Pro Se

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Second Circuit Reverses Dismissal of Medical Care Claim Remands Case to Proceed in the District Court

Plaintiff commenced a 1983 action alleging that three doctors employed by or contracted by DOCCS were deliberately indifferent in failing to diagnose him with prostate cancer. Defendants moved to dismiss the 1983 claims, arguing that Plaintiff had filed the claim more than three years after its accrual. In *Mallet v. NYS DOCCS, et al.,* 126 F4th 125 (2d Cir. 2025), the Second Circuit reversed a Southern District of New York decision dismissing the action on statute of limitation grounds, and **remanded** (sent back) the case for further proceedings in the Southern District.

In 2017, Plaintiff began to request medical care for difficulty with urination. Although Plaintiff was referred to various specialists and prescribed medication, the providers failed to order tests that would have shown whether he had prostate cancer. Within months of his parole release in 2019, Plaintiff sought urology treatment. In 2020, doctors administered a PSA test –a test designed to screen for prostate cancer – and found that Plaintiff had an elevated PSA level. In 2021, a biopsy revealed a large cancerous tumor. A few months after his diagnosis, Plaintiff commenced this 1983 lawsuit.

The Southern District granted Defendants' motion to dismiss on the basis that the latest date for **accrual of Plaintiff's claim** – the

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A LETTER OF THANKS TO THE READERSHIP

A Message from the Executive Director, Karen L. Murtagh

As we reflect on the challenges of the past few months, I want to take a moment to express my appreciation for the readership and others among New York's incarcerated population. The murders of Mr. Brooks (Marcy) and Mr. Nantwi (Mid-State) by correction staff are fresh in all of our minds. These cases remain in the investigative stage but full prosecution of all involved has been signaled by independent counsel.

Those events, coupled with the illegal correction officer strike, have created a difficult and dangerous environment for everyone.

Many of you were (and are still being) deprived of basic necessities – visits from loved ones, access to programming and education, hot meals, showers and exercise. Some of you went without necessary medical and mental health care, and others were unable to consult with your attorneys. Most of you endured weeks locked in your cells, with no clear end in sight, uncertain of when things might return to any semblance of normalcy.

Despite the hardship, you have risen to the occasion and continue to do so. You stepped up, not adding to the chaos, but rather maintained your dignity, composure and respect for one another. It's in moments like these that the true mettle of a person is tested. You could have chosen to take advantage of the situation, to let fear or frustration take hold. But instead, you pulled together, helped to make things as manageable as possible, even when it may have been tempting to do otherwise.

I want to also extend my heartfelt thanks to the National Guard, who stepped in to help during this time of crisis. Their assistance remains invaluable, as their presence has helped maintain some stability during a truly challenging situation. I also want to thank and recognize the efforts of Governor Hochul and the Department of Corrections and Community Supervision (DOCCS) for their work in trying to resolve the situation peacefully, and for communicating with you during the strike in an attempt to keep you informed and address your concerns.

It would also be remiss for us not to express gratitude to the correction staff who chose to remain on the job during the strike and steadfast in their commitment as peace officers. Their dedication to duty played a crucial role in keeping the peace, maintaining safety and ensuring that order was preserved when circumstances could have easily deteriorated.

It's often said that each of us is more than the worst thing we have ever done. Your response to these extraordinary challenges has proven that adage. Through your conduct, you are demonstrating your unwillingness to be defined by past mistakes and your desire to be judged by your response to today's adversities. I want you to know that your efforts have not gone unnoticed. Indeed, it is exactly what parole boards, clemency boards and policymakers are looking for when words like "rehabilitation", "successful reentry" and "smart on crime" choices are being debated in the halls of the State Capitol.

As New York State officials continue to grapple with the aftermath of these events and the steps needed to move forward productively, you've given them much to think about.

So, kudos to you all. I am immensely proud of each and every one of you and I implore you to continue exercising that same degree of patience, resiliency and determination not to add to the chaos, but rise above it. There will remain significant challenges on the road ahead, but you've proven that even in the darkest times, it is possible to find light in the actions of those who choose to do the right thing.

In closing, I want to turn the pen over to DOCCS' Commissioner Martuscello who has graciously accepted my invitation to join me in an expression of gratitude to you all:

> "*On February 23, I wrote to you all to keep you informed and address your concerns. I asked each of you to stick with us during this challenging time and reminded you that who we are and how we behave during times of adversity can define us. I want to start by thanking you for taking this message to heart. This has been an incredibly challenging time for all of us, especially on you and your families. While the strike has ended, the crisis is not over. Now we must take stock of what we've learned. We must continue to improve our culture and rebuild in a way that will make this agency stronger, standing on the value of all people, keeping everyone safe, while treating each other with dignity and respect. I vowed that I would not allow violence to become normalized in our facilities. My commitment to this goal has never wavered. Senseless killings and the people who commit these acts have no place here. We must do better, and I will continue to prioritize accountability and transparency. As we are slowly reopening, I ask for your patience. We have prioritized visitation because we understand the value and importance of time with your loved ones. I know that you are all anxious for things to return to normal. However, this will take some time and may result in a new normal. I look forward to us working collaboratively to making this vision a reality and heal from the past few months.*

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date on which Plaintiff should have known that Defendants had harmed him – was the date he was released from prison. The Southern District reasoned that by the time Plaintiff left prison, he should have known that the prison doctors who had treated him were deliberately indifferent to his serious medical need. This action was filed more than three years after that date. *

On review, the Second Circuit held that:

- Plaintiff's claim could not have accrued until Plaintiff knew or had reason to know that "he suffered from an objectively serious medical condition while he was incarcerated;" and
- Defendants failed to provide treatment because "they consciously disregarded a substantial risk to his health and safety."

The Second Circuit agreed that Plaintiff knew that he had a medical problem while he was incarcerated, but none of the providers indicated that his symptoms were signs of prostate cancer, nor did they screen for prostate cancer. The Court found it was "plausible" that Plaintiff did not know his condition was serious until he was released and received an elevated PSA test result. Without pinpointing an exact date of accrual for the claim, the Court held that as Plaintiff had filed his lawsuit within three years of his PSA testing, the 1983 claim should not have been dismissed as time-barred.

Because the Southern District dismissed the claim based on the statute of limitations, it did not consider Defendants' argument that Plaintiff had failed to state a plausible claim for relief. "In the interest of judicial economy," the Second Circuit, decided to review whether the complaint stated a plausible claim for relief.

In support of their motion to dismiss for failure to state a claim, Defendants argued that:

1) Plaintiff failed to demonstrate that Defendants "consciously disregarded substantial risks to [Plaintiff's] health by failing to conduct the appropriate screening tests" and
2) Plaintiff's medical care claim alleged only a disagreement over proper medical treatment, as opposed to an Eighth Amendment claim of deliberate indifference to a serious medical need.

