Pro Se

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Legal Landscape Post Strike

In many facilities, operations have not returned to normal, but we wanted to take this time to summarize legal developments that came about from or during the strike.

On May 14th, the NYS Senate Standing Committee on Crime Victims, Crime & Correction and the NYS Assembly Standing Committee on Correction held a joint public hearing concerning the "Safety of Persons in Custody, Transparency, and Accountability within State Correctional Facilities." PLS and others that serve incarcerated people provided written and oral testimony. DOCCS, the unions representing staff in the prison and the Inspector General also provided testimony.

As a result of the questionnaires many of you submitted, PLS's testimony contained statistical data based on your responses and concrete examples of the hardships endured during the heart of the strike and in the aftermath.

Body Camera Updates

After the murder of Robert Brooks, Commissioner Martuscello and Governor Hochul ordered all officers to turn their body cameras on during every interaction with an incarcerated individual. Although the Governor also expedited funding to install fixed cameras

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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.

UNFINISHED BUSINESS (AND A SHOUTOUT TO SISYPHUS)

A Message from PLS Executive Director Karen L. Murtagh

I recently gave testimony at a May 14 hearing sponsored by the Chairs of both the NYS Senate and Assembly Corrections Committees regarding "Safety of Persons in Custody, Transparency and Accountability within State Correctional Facilities."

I noted that little has changed in terms of oversight in NYS prisons over the past several decades, but what had changed was the level of tension, harassment and brutality in our prisons as evidenced by these recent events: the brutal murders of Robert Brooks and Messiah Nantwi, the three week illegal wildcat strike, the institutional refusal to accept, abide by and enforce the law as set forth in the Humane Alternatives to Long Term Confinement (HALT) act, and the refusal of corrections staff to follow the procedures set forth in DOCCS' Body Worn Camera (BWC) policy.

I also emphasized - and could not stress highly enough - that the staffing crisis within DOCCS is continued to be used as justification for the majority of incarcerated individuals still being locked in their cells to this day without programming and opportunities for "good time" credit and visitation, despite many staff returning to their jobs.

Taken together, these factors in my view are a recipe for increased tensions unprecedented since Attica, and I noted that they are compounded by a still broken and unfair disciplinary and grievance process that serves as a daily reminder of the abuses calling out for remediation.

That said, I commended the Legislature for holding these hearings at this critical juncture and appreciated the invitation to share my views.

As PLS has done many times since its formation in 1976, I called for bold reforms that will prevent further tragedies and ensure NYS prisons not only meet the basic standards of humanity and justice, but also become a model for the rest of the nation.

Specifically, at the invitation of the Legislative sponsors, I proposed a number of recommendations to help address these issues, including the following:

1. Mandate DOCCS make certain data publicly available on a daily basis including staffing levels and a list of all programs that are operating at which facilities.

2. Require statewide and expansive use of Body Worn Cameras (BWC) and mandate that hearing officers must draw an adverse inference against CO's in prison disciplinary cases where the CO involved failed to comply with BWC policy.

3. Pass A6651/S6727 changing the standard of proof at disciplinary hearings from substantial evidence to preponderance of the evidence and mandate that people accused of misbehavior and their attorneys are provided all disciplinary records in a timely manner.

4. Pass A6600/S6419 which requires a more rigorous standard of proof for prison disciplinary charges if the misbehavior report was authored within 180 days of the grievance by the staff person against whom the grievance was filed.

5. Finally, pass the three pending bills that would dramatically increase oversight and accountability: S1671/A5355, which authorizes DOCCS to discipline DOCCS employees for serious acts of misconduct; S1701/A6322, which creates the office of the Correctional Ombudsperson; and S651/A3781, which authorizes the Correctional Association of New York ("CANY") to visit correctional facilities at any time and without advance notice.

I'd like to note that many of these proposals were guided by voices of the incarcerated population who we solicited for input before providing our testimony.

For that, I wish to profoundly thank the readership.

In sum, it's not too late for the Legislature to take meaningful and decisive action as, of this writing, the Legislature was still in session and likely to remain so into the week of June 16 (with a possible special session on the horizon). The moment certainly calls for action and the Legislature seems poised for it.

I'll end with this: Sometimes bold action is the only action that matters. When people entrusted to the care of the State are denied medical and mental healthcare, programming, education, phone calls, visits with loved ones and contact with their legal representatives, we at PLS file a lawsuit. That's what we did in this case, and it mattered. Within days of filing a lawsuit demanding that DOCCS restore legal phone calls and legal visits during the illegal strike, DOCCS began scheduling both.

