In *Pro Se* Vol. 33, No. 3 (May 2023), we reported on the Second Circuit decision in *Vincent v. Annucci*, 63 F.4th 145 (2023). *Vincent v. Annucci* is an individual plaintiff lawsuit seeking damages for the DOCCS’ unlawful administrative addition of a five-year term of post-release supervision (PRS) to Mr. Vincent’s five-year determinate sentence. As imposed by the sentencing judge, Mr. Vincent’s sentence did not include a term of PRS. The unlawful addition of PRS caused Mr. Vincent to spend roughly 1,006 days in DOCCS custody or under parole supervision after his actually imposed sentence had expired.

Before we begin to discuss this and one other recent PRS related decision, a little background may be helpful in understanding how DOCCS came to unlawfully impose PRS on thousands of incarcerated individuals. Although required by statute, between 1998 and 2008, many judges did not include terms of PRS to the determinate sentences they imposed. Rather than applying these sentences as they were

*Continued on Page 4 . . .*

<table>
<thead>
<tr>
<th>Also Inside . . .</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hearing Officer Violated Petitioner’s Right to Call Witnesses</td>
<td>8</td>
</tr>
<tr>
<td>DOCCS’ Interpretation of LIMA Undermines Intent of Legislature</td>
<td>9</td>
</tr>
<tr>
<td>Successful Completion of Shock May Not Result in Release to Parole</td>
<td>13</td>
</tr>
<tr>
<td>DOCCS May Raise Privacy/Safety Exemptions for the First Time in Article 78</td>
<td>15</td>
</tr>
</tbody>
</table>
A TRIBUTE TO NYS ASSEMBLY SPEAKER PRO TEMPORE JEFFRION AUBRY
A Message from the Executive Director, Karen L. Murtagh, Esq.

At the end of this year, NYS Assembly Speaker Pro Tempore Jeffrion Aubry will retire after more than 30 years of public service in the State Legislature.

As true a public servant as you’ll ever find.

Prior to serving in the Assembly, starting in the early 1970s, Assemblyman Aubry worked at Elmcor Youth and Adult Activity, Inc. in Queens, NY, one of the largest nonprofits delivering services to the area. Jeff initially ran Elmcor’s education program before becoming its Executive Director. Jeff was also the former Director of Economic Development for the Borough President’s Office of Queens.

Jeff won a special election for the Assembly in 1992, but working in politics wasn’t always his goal; making a positive difference is really what Jeff is all about.

And it started early.

Jeff was born in New Orleans and his family migrated to Queens, NY when he was very young. He saw injustices along the way, experiencing segregation early and upfront, traveling to and spending summers with his grandmother in Louisiana and Alabama.

For him, the struggle for justice was personal; he knew that there were battles on the horizon, that they would need to be fought and he wanted to be involved.

As a young man, standing at the crossroads, Jeff is quoted as saying “The question is, do you stand outside and scream, or do you go inside and make it better? Obviously, screaming from the outside can help sometimes, but you also have to have people inside who can translate that noise into progressive policies.”

And, wow, has he delivered!

When I first met Jeff in 2007, we worked together in the constant struggle to fund and strengthen PLS. For those efforts, Jeff became the inaugural recipient of our John R. Dunne Champion of Justice award in 2014 named for the late John Dunne, the former State Senator who served NYS for 23 years (during which time he was one of the key negotiators who sought to peacefully resolve the 1971 Attica uprising). But Jeff had been fighting for PLS long before I had the fortune of meeting and working with him. From his first days in office, Jeff ensured that the Assembly contributed legislative funding to PLS to help expand services to the incarcerated population. And in 1997 when PLS lost all of its funding from the Executive,
Jeff made sure that PLS’ doors remained open by securing a significant increase in funding for PLS from the Assembly.

And yet, Jeff’s contributions to justice far transcend his stalwart efforts on behalf of PLS.

In 1997, Jeff spearheaded the effort to repeal the so-called Rockefeller Drug Laws which had accounted for a dramatic rise in the state’s prison population. Enacted in 1973, those laws were among the harshest in the nation, implementing lengthy mandatory minimum sentences for nonviolent drug offenses and disproportionately impacting communities of color.

Twelve years later, thanks in large part to Jeff’s relentless leadership, then-Gov. David Paterson signed Jeff’s repeal bill into law in a ceremony that took place at Elmcor – a fitting end to another hard and long-fought battle.

Jeff continued to push for criminal justice reform as the Assembly sponsor of the HALT bill to end the overuse of solitary confinement in state prisons. That effort culminated in 2021 with enactment of his bill into law.

Jeff is renowned among his colleagues for never wavering on issues of criminal justice, often opposing proposals that could lead to mass incarceration. If not for Jeff, and his persistent questioning of the need and wisdom of such measures, many of them could have easily moved to passage. According to a former Assembly colleague of his, “There was always one voice that would stand up in the Democratic conference and, just as a matter of principle, speak against the elevated penalties. I was just always impressed with (Aubry’s) real commitment to that principle and being usually the lone voice standing up and speaking out.”

Since 2003, Jeff has served as Speaker Pro Tempore of the Assembly, quite literally the one voice more associated with the daily proceedings in that house than any other.

In that role, and many others over the course of his career, Jeff has been called the “stateman’s statesman”, the “conscience of the Assembly Democratic Conference”, a “quiet force of nature” who never looks for credit but certainly deserves it.

He’s all those things and more to the many he has met and influenced. To me, he’ll always be my friend, my colleague and my hero.

