Pro Se

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STATE HELD LIABLE FOR STAFF CONDUCT DURING DORM RAID

On July 6, 2016, at a time when many officers at Mid-State C.F. believed that incarcerated individuals in the 4H Dorm had assaulted an officer while he was in the dorm's bubble, 30 officers and several members of the facility supervisory staff "searched" the dorm, ostensibly looking for the weapon that had been used. The actual purpose of the search, and what actually occurred during the search became the subject of a 32-claimant lawsuit in the New York Court of Claims known as *Matthew Aliaga, et al. v. State of New York.*

In the summer of 2023, a trial was conducted on the claim that during the search, security staff assaulted the residents of the dorm, and threatened the residents with retaliation if they sought medical help or reported the officers' conduct. Twenty-eight of the 32 incarcerated individuals living in the dorm (residents), 14 members of the security staff who participated in or were present during the search, and the Office of Special Investigations (OSI) Deputy Chief Investigator testified.

Also admitted into evidence was the conclusion of the OSI investigation that:

1. the officer had injured himself when he fell out of his chair; and
2. after the officer fell, incarcerated individuals entered the bubble to assist him and pulled the officer's pin to summon help.

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Also Inside . . .

This project is supported by a grant administered by the New York State Division of Criminal Justice Services (DCJS). Points of view in this document are those of the author and do not necessarily represent the official position of DCJS.

BODYCAM FOOTAGE: A PICTURE IS WORTH A THOUSAND WORDS

A message from the Executive Director, Karen L. Murtagh

The source of the adage I've used (and paraphrased) to title this message is disputed.

There is the Chinese expression (attributed to Confucius): "Hearing something a hundred times isn't better than seeing it once."

Leonardo da Vinci suggested that a poet would be "overcome by sleep and hunger before [being able to] describe with words what a painter is able to [depict] in an instant."

Napoleon Bonaparte posited: "A good sketch is better than a long speech."

The playwright Henrik Ibsen argued: "A thousand words leave not the same deep impression as does a single deed."

You get the idea. Undisputed is that a single visual image can impact its viewers far more strongly than any number of words can. Recent events bear testament to that truth.

I recently penned an OpEd for the Albany Times Union on the December 10, 2024 killing of Robert Brooks, the incarcerated individual housed at Marcy Correctional Facility. The OpEd ran on 1/13/25 and can be found at the link below:

https://www.timesunion.com/opinion/article/prison-reform-starts-transparency-means-20025306.php?utm_campaign=CMS%20Sharing%20Tools%20(Premium)&utm_source=share-by-email&utm_medium=email

We at PLS have represented people like Mr. Brooks for almost 50 years in an effort to address gross injustices, alter conduct, improve conditions and prevent another uprising like that at Attica in 1971 – an uprising that itself stemmed from the Department of Correctional Services' (DOCS) – now DOCCS – neglect and abuse of New York's incarcerated population.

What happened to Mr. Brooks at Marcy C.F. is neither novel nor, tragically, even particularly unusual. Consider the assaults on Melvin Virgil at Green Haven C.F. (2020); Harold Scott at Willard D.T.C. (2021); the residents of 4H Dorm at Mid-State C.F. (2016); Karl Taylor at Sullivan C.F. (2015); and Samuel Harrell at Fishkill C.F. (2015), not to mention all the other assaults on incarcerated individuals, whether or not officially reported or covered by the media.

Excessive force and cover-ups have plagued DOCCS facilities *ab initio*, but attempts to eliminate this conduct through policies and practices have always come up short.

Short of systemic changes, reform in the manner in which security staff treat incarcerated individuals will never satisfactorily address the problem of brutality behind bars. Reforms must include equipping all DOCCS staff who interact with incarcerated individuals with body cameras that are turned on at the start of the work day and are not turned off until the staff is off duty. The staff itself should not control whether the camera is on or off.

When abuses by DOCCS staff do occur, many of us would like to be able to rely on the courts to offer redress. While we have recently seen juries award compensatory and punitive damages in some excessive force lawsuits, historically, faced with only "he said/he said" evidence, more often than not jury verdicts in brutality cases favor the "keepers," as the prospective jurors in the upstate jury pools have historically been more apt to take the word of someone viewed as a friend or neighbor over that of someone who isn't. While body camera footage will undoubtedly help in these courtrooms, we still have a long way to go before we can rest assured that our courts will fairly and adequately compensate victims of excessive force.

Clearly, a piecemeal case-by-case approach never has – and never will – stem the violence that we've witnessed in the deadly assault on Mr. Brooks. Few would dispute, however, that the body camera footage of the savage beating of Mr. Brooks has made all the difference in shining a light on the magnitude and severity of the problem. As most government officials have already acknowledged, the footage depicts nothing short of a modern-day lynching and raises the specter of a culture that, sadly, no amount of sensitivity training will ever change.

We commend DOCCS for its recently expressed "zero tolerance policy" as to unnecessary and excessive force, but look to additional actions to hold accountable those officers who fail to prevent such violence or engage in cover-ups and false reporting.

Acknowledging that it is all but impossible to change such a culture overnight is the first step to understanding that we need to do much more if we want to alter the trajectory.

The solution?

Ensuring transparency and accountability is just the beginning.

In addition, DOCCS needs to:

- Routinely videotape all interactions between staff and incarcerated individuals. This means bringing in more cameras and restricting the ability of DOCCS staff to turn the cameras off.
- Require the release of video footage to the public.
- Ensure the availability of resources to hold bad actors accountable, including the preservation of videotaped evidence, so that it can be used in court.
- Extend the "zero tolerance" policy to all staff who fail to intervene in or engage in cover-ups of excessive force.

Such actions will demonstrate that NYS is serious about curing an ill that has long plagued its prison system.

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At trial, the residents of Dorm 4H testified that the security staff:

- did not wear name tags;
- kicked, punched, slapped, stomped and poured food on the residents;
- used racial epithets;
- threw and destroyed lockers;
- threw chairs at the walls, making holes and leaving at least one chair embedded in the wall;
- shoved objects into two residents' rectums and, while taking a urine sample, flicked the penis of a third resident multiple times;
- used a resident as a trampoline;
- threw residents against the wall;
- cut the cords on the television and the phone;
- kicked a bucket with bleach in it into a resident's face and eyes;
- destroyed the residents' property;
- kneeled on the residents' backs as they lay on the floor;
- used a fire extinguisher to break the locks on the residents' lockers; and
- threatened retaliation if the residents requested medical care or reported the staff conduct.