But, like most corrective actions in an incarcerative setting, the rock that Sisyphus is pushing uphill comes rolling back. Only the Legislature and the Governor can augur in the type of long-lasting systemic change needed here.

Here's to Sisyphus finally getting that rock up the hill.

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and distribute body-worn cameras, at this time, in many facilities, body cameras seem only to be available to sergeants or supervising officers and have not been given to all security personnel.

On May 9th, Governor Hochul signed the 2025-2026 State budget bill, which included creating a new statutory body camera requirement under Correction Law 135. This statute does not go into effect until July 2025. The statute specifies that all officers and supervisors must wear body cameras, powered on, while on duty, and identifies specific incidents and activities for which staff are required to activate the body camera, regardless of fixed camera availability. The statute also gives the commissioner authority to require body cameras for civilian staff who directly supervise incarcerated individual(s) without security present.

Security staff wearing body cameras must turn them on:

- during any interaction with an incarcerated person or visitor;
- when observing unauthorized activity by *anyone* in the facility;
- during movement, emergency calls, escorts and transports; and
- during any use of force or CERT response.

The cameras must also be turned on in congregate shower areas and during strip frisks or searches, with verbal notice to the incarcerated individuals and some protections to address personal privacy. This bill also includes provisions to hire and employ officers at age 18, which go into effect immediately.

We have received questions about the light status (red vs. green) on body worn cameras. Video and audio are retrievable from either lighting setting. If you are requesting specific footage, you will want to request it as soon as possible to preserve the video.

If you wish to make a complaint regarding body worn camera usage, please provide us with the name of the staff member, the location of the violation, time and date, and name of any other witnesses involved. Please also clearly state that you authorize PLS to share your complaint with DOCCS or other law enforcement agencies.

Legal Visits, Calls and Mail; Visits Generally

Legal Visits and Calls

During the strike, PLS heard from countless families and loved ones about dire conditions. Because legal calls and visits (as well as any other visits) were suspended at most facilities during this time, PLS, represented by New York Civil Liberties Union (NYCLU), sued DOCCS in the Federal District Court for the Northern District of New York seeking a preliminary injunction ordering DOCCS to allow PLS to resume confidential legal calls and visits with clients. *PLSNY v. Martuscello*, Dkt. 1:25-cv-00290-AJB-PJE (NDNY 2025).

Through negotiations with DOCCS, legal visits and calls restarted very soon after filing the lawsuit. This litigation has now concluded.

Legal Mail

DOCCS has submitted emergency regulations pertaining to legal mail and is implementing mail scanner technology. The equipment being used scans the **outside** of the envelope and detects chemical and physical abnormalities within the envelope. The use of the mail scanner technology is in a very early stage, so we do not have much information to share at this time. However, legal mail scanning may impact how PLS sends its larger legal education materials (Section 1983, for example) and returns a client's original documents.

Social Visits

Led primarily by the Osborne Association, over 80 organizations (including PLS) signed on to a letter advocating that DOCCS restore full family visitation.

HALT Suspension/Fields update

In a combined Article 78 petition and complaint for declaratory relief, Prisoners' Rights Project of the Legal Aid Society challenged DOCCS' suspension of HALT. This is a **putative** (proposed group of individuals who are negatively impacted) class action representing two groups of individuals:

1) individuals who are housed in general population, yet confined without disciplinary sanctions; and
2) individuals who are housed in disciplinary confinement who are not receiving the out of cell requirements of the HALT Act.

This litigation is in its very early stages.

This litigation, *Smalls, et al v. Martuscello*, Index No. 903926-25 (Sup Ct Albany County 2025), is not a damages action. That means that neither the named plaintiffs nor the class members will receive money damages if the case is successful. Rather, the relief sought is rescission of the suspension of the provisions of HALT that DOCCS' suspended.

Similarly, *Fields v. Martuscello*, Index No. 902997-23 (Sup Ct Albany County 2024) was a combined Article 78 petition and complaint for declaratory relief. This action addressed DOCCS confinement criteria for serious offenses under Correction Law 137 (6)(k)(ii). In June 2024, the Court issued its decision declaring DOCCS confinement policy for individuals serving extended SHU sentences to be arbitrary and capricious and not compliant with HALT. PLS continues to monitor sanctions and compliance with the Court's decision.

Damages Litigation

There are rumors that PLS or another firm has filed a class action about the strike impacts on the incarcerated population. To date, PLS has not filed any action, nor are we aware of a pending class action for damages focusing on the conditions resulting from the strike.