And to all of us at PLS, he is and always will be our “Champion of Justice.”
actually imposed, DOCCS – then known as DOCS – instead chose to add a term of PRS to judicially (court) imposed determinate sentences that did not include a term of PRS.

Many individuals took exception to this practice, and in 2006, in *Earley v. Murray*, 451 F.3d 71 (2d Cir. 2006), the Second Circuit held that only courts are authorized to impose sentences and any administratively imposed term of PRS was a “nullity.”

Following the *Earley* decision, formerly incarcerated individuals who had been wrongfully subjected to administratively imposed PRS began to bring lawsuits seeking compensation for the time they were unlawfully required to be on parole supervision or were incarcerated for alleged violations of wrongfully imposed PRS.

Shawn Vincent’s case was filed in 2008 in the Federal District Court for the Western District of New York. In September of 2020, the Court granted summary judgment to Mr. Vincent and determined that he was entitled to only 686 days out of the 1006 days – roughly 70% – that he had spent either on wrongfully imposed PRS or incarcerated for violations of wrongfully imposed PRS. The days for which the Court found Mr. Vincent could not be compensated included the days that preceded the *Earley* decision and 90 days immediately following that decision. The Court then awarded Mr. Vincent $175,000.00 in compensatory damages.

In March of 2023, the Second Circuit reviewed the award of damages and remitted the case for additional findings of fact. Specifically, the Court wanted to know, given that the burden is on the plaintiff to show that onset date for calculating any compensatory damages to which he may be entitled, whether, after the *Earley* decision was issued, there were any obstacles to DOCCS excising (cutting out) the terms of PRS that it had administratively imposed. If DOCCS had the authority to excise the administratively imposed terms of PRS, the Court noted, the plaintiff will have satisfied its burden upon the existing record.

As of March 23, 2024, the district court in which the *Vincent* case is pending, has been looking into the issue of the date upon which the Plaintiff Vincent is entitled to start receiving compensatory damages but it has not yet reached a decision on this issue.

The district court in *Betances v. Fischer*, the class action challenge to DOCCS’ administrative imposition of PRS, however, has addressed the issue of whether, after the Second Circuit issued the *Earley* decision, DOCCS had the authority unilaterally excise the illegal terms of PRS from the sentences to which it had added them. In *Paul Betances v. Brian Fischer*, 2024 WL 182044 (S.D.N.Y. Jan. 17, 2024), the Court held that the record clearly showed that Defendants Fischer and Annucci had in their depositions admitted that they could unilaterally have excised the terms of PRS. And, while Defendant Tracy denied he could do so without supportive documentation from DOCCS, the Court found that “that did not mean that the Division of Parole [DOP] needed a court order to release [incarcerated individuals] subject to unlawful PRS or that the [DOP] could invoke state procedures or laws as an excuse for not adhering to the federal constitutional dictates pronounced in *Earley*.”
Thus, the District Court in Betances v. Fischer, held that the Plaintiffs had established that Defendants Fischer and Annucci could excise administratively imposed terms of PRS without a court order and Defendant Tracy did not need a court order to stop enforcing those terms.

In Betances, the district court also decertified the class for the purposes of determining individual damages. The Plaintiffs have moved for reconsideration of this order and the Defendants have submitted opposition to the Plaintiffs’ motion.

Matthew D. Brinckerhoff, Emery Celli Brinckerhoff Abady Ward & Maazel LLP, represented Paul Betances in this Section 1983 action.

NEWS & NOTES

Noteworthy Verdict!

In 2017, Quintelle Hardy filed a complaint in the federal district court for the Northern District of New York alleging that in December 2014, when Mr. Hardy was 27 years old and incarcerated at Cayuga C.F., he was assaulted by two correction officers, one of whom struck him repeatedly, following which the second officer sexually abused him. The jury found that the Defendant who sexually abused the Plaintiff “intentionally made contact with [Plaintiff’s] genitalia or other intimate area; that the contact with [Plaintiff’s] genitalia or other intimate area was not for a legitimate penological purpose; and that the contact with [Plaintiff’s] genitalia or other intimate area was done either to gratify [Defendant’s] sexual desire or to humiliate [Plaintiff]. In 2023, the case went to trial and the jury awarded the Plaintiff compensatory and punitive damages against each of the two officers.

The jury awarded Mr. Hardy $15,000 in compensatory damages and $45,000 in punitive damages against the officer who engaged in excessive or unnecessary force. It awarded Mr. Hardy $30,000 in compensatory damages and $90,000 in the punitive damages against the officer who sexually abused Mr. Hardy.

After the Defendants filed a motion to reduce all of the damages awards, the Court ordered that the Plaintiff either accept $30,000 in punitive damages awarded against the officer who engaged in sexual abuse or re-try the issue of what amount of punitive damages from that Defendant is warranted.

The basis for the Court’s reduction in punitive damages against the officer who sexually abused the Plaintiff was that the Defendant’s negative net worth – that is, he owed more money than he possessed – and that a comparison of punitive damages awards in comparable cases indicated the amount that the jury awarded was inconsistent with the amounts that other fact finders had imposed in similar situations. In making this finding, the Court noted that neither of the Defendants was being indemnified by the State of New York. You can read about this decision in Hardy v. Adams, et. al., 2024 WL 838689 (N.D.N.Y. Feb. 28, 2024).
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 exclusively created 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 selected or not.