The security staff testified:

- all of the security staff involved in the search wore name tags;
- none of the security staff used force;
- none of the security staff destroyed state property;
- none of the security staff destroyed the residents' property;
- the security staff did not throw or break lockers;
- the security staff did not use fire extinguishers to break the locks on the lockers;
- none of the security staff used racial epithets;
- none of the security staff threatened dorm residents that if they asked for medical care or reported the staff conduct, there would be retaliation.

The Superintendent, who walked through the dorm when the search was being conducted, and one other officer, admitted that they had seen a chair embedded in the wall. The officer said that he did not know how the chair came to be stuck on the wall.

The *Aliaga* Court's Decision

After hearing this testimony and reviewing the evidence, the Court issued a decision holding the State liable for the injuries inflicted on the 28 Claimants who testified. See, *Matthew Aliaga, et al. v. State of New York*, 2024 WL 5132313 (Ct. Clms. Dec. 2, 2024).

<u>The Law Controlling the Claims</u>

The Court stated that for various reasons, the only viable claim was the claim for assault and battery. The use of force on incarcerated individuals in NYS prisons, the Court began, citing Correction Law §137, "is only permitted 'in self-defense, or to suppress a revolt or insurrection [and] … to maintain order, to enforce observation of discipline, to secure the persons of offenders and to prevent any such attempt or escape.' "

The Court also noted that it must consider whether the use of force was reasonable, and commented that use of force cases are highly fact specific and often depend on **credibility determinations** (deciding which witnesses are telling the truth).

The Court then referred to a frequently raised issue: Whether the challenged use of force was within the scope of the state employee's employment. Citing *N.X. v. Cabrini Med. Ctr.*, 97 N.Y.2d 247, 251 (2002), the Court reminded us that "an employer is only liable for the tortious acts of its employees if these acts were committed in furtherance of the employer's business and within the scope of employment."

Whether a challenged use of force is within the scope of the employee's employment is "heavily dependent on factual considerations," the *Aliaga* Court wrote. These considerations include:

- the connection between the time, place and occasion for the act;
- the history of the relationship between the employer and employee as spelled out in actual practice;
- whether the act is one commonly done by such an employee;
- the extent of the departure from normal methods of performance; and
- whether the specific act was one that the employer could reasonably have expected.

And, the Court continued, it is irrelevant whether the conduct is intentional or negligent.

With respect to deciding whether the conduct falls within the scope of a correction officer's employment, the Court referenced *Galloway v. State of New York*, 212 A.D.3d 965 (3d Dep't 2023). In *Galloway*, during a pat frisk, a DOCCS employee punched the Claimant in the face. The Third Department ruled that "while the force employed by the officer crossed the line of sanctioned conduct it cannot be readily divorced from the pat frisk and ensuing efforts to subdue the claimant so as to render it outside the scope of employment." Thus, the Court ruled that in that context, the punch to the face was within the scope of the officer's conduct.

And, with respect to allegations of sexual abuse, the *Aliaga* Court noted, in *M.K. v. State of New York*, 216 A.D.3d 139 (3d Dep't 2023), the Third Department held that where the DOCCS security staff ordered an incarcerated individual who was undergoing a strip frisk to alternate between putting his fingers in his mouth and on his genitals, "the underlying conduct … readily differs from those concerning sexual assault which would not be permitted conduct under any instance and thus would constitute a clear departure from the scope of employment."

In reaching this conclusion, the *M.K.* Court focused on the officers' motivation which was "clearly a despicable and perverse undertaking of the allowable procedures … not undertaken solely to humiliate the claimant and therefore part and parcel of the employment-related function of administering a pat frisk." Thus, the Court held the State liable, finding that the officers' actions "clearly crossed the line of sanctioned conduct, but cannot be readily divorced from the authorized acts."

<u>The *Aliaga's* Court's Findings of Fact</u>

The *Aliaga* Court found, based on the preponderance of the evidence, that excessive force was used against the 28 Claimants who testified at trial. The excessive force was used during an authorized raid on the 4H dorm at Mid-State C.F. and was motivated "largely if not entirely by a desire to send a message that assaults on [officers] would not be tolerated by Mid-State staff." The evidence supporting this conclusion was that:

- The raid was authorized by Mid-State supervisory staff;

- The raid had a dual purpose: first to locate a weapon, and second to send a message to the residents that further assaults on officers would not be tolerated.

According to the Court, both purposes were communicated by the Superintendent and the supervisory staff to most of the officers involved in the search.

The Court held that the actions taken by the security staff were within the scope of their employment and the State is 100% liable for all assaults and batteries committed.

Addressing the issue of the credibility of the Claimants, the Court wrote that it was struck by the consistency of the testimony of the 28 residents of Dorm 4H. Many became visibly emotional while testifying about what the Court characterized as a clearly traumatic experience, "underscoring the gravity of the events described."

Another point that the Court noted supported the credibility of the Claimants was that they all testified that they were ordered to lie on the floor in a prone position. Security staff confirmed that this was true, and were unable to explain why this deviation from the norm during a dorm frisk occurred. The Court found the reason for ordering residents to assume this position was so that the residents would not see the staff's faces. The Court also found that the officers did not wear name tags, a fact confirmed by one member of the security staff during the OSI investigation (a summary of the OSI investigation conclusions was admitted into evidence).

The Court found that the security staff had thrown chairs during the raid, with sufficient force that some were left sticking out of the walls. The Court could find no justification for such conduct.

The Court found that the security staff, with no justification, had cut the television and phone cords. This was consistent, the Court found, with threats of retaliation made to stop residents from reporting the assault. The Court found the phone and TV were working before the raid and that it was unlikely that the residents would have disabled their only source of entertainment and communication with the outside world.

With respect to the testimony of the three residents who said that the security staff either shoved an object up their rectums (two residents) or flicked his penis (one resident), the Court found, that "there can be little dispute that the employer-employee relationship, time, place and manner and the common nature of the search and the dorm frisk were established by the record. Because the officer flicked one resident's penis when the officer was collecting a urine sample, the Court found that his conduct "did not significantly deviate from the duties [of the staff responsible for collecting urine] and was foreseeable in the context of the dorm frisk authorized in this instance." The officer's conduct, "as inappropriate as the flicking of [the resident's] penis may be, was clearly in furtherance of the employer's interests in collecting a urine sample." For this reason, the Court held, the State will be held vicariously liable for this assault.

With respect to the insertion of objects into the rectums of two residents, the Court held that these assaults were carried out for a penological purpose, that is, to convey a message for the Superintendent and supervisory staff that assaults on correctional staff would not be tolerated.