As there is no provision for class actions in the NYS Court of Claims, damages claims for injuries resulting from strike-related conditions must be filed by each person individually. Any federal litigation on strike-related conditions would likely be subject to the grievance requirements of the Prison Litigation Reform Act.

PRO SE VICTORIES!

***Matter of Pegues v. Martuscello*, 85 Misc.3d 1231(A) (Sup Ct Albany Co Mar 10, 2025).** In this dramatic decision – in which the Court characterized the action as "an abuse of power case!" – the Court overturned a Tier III hearing finding Antonio D.D. Pegues guilty of refusing a frisk, running from officers and throwing a cell phone and charger cord into an unoccupied cell.

The Court held that the hearing officer's denial of Mr. Peques' request for an assistant to be an abuse of discretion and error of law that "undermined the integrity of the entire proceeding." The Court described the intentional denial as a violation of Mr. Pegues' right to due process, requiring reversal and expungement.

Further digging into the assistance issue, the Court opined that by gathering testimony prior to Mr. Pegues' access to assistance or document, the hearing officer undermined Mr. Pegues' ability to effectively pose questions and violated DOCCS regulations that require a hearing to commence no sooner than 24-hours *after* meeting with an assistant. 7 NYCRR 253.6 (a).

Also connecting Mr. Pegues' witness denial to the assistance denial, the Court noted that without assistance, Mr. Pegues had no independent means to determine if an incarcerated witness was willing to testify. As a result, the hearing officer relied on unsworn officer testimony that the incarcerated witness refused, and thus violated Mr. Pegues' right to call witnesses in his defense.

Lastly, the Court criticized the Respondent's omissions from its submissions. The Court noted that providing a list of documents that were available for review by the court, *upon request*, did not fulfill its obligation under CPLR 7804(e) to provide a full record, and as a result deprived the Court of easily reviewing documents squarely at issue. Similarly, the Court took exception to Respondent's failure to submit the audio recording of the hearing that would have allowed the Court to better understand conflicting testimony and credibility issues.

For interested readers, the case is well worth reading!

***Matter of Anthony H. Baptiste v. Daniel Martuscello*, Index No. 8222-24 (Sup Ct Albany Co Feb 25, 2025).** Anthony H. Baptiste filed an Article 78 challenging DOCCS' designation of him as **CMC** (Central Monitoring Case). The facility originally designated him CMC based on "the nature of" **three** convictions. In fact, Mr. Baptiste only had two prior convictions.

Mr. Baptiste appealed the decision from the facility to the Office of Special Investigations (OSI), following which he appealed the OSI decision to Counsel's Office. When OSI denied his appeal, he filed this Article 78. In his petition, Mr. Baptiste challenged the CMC designation as arbitrary and capricious because:

- The alleged conviction was partially based on a crime that he was neither charged with or convicted of;
- OSI based its determination on this misinformation; and
- The underlying facts of his conviction did not meet the definition of conduct that would qualify for CMC designation.

The Respondent (Commissioner Martuscello) moved to dismiss the Article 78 on the basis that: 1) Baptiste's convictions and the underlying facts of the convictions, provided a rational basis for the CMC designation, and 2) the erroneous reference to a charge not in his record was insignificant.

In deciding a motion to dismiss an Article 78, a court must accept the petitioner's factual allegations as true. The court must then determine if the petitioner's facts alleged constitute a **viable cause of action** (a claim that if supported by the facts alleged would be successful). Here, the Court held that Petitioner had alleged facts sufficient to constitute a viable cause of action and denied the motion to dismiss, directing Respondent to answer the petition.

Matter of Antonio Bruno v. Martuscello, 237 A.D.3d 1437 (3d Dept 2025). This Article 78 was transferred to the Appellate Division, Third Department presumably because it raises a substantial evidence issue. After Mr. Bruno filed his Article 78, the state administratively reversed the challenged disciplinary hearing. The Court returned Mr. Bruno's disbursement for filing fees related to his Article 78.

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 & Administrative Segregation

Photographs Were Not Substantial Evidence of Guilt

Upon transfer from the Albany County Supreme Court, the Third Department inspected photographs supporting the Tier III determination that the Petitioner had possessed gang related materials and contraband, and reversed the determination because it was not supported by substantial evidence. *Matter of Wester v. Dept. of Corrections and Community Supervision*, 237 AD3d 1358 (3d Dept 2025).

Officers recovered the two photographs upon which the charges were based in a search of Petitioner's cell. Both photos depicted the Petitioner crouching with his hands touching the ground and with children posing nearby. Petitioner explained in his brief that the children were his nieces, and the pictures were taken in the prison visiting room more than six years before the search.