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/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**

The PREP spotlight shines on **Prison Families Alliance (PFA)**, an organization that works to improve the lives of families and children with incarcerated loved ones. PFA offers free support groups for adults and youth affected by incarceration. Your loved ones, including children ages 7 and up, can participate in free support groups and activities, all done virtually. Services are available in both English and Spanish. Support groups are drop-in-based, meaning no ongoing commitment to attend is required. Please let your loved ones know that they can learn more and register for a support group meeting by visiting [https://prisonfamiliesalliance.org/](https://prisonfamiliesalliance.org/) or by calling PFA 702-763-1389.
Hearing Officer Violated Petitioner’s Right to Call Witnesses

After an investigation into a fight between incarcerated individuals, an officer charged Pedro Diaz with assaulting an incarcerated individual, engaging in violent conduct, fighting, creating a disturbance and possessing a weapon. That same day, officers searched Mr. Diaz’s cell, and, based on what they found, charged Mr. Diaz in a second misbehavior report with possession of contraband and an altered item.

At the related hearing, the hearing officer found Mr. Diaz guilty of all the charges in both misbehavior reports. After his administrative appeal was denied, Mr. Diaz filed an Article 78 challenge to the determination of guilt made at the hearing.

In response to the challenge to the determinations of guilt resulting from the second misbehavior report, the Respondent acknowledged that the hearing officer erred by refusing to call as a witness one of the officers who was present during the search. Due to this error, in its decision in Matter of Diaz v. Annucci, 221 A.D.3d 1401 (3d Dep’t 2023), the Court ruled that because of “the passage of time” – and because the Respondent had not asked for a re-hearing – the Court would not order a re-hearing.

With respect to the determinations of guilt resulting from the first misbehavior report, the Court again found that the hearing officer had improperly denied Mr. Diaz’s right to call a witness. At the hearing, Mr. Diaz denied that he participated in the assault and asked that the victim be called as witness. The witness did not testify and there was no indication that he refused to testify or that the hearing officer made an effort to produce him as a witness.

Quoting from Matter of Barnes v. LeFevre, 69 N.Y.2d 649 (1986), the Court wrote, “Where the record does not reflect any reason for the witness’ refusal to testify, or that any inquiry was made of him [or her] as to why he [or she] refused to testify or that the Hearing Officer communicated with the witness to verify his [or her] refusal to testify, there has been a denial of the [incarcerated individual’s] right to call witnesses as provided in the regulations.”

Citing Matter of Texeira v. Fischer, 26 N.Y.3d 230, 234 (2015), the Court stated, “[a]s we view the unexplained outright denial of a witness commensurate to the denial of Petitioner’s constitutional right to call witnesses, expungement rather than remittal for a new hearing is the appropriate remedy.”

Pedro Diaz represented himself in this Article 78 proceeding.
DOCCS’ Interpretation of LIMA Undermines Intent of Legislature

Effective March 1, 2022, the Less is More Act (LIMA) requires that a recognizance hearing be held within 24 hours of when a parole violation warrant is executed. See Executive Law (EL) §259-i(3)(a)(iv). At the recognizance hearing, a judge decides whether the accused violator is a flight risk and hence whether the person will be remanded pending further proceedings or will be released to supervision pending further proceedings.

Emphasizing the importance of a hearing occurring quickly after the execution of the warrant, the law further provides that if a court of record is not available to conduct any business within the 24 hours – as is frequently the case outside of New York City – “the recognizance hearing shall commence on the next day such a court in the jurisdiction is available to conduct any type of business.” Id.

Looking ahead in the revocation process, the statute also directs that where an individual is detained, within five days of a recognizance hearing at which the court issued a detaining order, or of the execution of the warrant, DOCCS must offer the individual a preliminary hearing. EL §259-i(c)(i)(B).

The issue of whether the failure to conduct a recognizance hearing within 24 hours of execution of the warrant invalidates subsequent hearings recently came before the First Department in what we think is currently erroneously captioned People v. Anthony Annucci, 2024 WL 1259934 (1st Dep’t Mar. 26, 2024).¹

This decision discusses Anthony Maniscalco’s argument that when DOCCS failed to conduct a recognizance hearing in relation to a parole warrant within 24 hours of execution of the parole warrant, DOCCS lost the authority to conduct the related parole revocation hearings.

Mr. Maniscalco was sentenced to a 5-year determinate term and a term of post release supervision. He entered DOCCS custody in in 2018. At the end of April, 2022, he was released to parole supervision. Several months later, on June 10, Mr. Maniscalco was re-arrested on felony charges.

On June 17, while Mr. Maniscalco was in jail on the felony charges, the Board of Parole issued a parole warrant to detain him for the violation of parole. DOCCS received the warrant – thereby completing the execution of the warrant – and called the court to request a recognizance hearing. DOCCS made no further efforts to schedule the hearing which took place on June 22, four days beyond the 24-hour deadline for providing a recognizance hearing. A preliminary hearing was held on June 24.

On June 27, Mr. Maniscalco’s attorney, Rupa Subramaniam filed a habeas action on his behalf, arguing that “the preliminary hearing was untimely because it was held on June 24,
more than five statutory days after the execution of the warrant on June 17, 2022.” *Peo. v. Annucci*, at *2. DOCCS opposed the petition, arguing that it should be dismissed because the preliminary hearing was within 5 days of the recognizance hearing and DOCCS was not responsible for any delays in scheduling recognizance hearings as long as it made a timely request for the hearing. *Id.*

DOCCS also argued that its interpretation of the recognizance hearing requirement – that the recognizance hearing must be held within 24 hours of the execution of the parole violation warrant – was irrelevant as long as the preliminary hearing was timely conducted relative to the date of the recognizance hearing. *Id.* In *People v. Annucci*, DOCCS argued, the parole violation warrant had not been executed until the recognizance hearing because that is when the warrant was served on the Mr. Maniscalco. Thus, according to DOCCS, the preliminary hearing on June 24 was timely because the five-day period for commencing the hearing began running on June 22.