The Second Circuit disagreed.

In support of its conclusion, the Court noted that in his complaint, Plaintiff alleged that the facility doctor made hostile comments about Plaintiff's repeated requests for care. Based on those allegations, the Second Circuit noted, it was plausible that the doctor "consciously chose an easier and less efficacious treatment plan." *Quoting, Chance v. Armstrong,* 143 F3d 698, 703 (2d Cir. 1998).

With respect to the DOCCS urologist, the Court opined that "a reasonable factfinder could infer from the complaint that [the DOCCS urologist] had 'actual knowledge'" of the possibility of prostate cancer given the abnormality of Plaintiff's test results, and that the urologist's decision to not conduct a PSA test could support a finding that he was deliberately indifferent to the risk presented by Plaintiff's test results.

*The statute of limitations for deliberate indifference to a serious medical need claims

expires three years after the date upon which the claim accrued.

For information about medical care claims, write to the PLS office that provides legal services to individuals incarcerated at the prison from which you are writing and request the memos: "Medical Care: Judicial Remedies," "Medical and Mental Health Care: Self-Help Remedies," and "Court Systems in NYS: Choosing the Proper Court."

Caner Demirayak, The Law Office of Caner Demirayak, Esq, Brooklyn NY, represented Antonio Mallet in this appeal.

PRO SE VICTORIES!

Matter of Wynn v. Rodriguez, Index No 9985-24 (Sup Ct Albany Co Jan. 31, 2025). After Charles Wynn filed an Article 78 challenge to a Tier III hearing, the Court issued an Order to Show Cause directing the Respondent to file an answer. Instead, an assistant attorney general wrote the Court indicating that Respondent would not be submitting an answer as after Mr. Wynn had filed his Article 78, DOCCS administratively reversed and expunged the hearing from his record and returned the $5 surcharge to Mr. Wynn's account.

Caballero v. State of New York, Claim No 133224 (Ct of Claims Feb. 13, 2025). *Pro Se* previously reported on Jonas Caballero's *pro se* win on liability in this Court of Claims action. The Court found that under Article 1, §12 of the New York State Constitution, Defendant was 100% liable for violating Mr. Caballero's reasonable expectation of privacy when a female officer remained in the operating room during a diagnostic colonoscopy for which he was sedated. In the damages phase of the action, Mr. Caballero was represented by counsel, and introduced testimony from his treating psychiatrist and psychiatric expert testimony in support of his claims for damages related to pain and suffering.

Relying on a comparable $20,000 damages award in a 1997 Court of Claims suit involving voyeurism in a NYS-owned park shower, the Court found that Claimant had a reduced expectation of privacy as an incarcerated person and that based on the female officer's testimony that she did not see any intimate areas, Claimant's privacy violation was more limited than the privacy interest involved in the shower example. Additionally, the Court noted in the three years since the procedure, Claimant had not experienced mental or emotional stress and successfully pursued education and career goals. The Court awarded Claimant $9,500 for past pain and suffering and $500 for future pain and suffering.

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 /LOCAL COURT DECISIONS

Parole

Think Twice Before Waiving

Your Preliminary Parole Hearing

This article discusses *Matter of Berger v. Arteta,* 84 Misc3d 863 (Co Ct Orange Co 2024), in which the Court examined a habeas petition raising the issue of whether the right to counsel in a parole revocation proceeding **attaches** (applies) prior to the recognizance hearing. Here, Petitioner waived her preliminary hearing before she was assigned counsel. Petitioner argued that because she did not have the benefit of consulting with a lawyer about the consequences of her waiver, her waiver was not knowing and intelligent.

The Court found that with respect to the parole revocation process, the earliest point at which the Executive Law provides for representation is at the parolee's recognizance hearing.* Petitioner waived her right to a preliminary hearing before her recognizance hearing had taken place. As Petitioner had no right to an attorney when she waived the preliminary hearing, the Court held, the fact that she was unrepresented was not sufficient to reverse the waiver.

*When a parolee is charged with a non-technical violation – that is, when a parolee is administratively accused of conduct that is a felony or a misdemeanor – they have the right to representation by counsel at their recognizance, preliminary and final revocation hearings. For a fuller discussion of the parole revocation process, write the PLS office that provides legal services to individuals incarcerated at the prison from which you are writing and request the memo, "Parole Revocation Proceedings and Related Sentence Computations."

Christopher Berger, Esq., Campbell Hall, NY, represented Petitioner Carol Ntuli in this habeas corpus petition.

Two City Court Reversals of Parole Violation Findings

According to Executive Law 259(7), a non-technical parole violation is conduct that constitutes a misdemeanor or felony. Executive Law 259-i(4-a)(a) allows a parolee who has been found guilty of a non-technical parole violation at a parole revocation hearing to appeal to either 1) the administrative board of parole appeals *or* 2) the lowest level of the following courts in the jurisdiction where the hearing took place: city court, district court, county court or supreme court. Here we discuss the court decisions issued on two parole revocation appeals relating to non-technical parole violations brought by two individuals to their local City Courts.

In restoring **community supervision** (parole) for Rashad Burden, Rochester City Court reversed the ALJ's (Administrative Law Judge) finding that Mr. Burden committed a non-technical violation when he failed to charge his DOCCS-owned GPS parolee tracking unit. According to Respondent, this conduct violates Penal Law 195.05(1), obstruction of governmental administration in the second degree, a class A Misdemeanor.

Penal Law 195.05(1) provides:

> "[a] person is guilty of obstructing governmental administration when . . . "[the person] intentionally obstructs, impairs or perverts the administration of law or other governmental function or prevents or attempts to prevent a public servant from performing an official function, by means of intimidation, physical force or interference, or by means of any independently unlawful act, or by means of interfering, whether or not physical force is involved, with radio, telephone, television or other telecommunications systems owned or operated by the state, or a county, city, town, village, fire district or emergency medical service or by means of releasing a dangerous animal under circumstances evincing the actor's intent that the animal obstruct governmental administration."

In looking at the elements of the Penal Law offense and the limited case law on the telecommunications aspect of the law as they relate to Mr. Burden's violation, the Court noted that the Court of Appeals has long required strict compliance with the elements of the statute to avoid an "overly broad catchall for interactions between civilians and public servants." *Matter of Burden v. New York State Dept. of Corrections and Community Supervision and Bd. of Parole*, 84 Misc3d 774, 775 (Rochester City Ct 2024), citing *People v. Case*, 42 NY2d 98 (1977).