During the hearing, DOCCS witnesses stated that the Petitioner's pose was commonly used to identify affiliation with a particular gang. In reversing the charges, the Court noted that the witnesses did not check whether the Petitioner was affiliated with a pgang, and two officers testified that they were not aware of any gang affiliation.

Acknowledging the minimal standard of substantial evidence, the Court stated that the photographs could not in any "rational way 'result in an inference being drawn'" that Petitioner was affiliated with the alleged gang.

Christopher Wester represented himself in this Article 78 proceeding.

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."

Pro Se Petitioner Awarded Costs

After Travail Madison filed a *pro se* Article 78 challenge to a Tier III hearing, the Attorney General advised the Court that DOCCS had administratively reversed the challenged hearing. *Matter of Madison v Martuscello*, 236 AD3d 1227 (3d Dept 2025). Petitioner requested reimbursement for his disbursements related to the filing. The Court granted the motion and directed the Respondent to reimburse the Petitioner $65.27 ($15 filing fee and $50.27 account disbursements) for his costs.

Travail Madison represented himself in this Article 78 proceeding.

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."

Four Hearings Challenged in One Action Bring Mixed Results

Petitioner in *Matter of Bright v. Martuscello*, 236 AD3d 1438 (4th Dept 2025) challenged four disciplinary determinations in one Article 78. Because the petition contested that one or more of the charges was not supported by substantial evidence, the proceeding was transferred to the Appellate Division, Fourth Department. The Appellate Division reversed one hearing because the Petitioner was denied witnesses, affirmed one hearing, and

remitted two hearings for additional proceedings.

In the first remitted hearing, the Appellate Division expunged one charge that was not supported by substantial evidence and ordered a new hearing for a denial of due process related to the Petitioner's evidence request. The record showed that Petitioner first requested a video recording from the wrong date. When he tried to correct the date, the hearing officer denied the request on the basis that he had already used his "one opportunity" for assistance. In denying Petitioner access to the videotape, the Court found, the hearing officer did not "articulate institutional safety or correctional goals sufficient to justify denying petitioner's right to reply to evidence against him" and thereby violated Petitioner's due process rights.

In the second remitted hearing, the Fourth Department first found that having properly submitted an administrative appeal, the fact that the Respondents did not respond to the appeal did not **preclude** the Petitioner from raising the claims in his Article 78. The Court then reversed two out of three charges because they were not supported by substantial evidence. Having vacated two of the three charges, the Court remitted the matter to the Respondent for imposition of an appropriate penalty as to the third charge.

Wyoming County-Attica Legal Aid Bureau represented Willie Bright in this Article 78 proceeding.

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."

Less is More Parole Appeal: No Second Tier Appeal

The Less is More Act revisions to Executive Law 259-i allow parolees to appeal, as of right, an unfavorable parole revocation hearing decision of a non-technical violation to the lowest level court serving the jurisdiction where either the parole hearing took place or the sustained conduct was alleged to have occurred. Depending on the county involved, the lowest level court may be the city court, district court, county court or supreme courts. Executive Law 259-1(4-A).

Following a parole revocation hearing in Monroe County, Nathan Tripodi unsuccessfully appealed to the Rochester City Court. He then attempted to appeal to the Monroe County Court. In *Matter of Tripodi v. NY S Dept of Corr & Community Supervision, et al.,* 229 NYS3d 896 (County Ct Monroe County, March 10, 2025), the County Court held that it does not have second-tier appellate jurisdiction over parole revocation decisions.

The County Court recognized that although the law provides for one judicial appeal from a parole revocation as of right, the City Court parole decision is an appellate decision. Under the Uniform City Court Act, County Court has jurisdiction to hear appeals on final judgments of the City Courts. Because the decision of the Rochester City Court was an appellate decision, it was not appealable

under Less is More or the Uniform City Court Acts.

The Monroe County Public Defender represented Nathan Tripodi in this proceeding.

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."

Parole: Collateral Estoppel and Evidence

In *People ex rel. Sloan v Martuscello*, 85 Misc3d 1224(A) (Sup Ct Bronx County 2025), a decision relating to petition for a writ of habeas corpus, the Petitioner challenged his detention and the delinquency determination that he had violated parole by resisting arrest.