Supreme Court, Bronx County, granted the petition and issued the writ of habeas corpus, finding that 1) the recognizance hearing had not been held within 24 hours of execution of the warrant, and 2) irrespective of the fact that DOCCS regulations require that a preliminary hearing be conducted within five days of the recognizance hearing, “upholding DOCCS’ related interpretation of the statute would enable the agency to sidestep the consequences of missing the 24-hour recognizance hearing deadline.” *Id.* Mr. Maniscalco appealed and the First Department upheld the lower court’s decision.

The First Department began its analysis by noting that “the primary consideration of the courts in the construction of statutes is to ascertain and give effect to the intention of the Legislature.” *Id.* To accomplish this assessment, the courts should:

- Consider the mischief sought to be remedied by the new legislation; and
- Constrain the act in question so as to suppress the evil and advance the remedy.

*Id.*

Here the Court noted, prior to the enactment of LIMA, preliminary hearing hearings were required to be held within 15 days. “The revised statutory time frame,” the Court wrote, “ensures that alleged parole violators will have a speedier day in court. *Id.* at *2.*

The First Department held that DOCCS’ interpretation of LIMA, “in essence, undermines the legislative intent when it amended Executive Law §259-i to compel the speedy adjudication of alleged parole violations.” *Id.* at *1.* The timing of recognizance hearings is “pivotal,” the Court wrote. *Id.* at *2.* In addition to determining whether the individual is a flight risk and therefore whether or not they will be detained or released to fight their case from the street while on parole supervision, the purpose of the hearing, the Court continued, “is to ensure that the executed warrant was properly issued and served.” *Id.* Adopting DOCCS’ analysis, the Court wrote, “would not only *countenance* [allow] the lengthy scheduling of the recognizance hearings for alleged parole violations but also disregard LIMA’s 24-hour scheduling requirement.” *Id.*
The Court pointed out that DOCCS interpretation of the statute abrogated (undercut) its plain meaning, resulting in a recognizance hearing that was held five days rather than 24 hours after the execution of the warrant. *Id.* at 3. And this error was compounded, the Court wrote, when the preliminary hearing was held 7 days after the execution of the warrant rather than 5 days, as required by the statute.

To sum up the Court’s holding, in determining the deadline for conducting the preliminary hearing, you count the days from the recognizance hearing if that hearing was timely but if the recognizance hearing happens more than 24 hours after execution of the warrant, the counting of days starts from execution of the warrant.

1. If you request a copy of this decision from the law library, please note that the caption format in the Westlaw citation is different from how the caption would normally be configured. In habeas actions brought by lawyers on behalf of incarcerated individuals, the Westlaw caption typically takes this form: *People ex rel. Rupa Subramaniam o/b/o Anthony Maniscalco v. Annucci*, or, more simply, *People ex rel. Subramaniam v. Annucci*. We have contacted Westlaw about this issue; it remains to be seen whether Westlaw will change the caption that it is currently using.

2. “Statutory days” is a reference to General Construction Law §20. This section of the law provides that when “a number of days specified as a period from a certain day within which an act is ... required to be done means such number of calendar days exclusive of the day from which the reckoning is made.”

Michelle McGrath, Steven Demarest and Kerry Elgarten, Esqs., The Legal Aid Society, represented Anthony Maniscalco in this habeas corpus proceeding.

---

**Court of Claims**

**Court Grants Summary Judgment to Claimant**

In January 2016, Jonathan Afanador was sentenced and went into DOCCS custody. On February 28, 2018, Mr. Afanador, who was serving an indeterminate sentence for having been convicted of attempted assault in the second degree, was released to parole supervision. His maximum expiration date was August 17, 2018, less than 6 months from his release.

On July 24, with less than a month left on his sentence, Mr. Afanador was arrested on a parole violation warrant. He waived his preliminary hearing and his final revocation hearing was scheduled for August 10, seven days before his sentence expired.

Mr. Afanador’s final hearing was not held on August 10. On August 17, DOCCS issued a “FINAL DISCHARGE,” certifying that Mr. Afanador had been discharged from parole supervision. Mr. Afanador was not released from custody on the parole warrant
until September 6, 2018, 19 days after his sentence was discharged.

Mr. Afanador then filed a claim against the State of New York, alleging that he had been unlawfully confined during the period of time that he spent in custody on the parole warrant after August 17. Following discovery that included the depositions of the Claimant and Senior Parole Officer Dandridge (SPO Dandridge), Claimant Afanador moved for summary judgment.

In support of the motion, the Claimant submitted a Verified Bill of Particulars, SPO Dandridge’s deposition transcript and affidavit, the parole arrest warrant, DOCCS’ FINAL DISCHARGE, Claimant’s deposition transcript and other related documents. In their opposition, the Defendant relied on SPO Dandridge’s deposition transcript and DOCCS’ Violation of Release Report.

Summarizing the summary judgment standard, the Court, in Jonathan Afanador v. The State of New York, 2023 WL 8464951 (Ct Clms. Oct. 3, 2023) (Afanador or Afanador v. NYS), wrote that to succeed on a motion for summary judgment, the moving party must produce “sufficient evidence, in admissible form, to show the absence of material issues of fact from the case.”