The Court found that a single failure to charge the tracking unit that occurred at approximately 3:15 a.m. did not establish that Mr. Burden "intentionally obstructed, impaired or perverted a public servant from performing an official function" under Penal Law 195.05(1). In reversing the revocation and restoring Mr. Burden to supervision, the Court established that the administrative record must – *and in Mr. Burden's case did not* – contain clear and convincing evidence of the following:

- the required intent to obstruct or impair (required by the statute);
- that failure to charge the device constituted physical force or interference; and
- failure to charge the device impacted DOCCS' ability to monitor others on supervision on a system wide basis.

In restoring community supervision for Charles Lewis, Elmira City Court found that the ALJ violated Mr. Lewis' due process rights and abused his discretion when both the Board of Parole and Mr. Lewis requested a two-week adjournment to allow him to resolve criminal matters that were the substance of the charged non-technical violations. The basis for the request was that both parties anticipated that Mr. Lewis would receive ACDs (Adjournment in Contemplation of Dismissal) on his criminal matters, which would clear the underlying parole violations. The ALJ instead ordered the final revocation hearing two days later.

Noting that adjournments are typically within the ALJ's discretion, Elmira City Court found that ALJ's unilateral denial of the jointly requested adjournment allowed the Board to violate Mr. Lewis' parole. In addition, the Court noted, the ALJ's 'rush' through a contested hearing caused other infringements on Mr. Lewis's due process rights, for example, Mr. Lewis was not able to be physically present, prepare a defense, or obtain documents or witness list before the hearing.

Elmira City Court also found that the record lacked clear and convincing evidence to substantiate the ALJ's finding that Mr. Lewis's behavior was a threat to the public or to the alleged victim when the alleged victim testified that Mr. Lewis did not assault or threaten him. *Matter of Lewis v. NYS Dept. of Corrections and Community Supervision,* 84 Misc3d 1231(A) (Elmira City Ct Nov. 19, 2024).

For information about parole revocations and appeals, 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 Revocations and Related Sentence Computations" and/or "Parole Appeals."

Alexander Prieto, Assistant Monroe County Public Defender represented Rashad Burden in this Rochester City Court parole revocation appeal.

Tasha Kates, Law Office of Tasha Kates, Ithaca, NY represented Charles Lewis in this Elmira City Court parole revocation appeal.

Sentence & Jail Time

Court Defines Predicate Felony Offender 10-Year Lookback Period

Individuals who previously served a felony sentence and who are later found guilty of committing another felony, run the risk of being found to be predicate felony offenders at their sentence proceedings. Predicate felony offenders include second felony offenders, second violent felony offenders, persistent felony offenders and persistent violent felony offenders. The consequences of a predicate felony offender finding are severe. This is because the Penal Law requires courts to impose enhanced sentences on predicate felony offenders. As a result, determining whether a prior felony offense is a basis for a finding that an individual is a predicate felony offender is a significant issue for defense attorneys and defendants alike.

With respect to predicate felony determinations, Penal Law §70.04 (1)(b)(iv) (*Section iv*) creates a ten-year lookback period that runs between the date the individual committed the new felony (commission date), and the date that the individual was sentenced on the prior conviction (sentence date). Thus, under *Section iv*, if someone was sentenced for a prior felony within ten years of the date on which they committed the new felony, that prior felony will qualify the defendant for predicate felony offender status.

Notably however, the very next section of the Penal law – Penal Law §70.04 (1)(b)(v), (*Section v*) – states that any time that the defendant spent incarcerated between *the commission* of the defendant's previous felony and the commission of the new felony does not count towards the ten-year lookback created in *Section iv*.

Thus, the **period of time at issue in *Section iv*** is between the commission date of the new felony and the sentence date of the prior felony. The **period of time at issue in *Section v*** is between the commission date of the prior felony and the commission date of the new felony.

In other words, if someone was convicted of a felony in 2012, served five years before being released, then committed a new felony in

2025, the prior 2012 felony would still make them a predicate felony offender, even though the 2012 offense occurred more than ten years after the defendant committed the prior felony. This is because under *Section v*, the five years incarceration are not included in *Section iv's* ten-year lookback period and extend that period by five years. Put another way, the lookback period was effectively extended by time spent in custody.

Critically though, there is a subtle **discord** (conflict) between *Section iv* and *Section v*. Namely, while *Section iv* sets a ten-year lookback period running between the **commission date of the new felony and the sentence date of the prior felony**, *Section v* conversely excludes any time a defendant spends in custody between the c**ommission date of the new felony and the commission date of the prior felony** from counting toward that lookback. Since the commission date of the prior felony would obviously come before the sentence date of the prior felony, *Section v* technically tolls a period of time that occurred before the ten-year lookback period established in *Section iv* would otherwise begin to run.

This statutory ambiguity was the sole legal dispute the Court of Appeals recently considered in *People v. Hernandez,* 2025 WL 515364 (NY Ct Apps Feb. 18, 2025*)*. There, Mr. Hernandez was found to be a persistent violent felony offender due to two prior convictions he received in 1991 and 1997 respectively. While there was no argument that the 1997 conviction fell within *Section iv's* ten-year lookback, especially when extended by the time he had spent incarcerated on that prior term, the same was not true for the 1991 offense.

If the look back period for the 1991 felony was measured from the sentence date to the commission date of the new felony, then even excluding the time Mr. Hernandez had spent incarcerated, that conviction fell outside of the ten-year lookback. However, if the ten-year lookback was further extended, specifically by including the time Mr. Hernandez spent incarcerated from the commission date of the 1991 matter, then it did fall within the lookback period. This was the metric proposed by the District Attorney and, over the objection of his defense counsel, Mr. Hernandez was declared a persistent violent felony offender, a finding that carries a mandatory maximum term of life.

On appeal, the Appellate Division affirmed the finding, holding that under *Section v* the pre-sentence incarceration on the 1991 felony **tolled** (legally extended) *Section iv's* ten-year lookback such that it was a qualifying felony. The Court of Appeals thereafter granted Mr. Hernandez leave to appeal the Appellate Division's decision.

In support of his case, counsel for Mr. Hernandez argued that the language in *Sections iv and v* were at odds and that the fairest interpretation of the statutes would be to find that *Section v's* tolling provision includes only periods of incarceration between the prior felony's sentence date and the new felony's commission date and not pre-sentence confinement on the prior felony as well.

In its decision, however, the Court of Appeals again affirmed both the trial Court and the Appellate Division. Specifically, the majority opinion concluded that there was no ambiguity in the language between *Sections iv and v*. To the contrary, the Court concluded that the plain text in *Section v* "unambiguously requires that the ten-year lookback period be extended by any period of incarceration between the time of the

commission of the previous felony and the time of commission of the present felony, including any period of presentence incarceration for the prior crime." In support of its conclusion the Court cited other statutes in which the legislature utilized the same tolling formula.