"These acts were taken in the midst of approximately 30 officers acting in concert against 28 incarcerated individuals, in the dormitory space, [while other officers] were knocking over furniture, dumping personal items on incarcerated individuals, speaking vulgarities, ordering that incarcerated individuals remain prone on the floor, assaulting them by kicking, hitting, stomping and making statements meant to elicit feelings of helplessness," the Court wrote. Further, the Court continued, "inserting an object into the rectum or anus of two incarcerated individuals was done with the objective of "maintaining order and discipline in the 4H dorm and to further convey to its residents a message that physical force would be used in the future to ensure order and discipline." Thus, the Court found, the evidence showed that the officers were not acting for wholly personal reasons and therefore, the State of New York would be held 100% liable for these additional assaults on the three residents.

A separate trial for damages will be held in the future.

For information about the use of force in New York State prisons and pursuing legal remedies for unlawful uses of force, write to the PLS office that provides legal services to individuals incarcerated at the prison from which you are writing and request the memos: "The Unnecessary or Excessive Use of Force by Correction Officers," "Court Systems in NYS: Choosing the Proper Court," and "Lawsuits in the New York State Court of Claims."

Glenn Miller and Edward Sivin, of Sivin, Miller & Roche, LLP, represented Matthew Aliaga and 27 other incarcerated individuals in this Court of Claims action.

NEWS & NOTES

Krin Flaherty Takes the Reins!

Hello Readers! This is Betsy Hutchings, writing to you for the first time in my own voice, to let you know that I am handing over my responsibilities as *Pro Se's* primary writer and editor to Krin Flaherty, Deputy Director of PLS. I have no doubt that Krin will successfully and creatively move PLS's prisoners' rights newsletter into the mid-twenty first century!

Writing *Pro Se* has been one of the great joys of my legal life. It has allowed me to stay in close touch with PLS's client base and to champion their successes, and mourn their losses, and those of the New York lawyers who have taken on the challenge of developing and vindicating prisoners' rights in the New York state and federal courts.

One of my greatest pleasures has come from the letters you wrote to accompany your judicial victories, in which you explained how a particular article you read in *Pro Se* helped you make an argument that led to your success. To know that prison bars cannot prevent the kind of partnership that brings about justice in the courts is a triumph indeed!

Thank you so much for your interest and eagerness to learn about the law and to litigate when you see injustices. This is how we get the work done!

CALL FOR SUBMISSIONS

HELP PRISONERS' LEGAL SERVICES CELEBRATE NATIONAL PRO BONO WEEK

National Pro Bono Week (October 19 – 25, 2025) 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 14th year celebrating National Pro Bono Week, and we are excited to announce PLS will be hosting a panel of experts for an extensive conversation about maintaining and improving familial relationships during and after a loved one's incarceration. We will cover topics including causes of strain on familial relationships, dealing with past and present trauma caused by incarceration, and ideas about how to improve familial relationships impacted by incarceration.

To assist with this year's event, PLS is seeking ideas, stories, questions, poetry, or other written submissions from currently and formerly incarcerated individuals, which focus on the impact of incarceration on familial relationships. Submissions can address topics such as:

- *Obstacles to maintaining familial relationships, as faced by incarcerated people, formerly incarcerated people, and their family members*
- *How family members can best support someone who is currently or formerly incarcerated*
- *Ideas for programs or other institutional support to help families navigate incarceration*
- *Things you wish your family understood about your incarceration experience*
- *Any issues that relate to the effects of incarceration on familial relationships*

Our goal is to give every incarcerated New Yorker a chance to contribute and have their ideas and stories about familial relationships heard. Whether you have created and/or maintained strong familial relationships during your incarceration, had difficulty maintaining familial relationships, or your family has struggled to connect with you during your incarceration, we welcome your thoughts.

If you speak/write in a language other than English, please feel free to send us a submission in the language in which you are most comfortable expressing yourself. Selected submissions will be read and/or used as talking points at our National Pro Bono Week event.

Submissions should be no more than two (2) pages in length and mailed to: Pro Bono Director, Prisoners' Legal Services of NY, 41 State Street, Suite M112, Albany, New York 12207, **no later than June 30, 2025**.

By hosting a panel on familial relationships, we hope to raise awareness, educate the public, and inspire stronger familial connections. We also hope to recruit attorneys to take cases *pro bono*, thus

increasing access to justice for indigent incarcerated persons across the State.

While we cannot guarantee that each submission will be read or included in our event, we encourage all submissions and will do our best to integrate as many submissions as possible. PLS reserves the right to make editorial changes to submissions.

We regret we will not be able to return any submissions mailed to us, whether selected or not.

Please note that contributing your submission 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 use my submission at their National Pro Bono Week event.
- PLS may use my real name in relation to 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.

CORRECTION

In the January 2025 issue of *Pro Se*, there was a typo in the name of the law firm that represented Wonder Williams in his successful lawsuit against James O'Gorman over conditions of confinement in long-term administrative segregation. The correct name of the law firm is Sidley Austin, LLP.

PRO SE VICTORIES!

***Matter of Julio Nova v. D. Rabideau and John Doe,* Index No. 3357-24 (Sup Ct. Albany Co. Aug. 29, 2024)**. After Julio Nova filed an Article 78 challenge to a Tier III hearing, the Court issued an Order to Show Cause. After service on them, the Respondents moved to dismiss the Petition for failure to exhaust administrative remedies.

In the context of a Tier III challenge, to exhaust administrative remedies, the incarcerated individual must file an appeal with the DOCCS Office of Special Housing and Inmate Discipline within 30 days of receipt of the determination of guilt. DOCCS has sixty days to decide the appeal. Where more than sixty days have passed from DOCCS' receipt of the appeal and the individual has not received a decision, the individual will be considered to have exhausted their administrative remedies.

Mr. Nova opposed the motion to dismiss, arguing that he had appealed the hearing by placing his appeal in the facility mail-box, after which he had no control over whether it reached the addressee. He noted that there was a well-known problem with mail reaching its

destination from the prison to which he was then assigned.

Based on this argument the Court denied the motion, and gave the Respondents 30 days to answer. While acknowledging that the Respondents were correct in stating that "a petitioner must exhaust all remedies before seeking judicial review[,] …" the Court found that for the purposes of the motion, the affirmations and submissions "sufficiently establish that Petitioner made a reasonable attempt to pursue his administrative remedies and the appeal that he claims that he submitted was not processed nor decided within the timeframes set for in the applicable administrative regulations."