The Court then turned to what the Claimant had to establish in order to win a claim for false imprisonment. “It is Claimant’s burden,” the Court wrote, “to demonstrate that he was falsely imprisoned as a matter of law” by showing:

1. The defendant intended to confine him;
2. The claimant was conscious of the confinement;
3. The claimant did not consent to the confinement; and
4. The confinement was not otherwise privileged.

In Afanador, the Court found that the Defendant had “implicitly conceded” that the Claimant had satisfied the first three elements of the claim. However, the Defendant argued, the Claimant’s motion must be denied because the confinement was privileged.

To succeed in its claim, the Claimant must make a prima facie showing that the confinement was not privileged. Once the Claimant has made the prima facie showing, the responsibility for showing that the detention was privileged, the Court noted, citing Moulton v State of New York, 114 A.D.3d 115, 120 (3d Dep’t 2013), must be shouldered by the Defendant.

Here the Court found that the Claimant had satisfied the prima facie burden in the documents attached to his motion, including:

- The FINAL DISCHARGE document certifying Claimant’s discharge from the jurisdiction of the Board of Parole; and
- SPO Dandridge’s affidavit and deposition transcript acknowledging that the final hearing was necessary to extend the maximum expiration date.
Thus, the burden shifted to the Defendant to demonstrate, also by admissible evidence, the existence of a material fact relating to the privilege issue. The Defendant argued that “by waiving his right to a preliminary hearing, he admitted to one of the things he was accused of and thus established probable cause for his arrest and confinement.”

The Court disagreed, finding that the waiver established probable cause for Claimant’s arrest and confinement through August 17, 2018. However, the Court wrote, any basis for confining the Claimant ended on August 17, 2018, and “the only way to extend parole’s jurisdiction over the Claimant was through a finding of Claimant’s guilt after a final hearing.”

Further, the Court went on, DOCCS may not hold an individual in custody on a parole violation warrant after the expiration date of the sentence so that the Board of Parole might conduct a final revocation hearing. Nor did the Defendant produce any evidence that the Claimant’s confinement after August 17 was imposed “pursuant to statute or in accordance with regulation.” Accordingly, the Court concluded, the Defendant’s confinement of the Claimant after August 17 was not privileged and the Claimant was entitled to summary judgment on liability.

---

Eric Levy, Esq., represented Jonathan Afanador in this Court of Claims action.

---

### Successful Completion of Shock May Not Result in Release to Parole

Ashawn Abbott was sentenced in 2007 as a second felony offender to three determinate terms and an indeterminate term, all running concurrently. The controlling determinate term was 8½ years with 5 years of post-release supervision (PRS) and the indeterminate sentence was 3½ to 7 years. (There is a formula for sentence computation that dictates how concurrent indeterminate and determinate sentences are aggregated). Mr. Abbott was twice released to parole supervision and twice violated the terms of parole release. As a result, the maximum expiration date of Mr. Abbott’s 2007 sentence was readjusted.

In 2016, while still serving the 2007 sentence, Mr. Abbott was sentenced on two drug convictions to concurrent terms of two years with three years PRS. The 2016 sentence ran consecutively to the 2007 sentence. Complicating this sentence computation was that Mr. Abbott was sentenced to parole supervision, that is, drug treatment.

Following Mr. Abbott’s release from inpatient drug treatment, Mr. Abbott was released to parole supervision and was found to be delinquent numerous times.
Mr. Abbott was convicted in 2020 of a drug related offense and sentenced to 5½ years and 2 years PRS, running consecutively to his previously imposed sentences (which he was still serving). He returned to DOCCS custody where DOCCS determined that Mr. Abbott’s parole eligibility date is January 24, 2025; his conditional release date is August 11, 2025; and his maximum expiration date is June 30, 2026.

In 2022, Mr. Abbott successfully completed the Shock Incarceration Program (SIP) and was awarded an earned eligibility certificate. Nonetheless, when he went before the Parole Board, the Board denied Mr. Abbott conditional release and held him until his parole eligibility date of January 24, 2025.

Mr. Abbott challenged his parole denial in a habeas corpus proceeding, arguing that “upon his receipt of the earned eligibility certificate and his successful completion of the SIP, conditional release was mandated by Correction Law §867(4) and the Board was without discretionary authority to deny his release.”

Neither the Supreme Court, Ulster County or The Third Department of the Appellate Division agreed with Mr. Abbott. In People ex rel. Ashawn Abbott v. Rosemarie Wendland, 2024 WL 629339 (3rd Dep’t Feb. 15, 2024), the Appellate Court began by referencing Correction Law §867(4):

An incarcerated individual sentenced to a determinate sentence of imprisonment who has successfully completed a [SIP] shall be eligible to receive such a certificate of eligibility and shall be immediately be eligible to be conditionally discharged.

In applying the statute, the Court found the determinative phrase in this section of the Correction Law to be “An incarcerated individual sentenced to a determinate sentence . . .” (emphasis added). Here, the Court wrote, Petitioner was serving an aggregate sentence that included an indeterminate sentence. This section of the statute, which authorizes immediate release of an individual serving a determinate term who has successfully completed SIP and possesses an earned eligibility certificate, the Court wrote, applies only to individuals serving exclusively determinate sentences.

The Court stated that because later imposed sentences are “aggregated” (combined) with previously imposed sentences, no sentence is completely served until all of the sentences are served. Based on this analysis, when Petitioner Abbott completed SIP and received an earned eligibility certificate, he was still serving the indeterminate sentence of 3½ to 7 years that was imposed in 2007, and that sentence, according to the Court, prevented him from being entitled to “immediate release.”