Notably, Judge Rivera (joined by Judge Wilson) authored a lengthy dissent to the majority's opinion, observing that he felt the majority were too fixated on viewing *Section v* in isolation, rather than considering it in context with the language in *Section iv*. In this regard, he concluded, the tolling provision in *Section v* was not a "free standing measurement" and should instead only be applied to the time within the ten-year period *Section iv* prescribes. In addition, Judge Rivera also highlighted how the majority ruling could disproportionately affect individuals who chose to exercise their rights to go to trial (and thus likely extending their stays in pre-sentence confinement), or those unable to pay bail (which would also extend their periods of pre-trial confinement).

Judge Rivera concluded his dissent by observing that it is now on the legislature to confirm if this was indeed the intended results of the language used in *Sections iv and v*. We do not know if this is something the legislature would choose to take on, however any proposed statutory changes (should they occur) would be covered in a future issue of ***Pro Se***. In the interim, the Court of Appeals decision has settled any lingering arguments over the logical ambiguities the language in *Sections iv and v* present. As a result, *Section iv's* ten-year lookback period is legally extended by any periods of incarceration between the date a prior felony was committed and the date the present felony was committed. Notably this period includes any period of pre-sentence incarceration for that prior crime.

Amit Jain, of Hecker Fink LLP, represented Mitchell Hernandez in this appeal. Prisoners' Legal Services (PLS), with the Center for Community Alternatives (CANY) and the American Civil Liberties Union of New York (NYCLU) submitted a jointly prepared Amicus brief in support of Appellant/Defendant's position.

Court of Appeals Reviews Appellate Standard for Reducing a Sentence

In *People v. Brisman,* 2025 WL 51484 (Ct App Jan. 9, 2025), the Court of Appeals clarified the appellate court standard for reviewing a criminal appeal that requests a reduction in sentence. Here, the Appellant was convicted of charges stemming from a prison fight with another incarcerated individual and possession of a porcelain shard which could be used as a weapon. He was convicted of promoting prison contraband in the first degree and sentenced as a second felony offender to 3½ to 7 additional years in prison.

Mr. Brisman's appeal challenged, among other issues, the severity of the sentence. The Third Department declined to adjust the sentence claiming there were "no extraordinary circumstances or abuse of discretion warranting a reduction of the sentence in the interest of justice." *People v. Brisman,* 200 AD3d 1219, 1219-1221 (3d Dept 2021).

Although the Court of Appeals lacks the authority to review the severity of a sentence, the Court took the opportunity to clarify the appropriate Appellate Division standard for doing so. The Court rejected the standard used by

the Appellate Court in its decision in Mr. Brisman's case: that appellants must demonstrate either extraordinary circumstances or an abuse of discretion.

The Court held that Criminal Procedure Law 470.15 (6)(b) and 470.20(6) set forth the *only* standard used to decide whether to reduce a sentence, empowering "the intermediate appellate courts [Appellate Divisions] to modify, '*as a matter of discretion in the interest of justice*,' a sentence that, 'though legal, *was unduly harsh or severe*' and provide that, upon making such a finding, 'the court must itself impose some legally authorized lesser sentence.'" *Brisman,* 2025 WL 51484, at *3.

Further, as the Court of Appeals held in 1992, the Criminal Procedure Law grants the Appellate Divisions broad power to reduce a sentence "without deference to the sentencing court." *People v. Delgado*, 80 NY2d 780, 783 (1992). The authority to modify a sentence stems from the Appellate Division's "interest of justice powers, which are distinct from determinations made on the law," and *may* be justified by a showing of ordinary mitigating circumstances. *Brisman,* 2025 WL 51484, at *3 and *5.

The Court recognized that the Appellate Divisions are *now* appropriately applying the discretionary standard set forth in the Criminal Procedure Law but reversed and remanded this appeal to the Third Department because it had applied the wrong standard.

On remand, the Third Department, in *People v. Brisman*, 2025 WL 714347 (3d Dept 2025), applied the standard discussed by the Court of Appeals to Mr. Brisman's claim that his sentence was intended to punish him for going to trial. In doing so, the Appellate Court noted that *at sentencing*, *the County Court (Co. Ct.) had found*:

- Defendant has a "very horrendous criminal history;"
- The majority of Defendant's convictions involved violence against others; and
- Defendant has two prior convictions for conduct while incarcerated.

In imposing a sentence of 3½ to 7 years when the plea offer had been 1½ to 3 years, the Co. Ct. also held:

- With respect to deterrence, "the punishment should "not only deter defendant, but also 'all similarly situated inmates who decide to promote or possess prison contraband ....;'"

- With respect to rehabilitation, Defendant had been removed from DOCCS programs due to disciplinary issues, causing the Court to conclude "there was little hope for defendant to be rehabilitated [;]" and

- With respect to retribution and isolation, it was "clear that [defendant] deserve[s] to be punished and punished severely" for the conviction, and imposed a sentence of 3½ to 7 years.

After a thorough review of the record, the Third Department "declined to exercise [its] interest of justice jurisdiction to reduce the defendant's sentence." In reaching this result, the Court first noted that when Defendant was before the City Court judge for sentencing, he had failed to raise the issue that the sentence was punitive. Had he done so, the Third Department commented, the

County Court could have explained why it had imposed the maximum sentence permitted by law. However, the Appellate Court continued, "the mere fact that a sentence imposed after trial is greater than that offered in connection with plea negotiations does not, without more, establish retaliation or vindictiveness."

Nor, the Court continued, was it inappropriate for the County Court to comment that the sentence was intended to deter not only Defendant but other incarcerated individuals.

Having considered Defendant's arguments and the relevant facts, the Appellate Court found that the record "contains no support for the conclusion that the sentence was retaliatory rather than based upon the seriousness of the offense." In light of his lengthy history of violence against others, lengthy disciplinary history and the seriousness of the offense, the Appellate Court found, the sentence was not unduly harsh or severe.

Clea Weiss, Monroe County Public Defender's Office represented Jason Brisman in this appeal.

Prison Charges Dismissed

Fourteen months after Kenneth Tyson allegedly engaged in misconduct involving a DOCCS employee while he was in prison, Mr. Tyson was charged with an E felony, aggravated harassment of an employee by an incarcerated individual. In response to the indictment, Mr. Tyson successfully moved to dismiss the indictment, arguing that his right to due process of law was violated by the People's pre-indictment delay. Following the issuance of the order dismissing the indictment, the People appealed. In *People v. Tyson*, 234 AD3d 1282 (4th Dept 2025), the Fourth Department affirmed the county court's decision to grant Defendant's motion to dismiss his indictment.

The Court listed the factors relevant to a speedy trial motion:

1. The extent of the delay;
2. The reason for the delay;
3. The nature of the underlying charge;
4. Whether there had been an extended period of pre-trial incarceration; and
5. Whether the defense had been impaired by the delay.