***Matter of Andre Scott v. Michael Ranieri*, *DOCCS FOIL Appeals Officer*, Index No. 3039-23 (Sup. Ct. Albany County, Sept. 10, 2024).** In response to an Article 78 Petition seeking a copy of an Inmate Records Coordinator Manual; a Guidance and Counselling Manual; and a Recreation Programs and Practice Manual, the Respondent asserted that the materials had been produced, but that the Petitioner had failed to pay the fee for the material. The Court however, held that the Answer referenced an earlier FOIL request and was unresponsive to the request which was the focus of the Article 78. The Court granted the Petition and ordered that the Respondent provide the Petitioner with the documents that he had actually requested.

Because the Petitioner had not received the manuals he requested, two months after the order requiring production was granted, the Petitioner moved to have the Respondent held in contempt. A month later, the Respondent turned over redacted copies of the manuals to the Petitioner and filed an affirmation in opposition to the motion. The Petitioner argued that the Court should impose a $250.00 fine on the Respondent because he invoked a FOIL exemption to justify the redactions only after the Court issued the order to produce.

The Court, citing *McCain v. Dinkins*, 84 N.Y.2d 216, 226 (1994), found that in order to meet the requirements for finding a party in civil contempt under Judiciary Law §753(A), "a lawful judicial order expressing an unequivocal mandate must have been in effect and disobeyed" and the party seeking the contempt finding must establish that they were prejudiced.

The Court held that the Respondent was not in contempt because the original order had not set a deadline by which date the manuals must be produced, nor had the Petitioner alleged that he was prejudiced by the redactions. Thus, the Court ruled, the Respondent had not violated an **unequivocal** [clear] mandate. Further, because the Petitioner had not shown that he was prejudiced by the redactions, the Court found no basis for finding the Respondent in contempt for redacting the manuals.

Pro Se Victories! *features summaries of successful pro se administrative advocacy and unreported pro se litigation. 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

Petitioner's Failure to Comply with OSC Leads to Dismissal

After the guilty determination made at a Tier III hearing was affirmed on administrative appeal, Paul Davila filed an Article 78 petition seeking the reversal of the hearing and expungement of the charges. The petition was filed and the Supreme Court, Albany County, issued an Order to Show Cause (OSC). The OSC directed the Petitioner to serve the OSC and the petition with supporting exhibits and affidavits upon the Respondent and the Attorney General. When the Attorney General did not receive the documents, he moved to dismiss the petition. The lower court granted the motion, finding that Mr. Davila had not served the papers as the Court had directed in the OSC.

Mr. Davila appealed. In *Matter of Davila v. Rodriguez*, 220 N.Y.S.3d 456 (3d Dep't 2024), the Court affirmed the lower court's decision. "It is well settled," the Court wrote, "that the failure of an incarcerated individual to comply with the directives set forth in an order to show cause will result in dismissal of the petition for lack of personal jurisdiction, unless the incarcerated individual demonstrates that imprisonment presented obstacles beyond his or her control which prevented compliance."

Here, the Court found, the Petitioner's affidavit of service asserted that he had served only the Respondent and not the Attorney General. Because the Petitioner served only one of the two entities that the OSC required he serve, and because he did not show that his imprisonment prevented him from serving the Attorney General, the Appellate Court affirmed the decision of the lower court.

For information about your rights at a Tier III Hearing and filing Article 78 actions, write to the PLS office that provides legal services to individuals incarcerated at the prison from which you are writing and request the memos: "Your Rights at a Tier III Hearing" and "Drafting and Filing an Article 78."

Paul Davila represented himself in this Article 78 proceeding.

No Due Process Violation Where the Tier II Was Initiated After a Reprimand

As the Petitioner in *Matter of Wesley-Rosa v. Russell*, 230 A.D.3d 1456 (3d Dep't 2024), was leaving a Family Reunion Program (FRP) visit, an officer conducting a search allegedly discovered that she was taking food from the FRP area and reprimanded her for doing so. Subsequently, the Petitioner was given a Tier II Misbehavior Report, charging her with smuggling, possessing contraband and violating the FRP rules. She was found guilty at the hearing and the determination of guilt was affirmed on administrative appeal.

Following the denial of the administrative appeal, the Petitioner filed the Article 78 challenge to the hearing, alleging that because she had already been reprimanded

by the officer immediately after the alleged offense occurred, the Tier II charges violated her Fifth Amendment double jeopardy rights. She also argued that the determination of guilt was not supported by substantial evidence. Because the petition raised the issue of whether the determination was supported by substantial evidence, the case, which was filed in Albany County, was transferred to the Appellate Division.

The Third Department ruled against the Petitioner with respect to her double jeopardy claim. Double jeopardy concerns, the Court pointed out, only apply to criminal prosecutions. Prison disciplinary proceedings are civil proceedings, not criminal.

The Court also rejected the Petitioner's claim that the determination of guilt was not supported by substantial evidence. It found that the misbehavior report, its author's testimony and a video-tape of the incident were substantial evidence that the Petitioner had violated the rules.

For information about your rights at a Tier II Hearing and filing Article 78 actions, write to the PLS office that provides legal services to individuals incarcerated at the prison from which you are writing and request the memos: "Tier II Hearings" and "Drafting and Filing an Article 78."

Jacqueline Wesley-Rosa represented herself in this Article 78 proceeding.

Hearing Supported by Sufficient Evidence; Court Asks HOs to State Where Sanction Will be Served

An officer allegedly observed Andre Smith and another incarcerated individual "striking each other" and Mr. Smith making "a cutting type motion" toward the other individual. Although the other individual had a laceration to his wrist, no weapon was recovered.

The officer charged Mr. Smith with fighting, assaulting an incarcerated individual, and engaging in violent conduct. At his Tier III hearing, Mr. Smith was found guilty only of assault. Mr. Smith submitted an administrative appeal which was denied.

Mr. Smith then filed an Article 78 challenge to the hearing, alleging that the determination of guilt was not supported by substantial evidence. The Court, in *Matter of Smith v. Annucci*, 232 A.D.3d 1014 (3d Dep't 2024), disagreed, finding that "notwithstanding the fact that a weapon was not recovered," the misbehavior report, hearing testimony and documentary evidence were substantial evidence that he had assaulted the other individual.

The Court also noted that since there are statutory limits on how many days DOCCS can confine an incarcerated individual in segregated confinement where the hearing officer has failed to make certain findings required by the statute, DOCCS should address the issue of hearing officers imposing segregated confinement sentences with the intention that the sentence will not be served in segregated confinement but will instead be

served, for example, in a Residential Rehabilitation Unit.

For information about your rights at a Tier III Hearing and filing Article 78 actions, write to the PLS office that provides legal services to individuals incarcerated at the prison from which you are writing and request the memos: "Your Rights at a Tier III Hearing" and "Drafting and Filing an Article 78."

