, Mr. Paucar appealed to the Board of Immigration Appeals ("the Board") and simultaneously moved the Board to remand his case to the IJ based on the ineffective assistance of prior counsel at the Hecht Law Firm. To qualify for such remand, a noncitizen must demonstrate that (1) prior counsel's representation fell below an objective standard of reasonableness, and (2) but for prior counsel's errors, there is a "reasonable probability" the IJ would have granted relief. *See Matter of Melgar*, 28 I. & N. Dec. 169, 171 (BIA 2020).

In support of the first prong, Mr. Paucar submitted a sworn declaration explaining that prior counsel had misled him into believing that he was eligible to apply for a green card because he had lived in the United States for ten years; that prior counsel instead submitted a frivolous asylum application with USCIS solely so that Mr. Paucar would be placed in removal proceedings; that Mr. Paucar was only able to speak with his counsel for less than one hour total during the nearly four years his case was pending; and that prior counsel therefore failed to adequately investigate his case. In support of the second prong, Paucar submitted several hundred pages of medical records showing that J.P. suffers from severe asthma requiring daily pills, two inhalers, and periodic injections when she is suffering from attacks—evidence which, according to Paucar, demonstrated a reasonable probability that he would have won if prior counsel had submitted it.

On January 22, 2021, a divided panel of the Board dismissed Mr. Paucar's appeal and denied his motion. In its decision, the Board agreed that prior counsel's representation was ineffective but found that he had not proven a reasonable probability that he would have won relief but for his prior counsel's failures. In so holding, the Board repeatedly cited its prior decision in *Matter of Coelho*, 20 I. & N. Dec. 464, 473 (B.I.A. 1992), a case which imposed a "heavy burden" on noncitizens seeking to reopen their removal proceedings based on newly available evidence.

Mr. Paucar timely petitioned for review by the Second Circuit, which granted the petition and remanded for additional proceedings before the Board. In its decision, the Second Circuit concluded that the Board had erred by applying the *Matter of Coelho* standard to Mr. Paucar's motion to remand, rather than the appropriate "reasonable probability" standard set forth by the Board in *Matter of Melgar*, 28 I. & N. Dec. at 169. This was error, reasoned the Court, because the Board had considered only whether Mr. Paucar's newly submitted evidence *conclusively established* his entitlement to Non-LPR Cancellation, whereas under the correct legal standard, Mr. Paucar "need only make a sufficiently strong showing to establish that there is a 'reasonable probability' of such entitlement to relief." 84 F.4th at 81.

The Second Circuit identified three additional legal errors with the Board's decision. First, in denying Mr. Paucar's motion, the Board had partially relied on the IJ's decision, reasoning that the IJ had

already considered and rejected many of the same issues raised by Mr. Paucar in his motion. The Second Circuit found this to be erroneous, observing that "[b]ecause Paucar's ineffective assistance of counsel claim was based on . . . failures to develop the record, it was error for the [Board] to reject this claim simply because some of the hardship issues raised on appeal had previously been considered in some form by the IJ." 84 F.4th at 82.

Next, the Court determined that the Board had erred by overlooking and mischaracterizing important parts of the record evidence. In addition to the medical records detailing J.P.'s severe asthma, Mr. Paucar had submitted mental health records showing that J.P. suffered from major depressive disorder with suicidal ideation; that she had been psychiatrically hospitalized for over two weeks in July 2020 after repeatedly trying to harm herself; and that she now requires constant monitoring, medication, and therapy. The Board dismissed this evidence on the grounds that J.P.'s mental health records "do not reference or describe the facts or issues underlying the mental health concerns that led to her hospitalization," and were not supported by "objective evidence." The Second Circuit rejected these contentions, finding that Mr. Paucar *had* provided objective evidence which the Board had simply ignored.

Finally, the Second Circuit concluded that the Board had erred with respect to Mr. Paucar's alternative request that his removal proceedings be remanded so that he could await adjudication of his U visa

application, which was pending before USCIS. (A U visa is a type of visa available to victims of a qualifying crime who assist law enforcement in the prosecution of that crime.) The Board had denied this request but the Second Circuit reversed, concluding that the Board had misapplied its decision in *Matter of Sanchez Sosa*, 25 I. & N. Dec. 807 (B.I.A. 2012), which set forth a legal standard for seeking a U visa while in removal proceedings. The Second Circuit therefore vacated the Board's decision in its entirety and remanded for additional proceedings.

WHAT DID YOU LEARN?