See, People v. Wiggins, 31 NY3d 1, 9-10 (2018).

Applying the factors, the Court found that 14 months was an unreasonable amount of time to delay the prosecution where:

1. the witnesses and evidence were available to DOCCS and the People early in the case;
2. the underlying charge is the lowest level felony offense and was not complex to prosecute; and
3. Defendant's imprisonment on another offense did not excuse the delay.

Abigail D. Whipple, Legal Aid Bureau of Buffalo, Inc. represented Kenneth Tyson in this motion.

Prison Conviction Reversed for Further Sentencing and Appeal

In a short decision finding that appellate counsel had failed to identify a viable issue in a criminal appeal, the Fourth Department held the current assigned counsel should be relieved and new counsel assigned. *People v. Concepcion,* 234 AD3d 1374 (4th Dept 2025). In reaching this result, the Appellate Court found that contrary to assigned counsel's

representation that there were no viable appeal issues, the court below had incorrectly classified Mr. Concepcion's prior conviction of aggravated harassment of an employee by an incarcerated individual as a violent felony offense. Aggravated harassment of an employee by an incarcerated individual is not among the offenses listed in Penal Law 70.02(1), the section of the Penal Law that lists offenses that are violent felonies.

In the conviction under review, Mr. Concepcion had been found guilty of assault in the second degree, a Class D violent felony. As a second violent felony offender, his **exposure** (the minimum and maximum sentences which the court could impose) would have been between five and seven years. Pursuant to Penal Law 70.02(3)(c), his exposure as a first-time violent felony offender would have been between two years and 7 years. Depending on whether Mr. Concepcion was a first or second violent felony offender, the maximum permissible terms of post-release supervision also differed.

Because of the erroneous classification, the Appellate Court noted, the sentencing court had misinformed Defendant at the time that he pleaded guilty, of both the minimum term of imprisonment *and* the maximum term of post- release supervision.

Concluding that the trial court had erroneously found Defendant to be a second felony offender, the Fourth Department held that Defendant had raised a non-frivolous issue as to whether his plea was knowing, voluntary and intelligent. The Court relieved current appellate counsel of her assignment and assigned new counsel to brief the issue of whether Defendant's plea was knowing, voluntary and intelligent, as well as any other issues counsel's review of the record may disclose. The Appellate Court did not reveal the name of the assigned counsel who had incorrectly determined that there were no viable issues to raise on appeal.

Shock Waiver Not a Component of Sentence

In *People v. Santos*, 2025 WL 554467 (Ct Apps Feb. 20, 2025), Defendant Juan Silva Santos, as part of his plea bargain, waived his eligibility for Shock by agreeing not to apply for the Shock Incarceration Program (Shock). Absent the waiver, he would have been statutorily eligible for Shock. At sentencing, Mr. Santos asked for Shock, but did not seek to withdraw his plea when the Court denied his request.

Defendant's appeal challenged the legality of his sentence because it included the Shock waiver, which he argued was a component of the sentence. Because the waiver did not direct DOCCS to impose "a particular form of punishment" or a specific means of calculating his sentence, the New York State Court of Appeals rejected the argument that the waiver was an illegal component of Defendant Santos's sentence.

The Court also noted that the effect of the waiver on the duration of his sentence was speculative: to the extent that Shock could reduce the amount of time that Defendant Santos spent in prison, doing so depended on Mr. Santos choosing to apply for the Shock program, DOCCS agreeing to approve the application – a discretionary decision – and the successful completion of the program. The Court held that the notation about Defendant's waiver on his uniform sentence and commitment did not automatically make it a component of his sentence. That is, there are several items in a sentence and commitment, for example certain surcharges

and fees and orders of protection, that are not considered components of the sentence.

Elizabeth Vasily, Esq., Center for Appellate Litigation, represented Juan M. Silva Santos in this appeal.

FREEDOM OF INFORMATION LAW

Unsubstantiated Law Enforcement Complaints May be Obtained Via FOIL

In 2020, the NYS legislature repealed Civil Rights Law 50-a, and in doing so gave the public access to law enforcement personnel records. Prior to this repeal, law enforcement personnel records could not be disclosed to the public. With the repeal of the non-disclosure provisions of §50-a, some agencies took the position that **unsubstantiated** complaints – complaints that were not proven – were exempt from public access as disclosure would be an unwarranted invasion of personal privacy.

In *Matter of New York Civil Liberties Union v. City of Rochester*, 2025 WL 554452 (Ct Apps Feb. 20, 2025), the Court of Appeals rejected that interpretation. The decision affirmed the Appellate Division's decision that there is no blanket personal privacy exemption for unsubstantiated complaints. Rather each record must be evaluated individually to determine whether "a particularized and specific justification" exists to deny public access.

Robert Hodgson, Esq., New York Civil Liberties Union (NYCLU) represented NYCLU in this appeal.

Access to Law Enforcement Personnel Records Created Prior to 2020

In the Matter of NYP Holdings, Inc. v. New York City Police Department, et al., 2025 WL 554468 (Ct Apps Feb. 20, 2025), the Court of Appeals held that the public may access law enforcement personnel records created before the 2020 repeal of Civil Rights Law §50-a. Relying on the legislative history surrounding the repeal, the Court held that the Legislature intended for the repeal to apply retroactively.

The Court reasoned that the legislation was remedial in nature and did not alter the operation of the Freedom of Information Law (FOIL). The Court also relied on the absence of an exemption for records created prior to the repeal. Factoring in the demands for reform after the killing of George Floyd, the Court held that the repeal was intended to apply to pre-legislation law enforcement personnel records and current records alike.

Jeremy Chase, Esq., Davis Wright Tremaine, LLP, represented NYP Holdings, Inc., et al., in this appeal.

FOIL Regs Require Agencies to Assist in Describing Records

This Second Department decision concerns a Freedom of Information Law (FOIL) request for records pertaining to the Nassau County Police Department's database contract selection process and database layout. After denying Petitioner's request, the County denied Petitioner's administrative appeal.

Petitioner brought this Article 78 petition to compel disclosure. The Supreme Court dismissed, finding that Petitioner did not "reasonably describe" the requested records. *Matter of Lane v. County of Nassau*, 234 AD3d 761 (2d Dept 2025).

Noting that Petitioner had specified the subject matter and time period, the Second Department disagreed with the lower court's determination that Petitioner had failed to reasonably describe the records. The Court cited 21 NYCRR 1401.2(b)(2), which requires an agency to assist requestors in identifying and reasonably describing the records that they are seeking. Here, the Court found, Respondents failed to **demonstrate** (show) that they had attempted to work with Petitioner to define the request before denying it.