Instead of immediate release, the Petitioner will next be eligible for release at a Parole Board appearance in January 24, 2025.

__________________________________
Norm Effman, Esq., Warsaw, N.Y., represented Ashawn Ashworth in this Habeas Corpus proceeding.
DOCCS May Raise Privacy/Safety Exemptions for the First Time in Article 78

In Matter of Whitfield v. FOIL Appeals Officer, Department of Corrections and Community Supervision, 221 A.D.3d 1341 (3d Dep’t 2023), the Court clearly states when DOCCS (or any other state agency) can rely on a Freedom of Information Law (FOIL) exemption upon which the agency did not rely during the administrative process. This is an important point of law; agencies frequently attempt to argue their non-disclosure was permitted by an exemption upon which they did not rely during the administrative process.

For readers unfamiliar with the Freedom of Information Law, it is found in Public Officers Law (POL), Article 6. As noted by the Court in Whitfield, the law “imposes a broad duty of disclosure on government agencies and all agency records are presumptively available for public inspection and copying unless one of the statutory exemptions applies, in which case the agency may withhold or redact the requested records.” Whitfield, at 1343. When an agency such as DOCCS opposes disclosing the requested records, it must show that the responsive records “fall squarely” within a FOIL exemption “by articulating [stating] a particularized justification for denying access.” Id. For more information about FOIL, ask the PLS office which is responsible for handling requests for assistance from incarcerated individuals at the prison to which you are assigned to send you a copy of the memo: “Access to Records.”

In Whitfield, the Petitioner, a formerly incarcerated individual, made a FOIL request for all records related to his clemency application. A DOCCS FOIL Officer denied the request, asserting that pursuant to POL §87(2)(a), the documents were exempt from disclosure under FOIL because they are specifically exempted from disclosure by state or federal statute.

After exhausting his administrative appeals, the Petitioner filed an Article 78 challenge to the denial of his FOIL request. Rather than answer the petition, the Respondent produced 755 pages of documents which were given to the Petitioner without restriction, whereupon after ascertaining that the Petitioner was interested in obtaining the other 90 pages of responsive records, the Respondent moved to dismiss the petition for mootness with respect to the records provided to the Petitioner, and, with respect to the remaining documents, failure to state a claim.

The Respondent submitted a privilege log with respect to the 60 pages of records it had not yet disclosed, claiming for the first time that the some of the materials were exempt from disclosure under one of the following exemptions:

POL §87(2)(b): Records which if disclosed would result in an unwarranted invasion of personal privacy (personal privacy exemption);

POL §87(2)(f): Records which if disclosed could endanger the life or safety of any person (endanger life/safety exemption); or
POL §87(2)(g):  Records which are classified as inter-agency or intra-agency materials (inter/intra-agency exemption).

After the lower court reviewed the documents and the log and considered the Respondent’s arguments for exempting each document from disclosure, the lower court ruled in the Respondent’s favor finding that the as yet undisclosed records fell within the above three exemptions. Petitioner appealed.

The Appellate Court first noted that when the request was being considered by DOCCS, the only ground raised for withholding the records was that their distribution was prohibited by a state or federal statute. Thus, the question arises: Can DOCCS raise exemptions for the first time in a court challenge to a DOCCS FOIL decision or must it rely on the exemptions it relied on during the administrative process? Normally, the Court wrote, “judicial review of an administrative determination is generally limited to the reasons provided by the agency.” Whitfield, at 1343-1344. Thus, “DOCCS ordinarily would not be entitled to rely upon any new grounds in this proceeding to justify the withholding or redacting of the remaining 60 pages.” Id.

However, the Court continued, there are exceptions to the prohibition on raising additional—or even exclusively new—exemptions during litigation: Where the safety or confidentiality rights of third parties may be implicated by the disclosure of documents, a court may consider statutory exemptions relating to those considerations even though they were not previously raised by the agency. Whitfield, at 1344. This means that DOCCS may raise a personal privacy exemption or an endanger life/safety exemption for the first time in response to a petition filed by an incarcerated individual.

The exceptions to the prohibition on raising new exemptions during litigation does not, however, extend to the inter/intra-agency exemption.

Based on this analysis, the Court concluded that

- The roughly 14 pages of documents that DOCCS asserts are exempt solely due to their classification as inter/intra agency materials do not qualify as documents withheld due to third party safety or confidentiality reasons and must therefore be disclosed;

- the lower court had erroneously found personal privacy exemption justified non-disclosure of roughly 25 documents and ordered those documents produced.; and

- The lower court correctly concluded that certain records should not be disclosed based on the endanger life/safety exemption.

____________________
John Whitfield represented himself in this Article 78 proceeding.
This issue’s column focuses on *Wilkinson v. Garland*, 144 S. Ct. 780 (2024), a March 19, 2024, decision of the Supreme Court which considers the limits of federal court jurisdiction over immigration appeals. Jurisdiction—defined by Black’s Law Dictionary as “[a] court’s power to decide a case or issue a decree”—is a legal principle that is often *shrouded in obscurity* (not easily understood) but which nonetheless carries profound consequences for persons seeking amends from the judicial system. If a court lacks jurisdiction to hear a case then the case must be dismissed, leaving the litigants without an opportunity to be heard before an impartial arbiter and without redress for their injuries.