Brad Rudin

1. **Under the Clean Slate Act which convicted person would be eligible for the sealing of the conviction?**
 - a. An individual convicted of Class A sex offense who is no longer on probation or parole.
 - b. An individual convicted of a misdemeanor who has not yet been sentenced.
 - c. An individual convicted of a Class B felony eight years after sentencing providing certain conditions are met.
 - d. An individual convicted of a Class E felony if the incarcerated person at the time of sentencing has no Tier II and Tier III disciplinary cases while in custody.
2. **Starting on January 1, 2024, the Civil Practice Law and Rules (CPLR) will allow the filing of papers in civil actions in the New York state courts that are:**
 - a. notarized by non-lawyers.
 - b. not notarized.
 - c. notarized by a lawyer.
 - d. notarized by a named party in the lawsuit.
3. **Under Public Officers Law 87[2][g], a state agency is exempt from the disclosure of:**
 - a. all documents that are circulated among employees within an agency.
 - b. some documents that are circulated among employees within an agency.
 - c. any document that is a copy of the original.
 - d. all documents related to Tier 3 disciplinary hearings.
4. **In *Matter of Jessie Barnes v. Michael Ranieri*, the Article 78 Court ordered DOCCS to produce the records covered by Requests 1-3 because the FOIL applicant:**
 - a. needed the records for a federal civil rights action against Michael Ranieri.

- b. supplied all of the information that might be helpful in finding the requested records.
 - c. provided DOCCS with information that reasonably described the requested records.
 - d. allowed DOCCS sufficient time to find the required records.
- 5. When an incarcerated person is given a direct order, such as in *Matter of Mack v. Annucci*, and does not comply with that order, that the person misunderstood the order will constitute a defense in:**
- a. no circumstances.
 - b. all circumstances
 - c. those circumstances in which the misunderstanding was reasonable.
 - d. circumstances involving use of the phone.
- 6. According to the decision in *Matter of Hibbert v. NYS Division of Parole*, the Parole Board's decision to grant parole:**
- a. must give equal weight to all statutory factors.
 - b. may ignore all statutory factors if the parole applicant shows he or she is not likely to commit another felony.
 - c. may give different weight to each statutory factor.
- d. must not consider parole release for incarcerated persons not enrolled in a drug program.
- 7. Under CPL 440.47, the trial court may re-sentence an offender if he or she:**
- a. has avoided disciplinary offenses while incarcerated.
 - b. was given an unduly harsh sentence for a drug-related crime and has participated in drug treatment.
 - c. killed a domestic violence abuser in self-defense.
 - d. is a domestic violence survivor who has met certain criteria set forth in the statute.
- 8. In *Matter of Rahman v. Annucci*, the Court noted that when a defendant is subject to a previously imposed but undischarged felony sentence and another sentence imposed:**
- a. The sentences must run consecutively if the defendant is sentenced as a second violent felony offender.
 - b. The sentences must run concurrently if the sentencing judge is silent as to the relationship between the two sentences.
 - c. The sentences may run concurrently or consecutively if the sentencing judge is silent as to the relationship between the two sentences;

d. The sentences must run concurrently if the defendant was under the age of 16 at the time of that they committed the first offense.

d. correctly interprets the Eighth Amendment.

9. As the Court held in *Armwood v. State of New York*, the State is liable for an injury to an incarcerated person caused by another incarcerated person in:

Answers

- a. every situation because the State is the insurer of the safety of all incarcerated persons.
- b. those situations in which the victimized person is innocent of any wrongdoing.
- c. no situation because the State cannot be held responsible for the misconduct of all incarcerated persons.
- d. situations in which harm to an incarcerated person is reasonably foreseeable.

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

10. In *Matter of Arriaga v. Quick*, the Court noted that judges in Article 78 cases review administrative decisions to determine whether the decision:

- a. correctly interprets DOCCS directives.
- b. is arbitrary and capricious.
- c. is arbitrary and capricious and in violation of U.S. Bureau of Prisons policy.

Incarcerated Individuals at Albion and Bedford Hills Can Speak With a PLS Lawyer on the Phone

Once a week, PLS lawyers are available to speak on the phone with women at Albion and Bedford Hills Correctional Facilities about a variety of issues.

What is PLS?

- PLS is a non-profit legal services organization that provides civil legal services to incarcerated individuals in NY State correctional facilities in cases where no other counsel (lawyer) is available.
- We help incarcerated individuals in NY State prisons with issues that arise **during** their incarceration.
- PLS does not assist incarcerated individuals with criminal appeals or issues related to their criminal cases.

What kind of legal matters can PLS help me with?

- Disciplinary hearings
- Child visitation
- Prison conditions
- Housing and protective custody
- Health, mental health and dental care
- Jail time credit and sentence computation issues

What kind of help will PLS give me?

- In some cases our attorneys investigate a case and communicate with DOCCS to be sure that incarcerated individuals are getting the services or care that they need.
- In other cases we provide written materials to help incarcerated individuals advocate for themselves.
- In some cases PLS represents incarcerated individuals in lawsuits against the state.

How long can I talk about my problem?

- Phone calls are limited to 15 minutes each.

How do I arrange a call?

- At Bedford Hills, Offender Rehabilitation Coordinator Figueroa will help you arrange a call. Calls are made on Thursdays between 1:30-2:30 p.m.
- At Albion, Aide Kristine Hydock will help you arrange a call. Calls are made on Wednesdays between 1:00-3:00 p.m.

Calls may be subject to the number of individuals who signed up.

Your Right to an Education



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

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

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

Pro Se
114 Prospect Street
Ithaca, NY 14850

PLS OFFICES

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

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

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

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

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

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

Auburn • Cape Vincent • Cayuga • Elmira • Five Points

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

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

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