Based on this analysis, the Second Department **remitted** (sent back) the petition to the Supreme Court to resolve whether the requested records could be located, identified and produced.

For information about the NYS Freedom of Information Law and other ways to access records, write to the PLS office that provides legal services to individuals incarcerated at the prison from which you are writing and request the memo: "Access to Records."

Cody H. Morris and Victor Yannacone, Jr., of counsel, Melville, N.Y. represented Charles Lane in this Article 78 Action.

Existence of Public Records: Speculation Does Not Justify a Hearing

The decision in *Matter of Stone v. Montgomery County Board of Elections*, 234 AD3d 1075 (3d Dept 2025) concerns a voter's FOIL request for a log of 2020 general election votes. The County denied the request stating it did not have the software to produce such a report. After an unsuccessful administrative appeal, Petitioner commenced this Article 78 to compel production.

The County moved to dismiss the Article 78 petition relying on affidavits that **averred** (stated under oath) that after a diligent search, the County was unable to produce the records with its current software. Petitioner argued that a hearing was appropriate because he had contradictory information: namely, he believed other states had this capability and a County official had told him that he could not run the report without the proper password.

When an agency certifies that it has performed a diligent search and does not have records, a requestor *may* be entitled to a hearing only where the requestor "can articulate a demonstrable factual basis to support … that the requested documents existed and were within the entity's control." *Matter of Jackson v. Albany County Dist. Attorney's Off.,* 176 AD3d 1420, 1421–1422 (3d Dept 2019).

Here, the County produced communication with the software company that indicated that the report could not be created with the software used by Montgomery County. When presented with the County's submissions based on personal knowledge of the software, the Supreme Court found, and Third Department agreed, that Petitioner's submissions were based on speculation and conjecture, and did not warrant a hearing.

For more information about NYS Freedom of Information Law, write to the PLS office that provides legal services to individuals

incarcerated at the prison from which you are writing and request the memo "Access to Records."

James Ostrowski, Esq, Buffalo, NY represented Joseph Stone in this Article 78.

MISCELLANEOUS

The Impact of Incarceration on an Abandonment Petition

The Third Department affirmed a Family Court's decision terminating the parental rights of an incarcerated father on the grounds of abandonment for six months. In so finding, the Court reasoned that although an incarcerated parent may be unable to visit with his/her/their child, the parent is "presumed able to communicate with their children absent proof to the contrary."

The Court noted that in an abandonment proceeding, the Department of Social Services is "not under any obligation to exercise diligent efforts to encourage a parent to establish a relationship with his or her child." *In the Matter of Ciara FF v. Robert FF,* 235 AD3d 1162 (3d Dept 2025).

The Court noted that even though the father had received a letter with the child's contact information and was in contact with other family members who could have provided him the child's contact information, the father did not contact the caseworker or Petitioner. Because the father was unable to rebut the Petitioner's showing of abandonment, the Third Department affirmed the Family Court's decision.

For information about protecting your rights as an incarcerated parent, write to the PLS office that provides legal services to individuals incarcerated at the prison from which you are writing and request the memo: "Rights and Responsibilities of Incarcerated Parents."

Sandra M. Colatosti, Esq. represented appellant father in this appeal.

FEDERAL COURT DECISIONS

Court's Review of Video and MBR on Motion to Dismiss Was Error

In reviewing the district court's dismissal of this county jail excessive force 1983 complaint, the Second Circuit examined the limits of the district court's authority to consider evidence outside the complaint. *Pearson v. Gesner,* 125 F4th 400 (2d Cir. 2025).

In *Pearson*, the complaint alleged that the named Defendants had subjected Plaintiff to unreasonable force and denied him medical care for a serious medical condition. On Defendants' motion to dismiss, the Southern District of New York dismissed the complaint with prejudice for failure to state a claim. In reaching this result, the district court looked to the complaint, but also reviewed the video submitted by the Defendants and the misbehavior report attached to the complaint.

The Second Circuit found that because Plaintiff wrote in his complaint that he was taken to medical after the use of force, he failed to state a claim with respect to the

failure to provide medical care and affirmed the district court's dismissal of that cause of action.

With respect to the dismissal of the excessive force claim, however, the Second Circuit found that the district court improperly relied on the misbehavior report which was attached to Plaintiff's complaint. In its discussion, the Court noted that it would be improper to treat material attached to the complaint as true when often a plaintiff wishes to incorporate a document, *not for its truthfulness, but for proof of other aspects of the claim*.

Here, the district court relied on the misbehavior report narrative as true. * However, the Second Circuit noted, Plaintiff likely attached the report to demonstrate that he had named the proper defendants. The misbehavior report not only contradicted the complaint allegations, the Appellate Court noted, but also supplied the district court with details not alleged in the complaint, namely that Plaintiff refused orders and staff warned him before using pepper spray. The district court erred in relying on the misbehavior report and ruling that Plaintiff failed to state a claim for excessive force.

The Second Circuit noted that on a motion to dismiss, the district court was required to ignore the Defendants' submission of video evidence (or to convert it to a summary judgment motion and allow the parties to conduct discovery). While the complaint referenced that the use of force was likely videotaped, the Court noted that 1) Plaintiff did not necessarily rely on the video to draft his complaint and 2) the video submitted by the Defendants showed events that took place *after* Plaintiff alleges the excessive force took place. Thus, by inference, the submitted video would not show the incident described in the complaint.

Based on the district court's improper reliance on the video evidence and on the facts set forth the misbehavior report, the Second Circuit vacated the dismissal of Plaintiff's excessive force claim and remanded the case to the district court for further proceedings.

*When deciding a motion to dismiss, the court must accept the allegations in the complaint as true. This is because when the defendants make a motion to dismiss, they are arguing that even if the facts alleged are true, they do not establish that the plaintiff is entitled to a judgment in his/her/their favor.

For information about 1983 lawsuits, write to the PLS office that provides legal services to individuals incarcerated at the prison from which you are writing and request the memo: "Section 1983 Civil Rights Actions."

Emily Villano and Jennifer M. Keighley of Orrick, Herrington & Sutcliffe represented Robert Pearson Jr in this appeal.

Evidence of the Party's "Intent to Deprive" Electronically Stored Information

The decision in *Hoffer v. Tellone,* 128 F4th 433 (2d Cir 2025), a police brutality 1983 case, looked at the imposition of sanctions in the context of missing video evidence of Defendants' tasering of Plaintiff. Plaintiff had reason to believe that the video existed because the officer who tased Plaintiff testified that each taser deployment generates a video. However, the officer also testified that he only saw video of the second tasing of Plaintiff, and that the first video "had somehow been overwritten."