*Wilkinson* concerns the removal proceedings of Situ Kamu Wilkinson (“Mr. Wilkinson”), a native and citizen of Trinidad and Tobago who fled to the United States in 2003 after being robbed and beaten in his home country. Mr. Wilkinson entered the United States using a tourist visa but never left the United States, and he thereafter resided in this country without lawful immigration status. In 2013, he had a U. S. citizen son, M., with his girlfriend Kenyetta Watson (“Ms. Watson”). Mr. Wilkinson lived with Ms. Watson and M. in Pennsylvania for the first two years of M.’s life, but for financial reasons, the couple decided that Ms. Watson would move with M. to New Jersey while Mr. Wilkinson would remain in Pennsylvania to work as a handyman and laborer. M. suffered from severe asthma and Ms. Watson suffered from depression, and so Mr. Wilkinson took the train to visit them each weekend and provided almost half of his monthly wages in informal child support.

In 2019, Mr. Wilkinson was arrested after police found drugs in a house in which he was working. When he appeared in criminal court to contest the charges, federal immigration authorities arrested and detained him. The criminal charges were ultimately withdrawn. The Department of Homeland Security thereafter initiated removal proceedings against him on the grounds that he was removable for overstaying his tourist visa. As relief from removal, Mr. Wilkinson applied for cancellation of removal for nonpermanent residents, a form of relief which, if granted, would allow him to adjust his status to lawful permanent resident (“LPR”). Of relevance to this case, to qualify for cancellation of removal, Mr. Wilkinson was required to prove that his deportation would result in “exceptional and extremely unusual hardship” to an LPR or U.S. citizen spouse, child, or parent—in this case, M. and Ms. Watson.

After a hearing in immigration court, an immigration judge (“IJ”) denied Mr. Wilkinson’s application on the grounds that he had not demonstrated that M. and Ms.
Watson would suffer the requisite level of hardship. Mr. Wilkinson appealed to the Board of Immigration Appeals, which affirmed, and then petitioned for review by the Third Circuit Court of Appeals. But the Third Circuit dismissed his appeal, finding that it lacked jurisdiction to consider Mr. Wilkinson’s challenge to the immigration agency’s hardship determination.

The Third Circuit based that decision on 8 U.S.C. § 1252(a)(2)(B)(i), a statute which bars federal courts from reviewing “denials of discretionary relief,” including decisions regarding cancellation of removal. The Third Circuit also cited to the Supreme Court’s 2022 decision in Patel v. Garland, 596 U.S. 328, 338 (2022), a case which found that 8 U.S.C. §1252(a)(2)(B)(i) “prohibits review of any judgment regarding the granting of relief” (emphasis in original), and thus bars a federal court from reviewing factual questions underlying an agency’s decision to deny relief. (Patel was featured at length in the “Immigration Matters” column in Pro Se, Vol. 32, No. 4, July 2022.)

Somewhat surprisingly, the Supreme Court vacated the Third Circuit’s decision and concluded that the “exceptional and extremely unusual hardship” determination is a mixed question of law and fact over which federal courts retain jurisdiction. Writing for a five-Justice majority, Justice Sotomayor found that this conclusion was compelled by the Court’s 2020 decision in Guerrero-Lasprilla v. Barr, 589 U.S. 221 (2020).

Guerrero-Lasprilla consolidated two appeals from noncitizens who sought to reopen their removal proceedings after the prescribed statutory deadline had expired. The agency denied their requests on the grounds that they did not demonstrate sufficient diligence in filing their requests after the deadline had expired, and the Fifth Circuit Court of Appeals denied their petitions for review, concluding that it had no jurisdiction to consider the appeals. The Court reversed, finding that Congress authorized federal court jurisdiction over “questions of law” in immigration cases, see 8 U.S.C. §1252(a)(2)(D), and that the “the statutory term ‘questions of law’ . . . includes the application of a legal standard to established facts.” 589 U.S. at 234. Since the facts of the noncitizens’ cases were not in dispute, the Court concluded that it had jurisdiction over the question of whether the agency applied the correct legal standard to those undisputed facts.

Applying Guerrero-Lasprilla to Mr. Wilkinson’s case, Justice Sotomayor found that the “exceptional and extremely unusual hardship” determination, while fact dependent, was governed by an identifiable set of legal standards: for example, an IJ must “evaluate a number of factors in determining whether any hardship to a U. S.-citizen or permanent-resident family member is substantially different from, or beyond, that which would normally be expected from the deportation of a close family member.” Slip op. at 12 (citation omitted). Justice Sotomayor distinguished Patel on the grounds that Patel dealt with a court’s jurisdiction over factual questions, while Mr. Wilkinson challenged the agency’s
legal determination that the facts presented did not qualify for relief.

The majority opinion drew a strong dissent by Justice Alito, which was joined by Chief Justice Roberts and Justice Thomas. For Justice Alito, the majority’s interpretation of the phrase “questions of law” “has a stunning sweep . . . [which] encompasses all sorts of discretionary rulings that depend almost entirely on the relevant facts[.]” *Id.* at 2 (Alito, J., dissenting). In Justice Alito’s view, when Congress permitted federal courts to review “questions of law” in immigration cases, it intended only to fashion a “narrow exception” to the general rule barring federal court review of discretionary immigration applications. *Id.* at 4. Quoting from Justice Thomas’ dissent in *Guerrero-Lasprilla*, Justice Alito found that under the majority’s interpretation, “the exception for ‘questions of law’ all but swallows the rule” (citation omitted). Such an interpretation defies common sense, reasoned Justice Alito, who likened such a statutory scheme to “a city council adopting an ordinance banning all dogs from a park with an exception for all dogs that weigh under 125 pounds.” *Id.* at 4.