Andre Smith represented himself in this Article 78 proceeding.

Entry of Guilty Plea at Hearing Bars Substantial Evidence Challenge

An officer wrote a misbehavior report alleging that while he was interviewing Jason Cato, Mr. Cato "became loud and disruptive." After initially refusing the order to report back to his group program, the report continued, Mr. Cato did so but then yelled, "This is all bullshit how we get treated and we need to stop dealing with this shit. This needs to stop and we all need to do something about this." The officer charged Mr. Cato with conduct involving the threat of violence, encouraging others to engage in a demonstration, creating a disturbance, interfering with an employee and refusing a direct order.

At his hearing, Mr. Cato pleaded guilty to refusing a direct order and was found guilty of the other charges except for interfering with an employee. On administrative appeal, the determination of guilt with respect to creating a disturbance was reversed. The remaining charges were affirmed.

Mr. Cato then filed an Article 78 challenge to the hearing. Because the Article 78 raised the issue of whether the charges of conduct involving a threat of violence, urging others to engage in a demonstration and refusing a direct order were supported by substantial evidence, the proceeding was transferred to the Appellate Division (Third Department). The petition also raised several procedural issues.

In *Matter of Cato v. Martuscello*, 232 A.D.3d 1191 (3d Dep't 2024), the Court, with little discussion, ruled that none of the procedural rights raised by the Petitioner – right to notice of the charges, failure of the reporting officer to testify and the hearing officer's failure to call the reporting officer as a witness – had been violated.

According to the Court, the misbehavior report was sufficiently detailed to notify Mr. Cato of the charges. The testimony of the charging officer was not required and the hearing officer's failure to call the officer as a witness did not violate Mr. Cato's rights as Mr. Cato had not requested the officer as a witness. Finally, the Court found that two of the charges were supported by substantial evidence and as to the third charge – refusing a direct order – the Petitioner's plea of guilty "precludes [bars] any challenge to the charge of refusing a direct order.

For information about your rights at a Tier III Hearing and filing Article 78 actions, write to the PLS office that provides legal services to individuals incarcerated at the prison from which you are writing and request the memos: "Your Rights at a Tier III Hearing" and "Drafting and Filing an Article 78."

Jason Cato represented himself in this Article 78 proceeding.

Where Medical Staff Identify a Substance as a Specific Drug, No Drug Test is Required

Terell Viera was charged with possessing drugs, drug distribution and possessing contraband. The misbehavior report alleged that during a pat frisk and a search, Mr. Viera admitted to possessing K-2 and gave the officers 7 paper bindles, a bag containing a brown leafy substance and seven pieces of orange film which the medical staff positively identified as buprenorphine.

Mr. Viera pleaded guilty to possessing contraband and was also found guilty of possessing drugs. In response to Mr. Viera's administrative appeal, the determinations of guilt were affirmed. Mr. Viera then filed an Article 78 challenge to the hearing. The proceeding was transferred to the Appellate Division (Third Department) because the petition raised the issue of substantial evidence.

As in the decision in *Matter of Cato v. Martuscello*, see preceding article, the Court, in *Matter of Viera v. Annucci*, 220 N.Y.S.3d 529 (3d Dep't 2024), found that because the Petitioner had pleaded guilty to possessing contraband, he was **precluded** (barred) from challenging the sufficiency of the evidence supporting that charge.

With respect to the charge of possessing drugs, the Court rejected the Petitioner's argument that the determination of guilt must be reversed because DOCCS had not properly tested the strips claimed to be buprenorphine.

Seven NYCRR 1010(4)(d) and (e), are the sections of the regulations controlling the procedures to use following the recovery of a substance that is suspected of being a contraband drug. Sub-section (d) provides that "the substance shall be examined at the facility pharmacy for identification, or if appropriate pharmacy staff are not available, with the assistance of nursing staff."

Subsection (e) provides that only where the substance has not been conclusively identified at the facility pharmacy [or by inference, a member of the medical staff], is the facility required to test the substance using the narcotics identification kit (NIK) manufactured by Public Safety, Inc.

At Mr. Viera's hearing, the Court wrote, because "the facility nurse visually identified the contraband as buprenorphine … no further drug testing was necessary."

The Court also found that both charges were supported by substantial evidence and confirmed the determination of guilt.

For information about your rights at a Tier III Hearing and filing Article 78 actions, write to the PLS office that provides legal services to individuals incarcerated at the prison from which you are writing and request the memos: "Your Rights at a Tier III Hearing" and "Drafting and Filing an Article 78."

Terell Viera represented himself in this Article 78 proceeding

Parole

Appellate Court Affirms Parole Denial

John Richard was convicted of three counts of murder 2nd, and one count each of grand larceny 4th, criminal possession of a weapon 3rd and criminal possession of stolen property 4th. He was sentenced to 32½ years to life. When he came up for parole in 2021, he was denied release to community supervision. Following the denial of Mr. Richard's administrative appeal, he filed an Article 78 challenge to the denial. The lower court – Supreme Court, Sullivan County – dismissed the petition. Mr. Richard appealed the dismissal to the Appellate Division (Third Department).

In *Matter of John Willis Richard v. Chan Woo Lee*, 233 A.D.3d 1115 (3d Dep't 2024), after setting forth the facts, the Third Department wrote about the law controlling judicial review of parole denials. First, the Court noted, "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-i."

Executive Law (EL) §259-i, as it relates to the issues in the *John Willis Richard* case, provides that "the Board must consider whether, if released, there is a reasonable possibility that the incarcerated individual 'will live and remain at liberty without violating the law' and that such release 'is not incompatible with the welfare of society and will not so **deprecate** [undercut] the seriousness of the crime as to undermine respect for the law."

In making this determination, EL §259-i(2)(c)(A) provides that the Parole Board must consider, among other statutory factors:

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

Further, the Court continued, "[t]he Board is not required to give equal weight to – or expressly discuss – each of the statutory factors."

When it examined the record, the Court found that the Board had considered the statutory factors, specifically, the seriousness of the underlying crimes, the Petitioner's continued violent criminal conduct while awaiting trial, the Petitioner's long criminal history and his "bad" and "extensive" disciplinary record. The Board also considered, the Court continued, the Petitioner's lack of remorse and insight into his crime, his post-release plans and his low score on the COMPAS risk assessment instrument.

Turning to the Petitioner's arguments, the Court found that the Board had not impermissibly considered his presentence report or his criminal history as it was reflected in his family court records.