Plaintiff requested that the district court instruct the jury that due to absence of the video of the first tasing, the jury could draw an adverse inference against Defendants. An adverse inference instruction is a sanction instructing the **fact finder** (jury) that they are permitted to infer facts about a party's missing evidence in a way that would be **adverse to** (hurt) that party's case.

The district court denied the request finding that the evidence was insufficient to demonstrate that the Defendant intended to deprive Plaintiff of use of the video.

The Second Circuit reviewed the standard for granting an adverse inference instruction and held that Federal Rule 37(e)(2) – which applies to *electronically stored information* – requires a showing by a preponderance of the evidence that a party had an "intent to deprive." The Court rejected Plaintiff's argument that negligence and gross negligence in maintaining electronically stored evidence, or even the knowing disposal of electronically stored evidence, would meet the standard. Rather, the Court held, the party seeking an adverse inference must show that the other party both intended to destroy electronically stored information *and* to deprive the other party of evidence.

Relying on the Federal Rule's "stringent and specific" standard of "intent to deprive," the Court declined to impose a more restrictive standard of proof (clear and convincing evidence). The Court reasoned that the preponderance-of-the-evidence standard is the default standard in civil cases and "imposing 'too strict a standard of proof'… risks 'subvert[ing] the **prophylactic** [preventative] and punitive purposes of the adverse inference." (emphasis added).

As applied to this case, the Second Circuit concluded that the district court did not abuse its discretion in denying the adverse inference instruction.

For information about 1983 lawsuits, write to the PLS office that provides legal services to individuals incarcerated at the prison from which you are writing and request the memo: "Section 1983 Civil Rights Actions."

C. Mitchell Hendy, Mayer Brown LLP represented Richard Hoffer in this appeal.

Proper Party in Federal Title VI Complaint

Most federal prison litigation is brought under 42 USC 1983. Section 1983 requires plaintiffs to name specific individuals who were personally involved in depriving them of one or more of their constitutional rights. Without reaching the merits of the underlying race discrimination complaint, the Southern District of NY in *Gilmore v. Jackson,* 2025 WL 27489 (SDNY Jan. 3, 2025) clarified that in a Title VI discrimination complaint, DOCCS – as opposed to a specific individual – is the proper defendant. Title VI actions challenge discriminatory conduct in the context of a federally funded program or activity. 42 USC 2000d. In this instance, DOCCS is the recipient of federal funding. The Court recognizing Plaintiff as a *pro se* litigant, added DOCCS as a defendant pursuant to Federal Rules of Civil Procedure Rule 21.

Dale Gilmore represented himself in this this Section 1983 action.

IMMIGRATION MATTERS

Nicholas Phillips

Riley v. Bondi, a case now pending before the Supreme Court, Docket No. 23-1270, concerns the 30-day deadline for seeking federal court review of a deportation order issued in withholding-only proceedings. The case was argued on March 25, 2025. The Court's decision is now pending.

To understand *Riley*, some background information about deportation proceedings is necessary. When a noncitizen in the United States is placed into deportation proceedings, which are also known as "removal proceedings," the noncitizen must appear for immigration court hearings conducted by the Executive Office of Immigration Review ("EOIR"), a component of the Department of Justice. Under EOIR procedures, a noncitizen must first appear before an Immigration Judge ("IJ") who determines 1) whether the noncitizen is removable, and if so, 2) whether the noncitizen is eligible for relief from deportation. If the IJ issues an adverse decision and orders that the noncitizen be removed from the United States, the noncitizen can appeal to the Board of Immigration Appeals ("the Board"), which has the authority to review the IJ's decision for legal and factual errors. If the Board affirms the IJ's decision, then the noncitizen is now subject to a final order of removal and can be deported to their home country. *See* 8 C.F.R. §1241.1(a).

What if the noncitizen wants to challenge the order of removal in federal court? Under 8 U.S.C. §1252, a noncitizen can seek federal court review by filing a petition for review in the appropriate federal circuit court. A petition for review must be filed "not later than 30 days after the date of the final order of removal." 8 U.S.C. §1252(b)(1). That deadline is fairly straightforward in the context of regular deportation proceedings, but things become much more complicated in what are known as "withholding-only proceedings."

Withholding-only proceedings concern noncitizens who have already been issued a final order of removal, but who subsequently assert a fear of returning to their home country. Typically, such proceedings take place at the United States border. In the most common scenario, immigration officials encounter a noncitizen who has already been deported from the United States pursuant to a final order of removal, and who has then attempted to illegally re-enter the United States. In this situation, if the noncitizen expresses a fear of returning to their home country, they would be given a "reasonable fear interview" to determine if they can show a reasonable fear of persecution or torture in their home country.

If the noncitizen passes the reasonable fear interview, the noncitizen would be placed into withholding-only proceedings. In those proceedings, which are conducted before an IJ, the noncitizen would be permitted to apply for a form of relief from deportation known as withholding of removal, as well as a related form of relief know as deferral of removal under the Convention Against Torture ("CAT"):

* *Withholding of removal* requires a noncitizen to prove that if they were removed to their home country, they would more likely than not *suffer persecution*.

* *Deferral of removal* under the CAT requires a noncitizen to prove that if they

were removed to their home country, they would more likely than not *suffer torture*.

What happens to the initial order of removal in withholding-only proceedings? Pursuant to 8 U.S.C. §1231(a)(5), "the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed[.]" Under that statutory provision, then, if withholding of removal or deferral of removal under the CAT is granted by the IJ, the noncitizen would still be subject to their original final order of removal, but they would also have an order issued by an IJ stating that they cannot be removed to their home country, which would prevent the federal government from effectuating the noncitizen's deportation.

All of that brings us to *Riley*. In the underlying immigration case, Pierre Yassue Nashun Riley, a Jamaican national, was ordered removed on January 26, 2021 because of his federal court convictions for drug distribution and gun possession. After he was ordered deported, he expressed a fear of returning to Jamaica and was referred to withholding-only proceedings, in which the IJ granted his application for deferral of removal under the CAT. The Department of Homeland Security appealed the IJ's order to the Board, which sustained the appeal, vacated the IJ's order granting deferral of removal, and ordered Mr. Riley removed to Jamaica.

On June 3, 2022, three days after the Board's decision, Mr. Riley filed a petition for review with the Fourth Circuit Court of Appeals. While the petition was timely as to the Board's decision, the Fourth Circuit nonetheless dismissed the appeal for lack of jurisdiction. In so holding, the Fourth Circuit noted that the *initial* order of removal was issued on January 26, 2021, more than one year before the petition had been filed. And because that order was "reinstated from its original date" pursuant to 8 U.S.C. §1231(a)(5), the petition should have been filed within 30 days of January 26, 2021, for the Fourth Circuit to have jurisdiction.