Justice Jackson concurred in the majority’s judgment without joining its opinion. Justice Jackson explained that, like Justice Alito, she is “skeptical that Congress intended ‘questions of law’ as used in §1252(a)(2)(D) to sweep so broadly, given the statutory scheme.” *Id.* at 2 (Jackson, J., concurring in the judgment). But Justice Jackson agreed that *Guerrero-Lasprilla* controlled the outcome, and that under the principle of *stare decisis*—“the idea that today’s Court should stand by yesterday’s decisions,” *Kimble v. Marvel Entertainment, LLC*, 576 U.S. 446, 455 (2015)—the Court was bound to follow its own precedent in Mr. Wilkinson’s case.

**WHAT DID YOU LEARN?**

Brad Rudin

1. **The Second Circuit in Earley v. Murray** held that a sentence including post-release supervision could be imposed by:

   a. prison officials with the approval of the trial court.
   b. the trial court with the approval of prison officials.
   c. the trial court only.
   d. the state Appellate Division.

2. **The issue addressed in Betances v. Fischer** is whether DOCCS, in the absence of a court order, possessed the authority to:

   a. excise that part of a sentence that was unlawfully imposed.
   b. add a term of PRS to a sentence lawfully imposed by the original trial court.
   c. appeal a sentence constituting cruel and unusual punishment.
d. reduce a sentence because of the good behavior demonstrated by an incarcerated person.

3. Although the jury in *Hardy v. Adams* found two correction officers liable for damages, the Federal District Court for the Northern District of New York:
   
a. vacated that finding on the grounds the plaintiff had presented insufficient evidence of harm.
   b. ordered the State of New York to compensate the officers for any damages found by the jury even if there was finding of an intent to injure the plaintiffs.
   c. declined to award any compensatory damages but allowed punitive damages in the amount of $135,000 to both plaintiffs.
   d. ordered a new trial with respect to punitive damages against one of the officers if the plaintiff did not accept $30,000 in punitive damages.

4. In *Matter of Diaz v. Rodriguez*, the Article 78 court expunged the disciplinary finding because the hearing officer:
   
a. failed to satisfy the DOCCS rule directing a hearing officer to require the appearance of the victim witness even if not requested to do so by the charged individual.
   b. did not conduct an on-the-record inquiry about why the victim was not available to testify.
   c. relied on hearsay evidence in reaching the determination against the charged person.
   d. failed to question the officer who wrote the misbehavior report.

5. In *People v. Anthony Annucci*, DOCCS opposed the parolee’s habeas petition on the ground that the law requiring a recognizance hearing within 24 hours of execution of the parole violation warrant:
   
a. was satisfied because the parole violation warrant was not executed until it was delivered to the Defendant at the recognizance hearing and because the preliminary hearing was conducted within five days of the date of the recognizance hearing.
   b. violates the state constitution.
   c. has no relevance where the parolee had already been arrested and denied bail on felony charges.
   d. could not be enforced if a court was not immediately available to conduct a hearing.

6. In *People v. Anthony Annucci*, the Court noted that the DOCCS interpretation of the Less is More Act would result in:
   
a. a speeding up the parole revocation process.
   b. the incarceration of parolees charged with a felony until such time that the felony had been disposed of.
   c. a slowing down the parole revocation process.
   d. the automatic release of parolees charged with a felony that had not been indicted.
7. In Afanador v. The State of New York, the Court of Claims found that the parolee’s incarceration was not considered privileged because the parolee:

a. had been issued a Final Discharge document ending his supervision by the Board of Parole.
b. successfully challenged the claims set forth in the parole violation warrant.
c. obtained a writ of habeas corpus entitling him to release from custody.
d. was able to show that the parole violation warrant was issued by an official not employed by the Board of Parole.

8. Ashawn Abbott was found by the court to be ineligible for release after successful completion of the Shock Incarceration Program on the grounds that the “immediate release” benefit of the Program is limited to incarcerated individuals who:

a. have been convicted of only one felony.
b. are serving only determinate sentences.
c. are serving an indeterminate sentence and a determinate sentence.
d. are housed in a correctional facility for individuals experiencing mental health issues.

9. In Matter of Whitfield v. FOIL Appeals Officer, Department of Corrections and Community Supervision, the Third Department ruled that DOCCS could claim a privacy exemption from a FOIL request even if the agency:

a. raised the exemption for the first time in response to an Article 78 challenge to DOCCS’ denial of a FOIL request.
b. failed to present any proof supporting the exemption.
c. exclusively relied on a federal statute.
d. did not state a particularized reason for denying access.

10. Under the New York Freedom of Information Law (FOIL) incarcerated persons are presumptively entitled to information about their incarceration:

a. after their release from custody.
b. if the facility superintendent agrees to the disclosure.
c. when the public interest is served by the disclosure.
d. unless a statutory exemption applies.

Answers:

1. c  6. c
2. a  7. a
3. d  8. b
4. b  9. a
5. a  10. d
Are You Incarcerated at Albion or Bedford Hills? Do You Want to Have a Phone Call About Legal Issues with a PLS Lawyer?

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.

The number of calls may be limited by the total amount of time reserved for Warmline Calls at each facility.
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
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

---

**Pro Se Staff**

**EDITORS:** BETSY HUTCHINGS, ESQ., KAREN L. MURTAGH, ESQ.

**WRITERS:** BRAD RUDIN, ESQ., NICHOLAS PHILLIPS, ESQ.

JILL MARIE NOLAN, LCSW

**COPY EDITING AND PRODUCTION:** ALETA ALBERT