After applying the law to the facts, the Court found that the denial of parole release did not show irrationality bordering on impropriety or that it was arbitrary or capricious. Thus, the Court concluded, the lower court had properly dismissed Petitioner's challenge to the Board's denial of parole.

For information about the factors considered by the Board of Parole and Judicial Review of Parole Denials, write to the PLS office that provides legal services to individuals incarcerated at the prison from which you are writing and request the memos: "Parole Release: Factors Considered by the Board of Parole" and "Drafting and Filing an Article 78."

John Willis Richard represented himself in this Article 78 proceeding.

Sentence & Jail Time

Terms of Resentencing Require that All Sentences Run Concurrently

Following a conviction relating to a 2015 indictment, Davontae Brown was sentenced to:

- Robbery 1 12 years
- Criminal Poss'n of a Weapon 2 12 years
- Assault 1 10 years
- Assault 2 7 years

The sentences for Robbery 1, Criminal Possession of Weapon 2 and Assault 2 were imposed to run concurrently. The sentence for Assault 1 was imposed to run consecutively to the sentences imposed on the other convictions, for an **aggregate** (combined) sentence of 22 years.

On appeal, the Appellate Division held that the sentence for Assault 1 could not legally run consecutively to the sentence imposed for the Robbery 1. The Court therefore "modified the judgment of conviction accordingly and directed that the sentence imposed for [Assault 1] shall run concurrently with the sentence imposed for [Robbery 1]."

When DOCCS recalculated Mr. Brown's sentence, in addition to running the 10-year Assault 1 sentence concurrently with the 12-year sentence for Robbery 1, the Department ran the Assault 1 sentence *consecutively* to the sentences for Criminal possession of Weapon 2 and Assault 2. Mr. Brown asked DOCCS to run all of the sentences concurrently to each other. When DOCCS refused to do so, Mr. Brown filed an Article 78 asking that the Court order this relief. The trial court dismissed the petition. The Petitioner appealed to the Fourth Department of the Appellate Division.

In *Matter of Brown v. Annucci*, 232 A.D.3d 1236 (4th Dep't 2024), the Appellate Court agreed with the Petitioner that all of the sentences should have been computed as running concurrently with each other. Specifically, the Court wrote, by modifying the judgment of conviction to run the sentence for Assault 1 concurrently with the sentence for Robbery 1, the Court had effectively directed that the 10-year sentence [for Assault 1] merge in and be satisfied by discharge of the term which has the longest unexpired time to run, [that is], the concurrent 12-year sentence on Robbery 2."

DOCCS provided the Court with an alternative interpretation of the Court's order. In response, the Court wrote, to the extent that the Appellate Court's original modification of the sentence may have been **ambiguous** – could be read more than one way – the Court found that DOCCS lacked the authority to resolve the **ambiguity** (lack of clarity) because "sentencing is a judicial function and as such, lies beyond DOCCS's limited jurisdiction over inmates and correctional facilities."

For this reason, the Court reversed the lower court's judgment and reinstated and granted the petition.

David J. Pajak, Esq., Alden, N.Y., represented Davontae Brown in this Article 78 proceeding.

Court of Claims

Court Rules Against Fifth Amendment Objection Made at Deposition

In 2019, the Second Circuit Court of Appeals ruled that Pablo Fernandez's 1996 conviction for the murder of a gang leader was constitutionally flawed and ordered that Mr. Fernandez either be released or retried within the next 60 days. The District Attorney elected to release him rather than conduct a new trial. At the time that he was exonerated, Mr. Fernandez had been incarcerated for close to 25 years.

After his release, Mr. Fernandez filed a claim for damages in the New York State Court of Claims. The claim alleges he was convicted based on the testimony of several witnesses who falsely identified him as the murderer but who later recanted their testimony, saying that their testimony had been coerced by Albert J. Melino, an officer for the New York City Police Department (NYPD). The facts underlying this claim are discussed in *Fernandez v. State of New York*, 223 N.Y.S.3d 509 (Ct. Clms. Nov. 25, 2024).

In 1996, following Officer Melino's investigation of the murder that resulted in Mr. Fernandez's conviction, the NYPD fired Officer Melino because in 1992 Officer Melino – then Mr. Melino – had possessed and sold cocaine. Officer Melino was also arrested for possessing and selling cocaine, however the indictment was dismissed on speedy trial grounds – there was no explanation of why the indictment had been delayed for roughly 4 years – and the related files were sealed.

In 2023, the Court of Claims Judge denied Claimant Fernandez's (Claimant) motion to unseal the criminal records of the 1991-1992 narcotics related criminal investigation of Mr. Melino. When the Judge did so, the Claimant had not yet deposed him.

When the Claimant did depose Mr. Melino, he refused to answer questions relating to the criminal allegations with respect to his drug dealing in the early 1990s, and his 1996 arrest and indictment. With respect to these matters, Mr. Melino stated that "on the advice of counsel, I take the Fifth Amendment." The Claimant, the Court noted, wants to depose Mr. Melino on these matters to establish a connection between Mr. Melino's drug activities his motive for framing the Claimant for the murder: to cover up other suspected drug dealers.

The Claimant then moved to compel Mr. Melino "to answer questions about his drug dealing in and around the early 90s and his motivation for purportedly framing the claimant for the underlying murder." In support of his motion, the Claimant argued that Mr. Melino had no valid basis for invoking the privilege against compulsory self-incrimination under the Fifth Amendment (to the U.S. Constitution) because of:

1. the prior dismissal of the criminal charges against him; and
2. the length of time that had passed – over 30 years – since the alleged crimes were committed.

Finally, the Claimant argued, the statute of limitations for charging Mr. Melino for his alleged drug dealing had long ago expired.

In its analysis, the Court noted that "the Fifth Amendment … provides that no person shall be compelled to testify against himself. The privilege against self-incriminating testimony not only embraces answers that would in themselves support a conviction but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant." However, if the statute of limitations has expired, or if immunity attaches with regard to a particular offense, the Court continued, a witness cannot claim the privilege and refuse to testify.

Applying this law to the facts before it, the Court found that:

- The Claimant needs the testimony to prove Mr. Melino's motive for framing the Claimant;
- The statute of limitations has expired with respect to the drug crimes Mr. Melino is believed to have committed; and
- Because the drug charges had been dismissed on speedy trial grounds such a long time ago, the double jeopardy clause of the Fifth Amendment would likely also protect Mr. Melino from being indicted for the same charges.

Based on this analysis, the Court granted the Claimant's motion to require Mr. Melino to answer questions about his drug dealing in the early 1990s.