The Second Circuit reached a similar conclusion in *Bhaktibhai-Patel v. Garland*, 32 F.4th 180 (2d Cir. 2022), finding that an IJ's decision in withholding-only proceedings does not affect the finality of the underlying order of removal. However, five other circuit courts have held that an order of removal does not become "final" – thus triggering the 30-day deadline – until the *conclusion* of withholding-only proceedings. *See Argueta-Hernandez v. Garland*, 73 F.4th 300 (5th Cir. 2023); *Kolov v. Garland*, 78 F.4th 911 (6th Cir. 2023); *F.J.A.P. v. Garland*, 94 F.4th 620 (7th Cir. 2024); *Alonso-Juarez v. Garland*, 80 F.4th 1039 (9th Cir. 2023); *Arostegui-Maldonado*, 75 F.4th 1132 (10th Cir. 2023).

Given this circuit split, it is unsurprising that the Supreme Court granted review in *Riley*. In granting certiorari, the Supreme Court also agreed to address the ancillary issue of whether the 30-day deadline imposed by 8 U.S.C. §1252(b)(1) is *jurisdictional*, or whether it is instead *a mandatory claims-processing rule*. That distinction matters because if the statute is jurisdictional, the deadline is absolute, and "[t]he parties cannot waive it, nor can a court extend that deadline for equitable reasons." *Dolan v. United States*, 560 U.S. 605, 610 (2010).

Courts have greater authority to adjust Claims-processing rules as they are simply "rules that seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011).

Thus, claim-processing rules can potentially be extended by the court for equitable reasons, for example, where a party was prevented from timely filing for extraordinary reasons. *See Harrow v. Dep't of Def.*, 601 U.S. 480, 489 (2024).

At oral argument in *Riley*, several of the Justices seemed concerned that the Fourth Circuit's ruling imposes an impossible-to-meet requirement, with Justice Kagan questioning whether the ruling "effectively precludes [a non-citizen] from ever getting . . . judicial review[.]" A decision in *Riley* should be issued by the end of the Supreme Court's current term.

WHAT DID YOU LEARN?

Brad Rudin

1. **In *Mallet v. NYS DOCCS*, the Second Circuit ruled that with respect to Mr. Mallet's 1983 claim, the statute of limitation accrued [started to run]**:

   a. the day that Plaintiff was discharged from parole supervision because that is when he was no longer in DOCCS custody.
   b. the date on which Plaintiff was released to parole supervision because that is when he first had access to a lawyer.
   c. the date on which Plaintiff learned the results of a PSA test, because that is when he learned he had a serious medical issue.
   d. the date on which Plaintiff first experienced difficulty urinating because that is a known symptom of prostate cancer.

2. **To overcome a motion to dismiss for failure to state a claim for deliberate indifference to a serious medical need, the Plaintiff in *Mallet* sufficiently pleaded that a Defendant doctor was deliberately indifferent by alleging that:**

   a. there was an evidence-based disagreement among medical professionals about the proper course of treatment.
   b. after making hostile comments in response to Plaintiff's repeated requests for care, Defendant doctor consciously refrained from conducting appropriate screening tests.
   c. Defendant doctor refused to use experimental treatment methods when requested to do so by Plaintiff.
   d. Defendant doctor failed to consult with a top-rated specialist irrespective of the cost of such a consultation.

3. **In *Matter of Wynn v. Rodriguez*, DOCCS did not file an answer to an Article 78 challenge to a Tier III hearing because:**

   a. the Article 78 Petitioner withdrew his claim.
   b. the Court had previously ruled in favor of Petitioner.
   c. DOCCS administratively reversed the disciplinary determination.
   d. the Attorney General acknowledged that prison officials had acted improperly.

4. In *Caballero v. State of New York*, the Court of Claims found that an incarcerated person undergoing a medical examination:

a. has no expectation of privacy.
b. has a reduced expectation of privacy as compared to a person who was not incarcerated.
c. has the same expectation of privacy that is applicable to any person.
d. has a greater expectation of privacy than is applicable to other people.

5. Under Executive Law-i[4-a][a] a parolee found guilty at a parole revocation proceeding of conduct that would constitute a misdemeanor or felony offense may appeal the findings by filing an appeal in:

a. the lowest level court in the jurisdiction where the hearing took place, i.e., a city court, district court, county court or supreme court.
b. the Supreme Court in a county where an Article 78 challenge to the hearing could be heard.
c. the federal district court that has jurisdiction in the geographic area where the parole revocation hearing was conducted
d. the Supreme Court located in Albany County.

6. The Court in *Matter of Berger v. Arteta* noted that in a parole revocation proceeding, the right to counsel attaches:

a. only if the court appoints counsel.
b. if the violation of parole is based on a technical violation.
c. at the final revocation hearing.
d. at the parolee's recognizance hearing.

7. The Rochester City Court reversed Rashad Burden's parole violation arising from a failure to charge his GPS tracking unit because the alleged crime of Obstructing Governmental Administration was not supported by evidence showing that Mr. Burden:

a. possessed an intent to impair the functioning of the tracking unit.
b. prevented parole officials or the police from inspecting his tracking unit.
c. knew that he was required to wear the tracking unit.
d. intended to damage or destroy the tracking unit.

8. Criminal Procedure Law 470.15[6][b] authorizes the Appellate Division to modify the trial court's sentence when the appellant demonstrates:

a. either extraordinary circumstances or an abuse of discretion by the trial court.
b. that modification of an unduly harsh or severe sentence is appropriate in the interests of justice.
c. that the sentence was illegally imposed, and this issue was presented to the trial judge at the time of sentencing.
d. the prejudicial conduct of the prosecutor who tried the case.

9. In *People v. Concepcion*, the Fourth Department ordered the appointment of new appellate counsel because prior appellate counsel failed to:

a. raise the issue of whether Defendant had knowingly and intelligently entered a plea of guilty.

b. inform the trial court about the unlawful nature of Defendant's conviction and sentence.
c. make any representation to the court about the merit or lack of merit of various appellate issues.
d. file a notice of appearance or otherwise inform the Fourth Department that she was representing the appellant.

10. Under *Matter of Lane v. County of Nassau,* a government agency receiving a FOIL request must:

a. disclose requested records if such material can be immediately located.
b. disclose requested records only if such material is related to a legitimate inquiry or is part of an ongoing court case.
c. provide reasonable assistance to the requestor in identifying the desired materials.
d. decline to disclose requested material if finding such material would unduly interfere with the operation of the government agency.

ANSWERS

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

Your Right to an Education

For questions about access to GED support, academic or vocational programs, or if you have a learning disability, please write to: Maria E. Pagano – Education Unit, 14 Lafayette Square, Suite 510, Buffalo, New York 14203.

PREP

PREP 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. 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. Write to 10 Little Britain Road, Suite 204, Newburgh, NY 12550.

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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.

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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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