Nonetheless, the Court recognized that some protection might be appropriate. To protect Mr. Melino from answering questions and risking prosecution, the Court held that Mr. Melino "would have a reasonable cause to apprehend danger from a direct answer to the questions posed by claimant's counsel outside his drug dealing in and around the early 1990s." Thus, the Court limited the requirement that Mr. Melino answer questions about his criminal conduct to question concerning drug dealing in and around the early 1990s.

Finally, the Court noted, that in the event that Mr. Melino fails to directly answer the questions permitted by this ruling, the Claimant would be entitled to request that an adverse inference be drawn from the refusal to answer questions on the basis of the Fifth Amendment right not to incriminate oneself.

Mark K. McCarthy, Emma Freudenberger, and Rhianna Rey, Esqs., of Neufeld Scheck Brustin Hoffmann & Freudenberger, LLP, represented Pablo Fernandez in this Court of Claims action.

IMMIGRATION MATTERS

Nicholas Phillips

While the "Immigration Matters" column generally focuses on federal court immigration cases, this issue's column will instead detail a federal law known as the Laken Riley Act, which was signed into law by President Trump on January 29, 2025, after being passed by both houses of Congress. *See* Laken Riley Act, Pub. L. 119-__, __Stat. __ (2025). The Laken Riley Act amends the Immigration and Nationality Act ("INA") in several ways, with particularly important consequences for noncitizens who have been arrested, charged, or convicted of certain crimes.

To understand the changes implemented by the Laken Riley Act, it is important to understand the federal government's statutory authority to detain noncitizens. The INA vests the federal government with authority to detain noncitizens in two different circumstances. First, under 8 U.S.C. §1226(a), the Department of Homeland Security has the discretionary authority to detain any noncitizen "pending a decision on whether the [noncitizen] is to be removed from the United States." Persons detained under this provision have the right to request a bond hearing before an Immigration Judge ("IJ"), at which the noncitizen has the burden of proving that he or she is not a danger to the community or a flight risk. *See Matter of Guerra*, 24 I. & N. Dec. 37, 40 (BIA 2006). The IJ may order the noncitizen's release subject to certain conditions, such as the payment of a bond, or may order that the noncitizen continue to be detained by DHS without bond. A separate provision of the INA, 8 U.S.C. §1226(c), governs the *mandatory* detention of certain noncitizens convicted of criminal offenses. Persons detained under this provision are not provided with a bond hearing and must be detained until the conclusion of their removal proceedings.

The Laken Riley Act significantly increases the government's detention authority by expanding the categories of noncitizens who are subject to mandatory detention. Prior to the Laken Riley Act, noncitizens would generally be subject to mandatory detention because of criminal *convictions*—that is, criminal judgments that have been issued by a criminal court and that have attained a sufficient degree of finality to support deportation proceedings. *See, e.g., Brathwaite v. Garland*, 3 F.4th 542, 553 (2d Cir. 2021) (affirming that "a conviction may not trigger deportation until it is final; that is, until appellate review is waived or exhausted").

However, the Laken Riley Act expands the mandatory detention statute to include any noncitizen who meets two requirements. First, the noncitizen must be "inadmissible"—that is, legally barred from being allowed to obtain United States immigration benefits—for entering the United States without inspection, committing immigration fraud or misrepresentation, or not currently being in possession of a valid immigrant visa or other lawful immigration status. 8 U.S.C. §1226(c)(1)(E)(i). Second, the statute applies to a noncitizen who:

> is charged with, is arrested for, is convicted of, admits having committed, or admits committing acts which constitute the essential elements of any burglary, theft, larceny, shoplifting, or assault of a law enforcement officer offense, or any crime that results in death or serious bodily injury to another person[.] 8 U.S.C. §1226(c)(1)(E)(ii).

The Laken Riley Act continues by providing that the terms "burglary," "theft," "larceny," "shoplifting," "assault of a law enforcement officer," and "serious bodily injury" "have the meanings given such terms in the jurisdiction in which the acts occurred." 8 U.S.C. §1226(c)(2).

This statutory expansion is notable for several reasons. First, the mandatory detention statute now includes not only people who have been *convicted* of criminal offenses, but also people who have simply been *charged with* or *arrested for* certain enumerated offenses. In addition to raising Due Process concerns, this expansion presents several logistical issues. For example, where noncitizens are detained based on a criminal *arrest*, how exactly would state criminal proceedings be able to proceed if the noncitizen is subject to mandatory immigration detention following the arrest? 8 U.S.C. §1226(c)(1) provides that the government must detain a noncitizen "when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation." Under the Laken Riley Act amendments, then, a noncitizen arrested but then released by local law enforcement would be immediately taken into federal immigration custody, potentially thwarting criminal prosecution.

Second, by specifying that the Laken Riley Act's enumerated offenses are given "the meanings given such terms in the jurisdiction in which the acts occurred," 8 U.S.C. §1226(c)(2), the statute bypasses the traditional test for determining whether a state conviction carries federal consequences, which is known as the "categorical approach." The categorical approach stems from a line of Supreme Court cases considering whether prior state convictions warrant federal sentencing enhancements. *See, e.g., Taylor v. United States*, 495 U.S. 575, 600-02 (1990). Under the categorical approach, to determine whether a state offense carries federal consequences, a court must look to the plain text of the statute of conviction, and not to the underlying facts of the crime itself, to determine whether the minimum conduct criminalized by the statute necessarily matches the federal generic offense. This approach requires analyzing the statutory criminal offense in the abstract to determine the "elements" of the statutory offense—that is, "the constituent parts of a crime's legal definition—the things the prosecution must prove to sustain a conviction," *Mathis v. United States*, 579 U.S. 500, 504 (2016) (internal quotation marks and citation omitted)—and then comparing those to the elements of the federal offense.

Here, in contrast, the Laken Riley Act bypasses this process and simply provides that the crimes are defined by the jurisdiction in which the acts occurred. It seems likely that Congress was deliberately attempting to undercut the highly technical categorical approach, which has drawn the antipathy of several federal judges. For example, in a 2021 *en banc* Second Circuit opinion, Judge Park wrote a concurring opinion lamenting that the categorical approach "perverts the will of Congress, leads to inconsistent results, wastes judicial resources, and undermines confidence in the administration of justice." *United States v. Scott*, 990 F.3d 94, 126 (2d Cir. 2021) (Park, J., concurring). Other federal judges have expressed similar frustrations. *See, e.g., Lopez-Aguilar v. Barr*, 948 F.3d 1143, 1149 (9th Cir. 2020) (Graber, J. , concurring) ("I write separately to add my voice to the substantial chorus of federal judges pleading for the Supreme Court or Congress to rescue us from the morass of the categorical

approach. The categorical approach requires us to perform absurd legal gymnastics, and it produces absurd results." (citations omitted)). Only time will tell whether the Laken Riley Act's more minimalist approach will be expanded to other provisions of the INA.

WHAT DID YOU LEARN?

Brad Rudin

1. **Under the Correction Law, the use of force by a correction officer is permissible against an incarcerated person *except* for the purpose of:**
   a. sending a message about the consequences of misconduct.
   b. engaging in self-defense or the defense of another correction officer.
   c. preventing escape.
   d. maintaining order.

2. **In the Court of Claims, where an incarcerated individual does not raise supervisory liability claims, DOCCS is only liable for the misconduct of a correction officer when:**
   a. the officer has been convicted of violating a section of the N.Y. Penal Law.
   b. the officer acknowledges engaging in the alleged misconduct.
   c. the alleged misconduct falls within the scope of the officer's employment.
   d. the alleged misconduct, if proven, would violate the Corrections Law.

3. **Prior to challenging a Tier III disposition in an Article 78 proceeding, petitioners must exhaust their administrative remedies by:**
   a. filing with the court an Order to Show Cause.
   b. sending a grievance to the facility superintendent.
   c. filing with the court a sworn complaint setting forth the facts justifying relief under Article 78.
   d. filing a timely appeal with the DOCCS Office of Special Housing/Inmate Discipline.

4. **The Petitioner in *Matter of Julio Nova v. D. Rabideau and John Doe* defeated the State's motion to dismiss by establishing that he:**
   a. was not guilty of the Tier III disciplinary charges.
   b. made a reasonable attempt to pursue his administrative remedies by depositing his administrative appeal in a facility mailbox.
   c. avoided the need to show exhaustion of administrative remedies.
   d. proved beyond any doubt that prison officers had destroyed his administrative appeal.

5. **The Petitioner in *Matter of Davilla v. Rodriguez* lost his opportunity to proceed in Supreme Court, Albany County, because he failed to:**
   a. file a Proposed Order to Show Cause.
   b. file an Article 78 petition with Supreme Court Albany County.
   c. serve the petition and other documents on the Respondent.
   d. serve the petition and other documents on the Attorney General.

6. Which of the following arguments did The Court in *Matter of Wesley-Rosa v. Russell* reject:

a. a Tier II hearing conducted after a verbal reprimand constituted a violation of the Fifth Amendment prohibition on double jeopardy.
b. DOCCS regulations do not permit Tier II hearings for minor food-related violations.
c. the charges automatically constitute a double jeopardy violation when DOCCS does not rely on a video-tape of the incident.
d. the lower court was required to reach the merits of the petition before it was decided by the Appellate Division.

7. The Petitioner in *Matter of Smith v. Annucci,* lost his appeal of the Tier III disciplinary determination for assaulting another incarcerated person because:

a. the weapon was recovered by the correction staff.
b. where the weapon was not recovered, circumstantial proof of slashing motions and of an injury caused by a blade may constitute substantial evidence of assault.
c. the Petitioner confessed to using a weapon to cut another person.
d. nobody suffered a laceration resulting from the Petitioner's use of a weapon.

8. Which legal principle was cited in the court's ruling in *Matter of Cato v. Martuscello*?

a. a challenge to a determination of guilt made with respect to a particular charge at a Tier III hearing is precluded by a plea of guilty to the that charge.
b. the testimony of the charging officer is never sufficient to establish substantial evidence.
c. a hearing officer must call every witness possessing information about the accuracy of a misbehavior report.
d. encouraging incarcerated persons to engage in a demonstration is a right protected by the First Amendment.

9. Possession of the drug known as buprenorphine may be established by:

a. any scientific test found suitable by the correction staff.
b. a NIK test but only when combined with the testimony by the facility pharmacy.
c. an identification made by the staff of the facility pharmacy or the nursing staff.
d. the testimony of a correction officer familiar with this drug.

10. In *Matter of John Willis Richard v. Chan Woo Lee*, the Third Department dismissed the Petitioner's Article 78 challenge to the parole board's denial of parole because:

a. persons convicted of multiple murders are not entitled to parole.
b. the Petitioner failed to present the parole board with substantial evidence supporting the granting of parole.
c. the denial of parole release did not reflect irrationality or capricious reasoning by the parole board.
d. the petitioner did not present the parole board with detailed post-release plans.

(Answers on next page.)

ANSWERS

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

SPOTLIGHT ON THE PLS PREP PROGRAM

PREP is our unique, voluntary, and free initiative that provides counseling and re-entry planning guidance for individuals who are within 6-18 months of their release date and returning to one of the five (5) boroughs of New York City or one of the following counties: Dutchess, Erie, Genesee, Monroe, Niagara, Orange, Orleans, Putnam, Rockland, Sullivan, Ulster, Westchester or Wyoming. Our mission is to assist those interested in personal growth and committed to avoiding future involvement in the criminal legal system. We are dedicated to helping those who are committed to helping themselves. The PREP program is designed for individuals seeking a 'hand-up, not a hand-out,' meaning we provide the tools and support to make positive changes in your life, but the effort and commitment must come from you. You'll identify your short- and long-term goals through counseling and personalized case management with your licensed social worker and develop action plans to achieve them. Your social worker will help identify immediate release needs, such as medical or psychiatric care and shelter placement, and guide you through the necessary steps to meet these needs. Participants work with their social worker for three years after coming home. This ongoing support is designed to give you the reassurance and support you need to reintegrate into society successfully. You will then graduate from the program equipped with the tools and confidence to thrive in your life beyond the bars.

Individuals serving their maximum sentence should automatically receive an application by legal mail. Individuals who will be on parole are eligible only if they have served at least one prior prison sentence. Individuals convicted of sexual crimes and those on the sex offender registry are ineligible. Mail application requests to:

Jill Marie Nolan, LCSW
PREP Coordinator
Prisoners' Legal Services of New York
10 Little Britain Road, Suite 204
Newburgh, NY 12550

The PREP application process involves completing a paper application and participating in an admission interview. Admission and continued enrollment are reserved for applicants committed to participating in counseling, therapeutic programming, goal-setting, and avoiding future involvement in the criminal legal system. Participants who do not demonstrate this commitment are disenrolled. Please note that PREP does <u>not</u> generally provide parole support letters. Applicants should ensure they meet eligibility requirements before applying and recognize that serious commitment is required for the program. PREP is for people ready to make changes and committed to personal growth and future success.

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PLS OFFICES

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

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