In March 2025, Petitioner was charged with parole violations based on alleged resisting arrest, failing to charge his GPS device and removing his GPS device. After a second incident that allegedly took place in April 2024, Petitioner was arraigned in criminal court for resisting arrest and parole violation charges were **initiated** (begun). Petitioner had a recognizance hearing with respect to the parole and criminal charges and was remanded to jail.

Five days after the arraignment, Petitioner's preliminary parole revocation hearing started. The Division of Parole proceeded on the charge that on April 24, Petitioner had violated parole by resisting arrest by flailing his arms and refusing to be handcuffed. Petitioner, represented by counsel, objected to the hearing on this charge because the State had not provided "chronological entries relating to the charge." In the alternative, Petitioner argued the hearing should be adjourned until they were given the entries. The hearing officer overruled the objection and ordered that the hearing continue.

In support of the charges, the parole officer testified that on April 24, after Petitioner failed to report when he had been directed to do so, he went to Petitioner's house and found that he had removed his GPS device. When parole officers tried to arrest Petitioner, the officer continued, Petitioner resisted. Based on this testimony, the hearing officer found that Petitioner had violated a condition of release.

With respect to the criminal charges, Petitioner was indicted on May 1, 2024, for resisting arrest and assault on April 24. The Court granted Petitioner's motion to dismiss, but allowed the charges to be resubmitted. When the charges were resubmitted to the grand jury, it refused to indict and the criminal charges were dismissed.

Petitioner then filed a state habeas corpus petition, arguing that the grand jury's dismissal of the criminal charges collaterally estopped DOCCS from proceeding with the revocation charges that were related to the criminal matter. A claim is **collaterally estopped** when a party tries to relitigate an issue that was decided in a prior action.

The Court agreed with the Petitioner's contention that the grand jury dismissal collaterally estopped DOCCS from revoking parole on the same factual basis as was rejected by the grand jury.

In this case, the Court noted, the burden of proof to revoke parole is "preponderance of the evidence," which is a **more stringent** (more difficult to meet) standard than is required for a grand jury to indict. A grand jury must have "reasonable cause to believe that such person committed such offense." It takes less evidence to establish "reasonable cause to believe" than it does to establish "proof by a preponderance of the evidence." Where the People failed to meet the lower grand jury standard, DOCCS is prohibited from proceeding on revocation charges related to the same conduct.

The Court further noted DOCCS' incomplete disclosure of documents necessary for Petitioner's cross examination of the parole officer. Because the Executive Law does not provide for discovery sanctions, the Court directed DOCCS to provide the complete documents requested and provide a new preliminary revocation hearing with respect to the other parole revocation charges that had not been addressed in the criminal charges that were dismissed.

Abigail Sloan and Michelle McGrath of The Legal Aid Society represented Bruce Lorick in this habeas corpus petition.

For information about parole revocations and judicial challenges to parole revocations, 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 Revocation Proceedings and Related Sentence Computations" and "Habeas Corpus Proceedings in State Court."

Failure to Charge a GPS Tracker is Not a Non-Technical Violation

In *People ex rel. Savon O'Neal v. Daniel Martuscello*, Case No. 8F2024-121 (Sup Ct Greene County March 11, 2025), a parole revocation case, Savon O'Neal was arrested for failing to charge his GPS tracking device in violation of his special conditions. DOCCS argued that the failure constituted a misdemeanor: Obstructing Governmental Administration in the Second Degree ("OGA2"), and thus was a non-technical violation of parole. The Administrative Law Judge (ALJ) agreed, finding that Mr. O'Neal willfully and without valid reason failed to charge the GPS unit for two days. This failure, the ALJ concluded, constituted the misdemeanor OGA2 and was a non-technical violation.

Obstructing Governmental Administration in the Second Degree provides, in relevant part, that a person is guilty of obstructing governmental administration when the person ". . . prevents or attempts to prevent a public servant from performing an official function . . . by means of interfering . . . with radio, telephone, television or other telecommunications systems owned or operated by the state . . . ." Penal Law 195.05(1).

The Court, however, agreed with Petitioner's contention that DOCCS did not present sufficient evidence to establish the Penal Law requirement that New York State own or operate the tracker. Because only data was

transmitted to the State, Petitioner's failure to charge the device could not constitute interference with a telecommunication system owned or operated by the State.

In ordering reversal of the non-technical violation, the Court also held that OGA2 "interference" must be physical in nature, and the Petitioner's actions were "properly described as passive noncompliance rather than active physical interference[.]" In addition, the Court held, Petitioner's actions did not impair the system or prevent DOCCS' ability to monitor others on the system.

Spencer F. Goldberg of Hiscock Legal Aid Society represented Savon O'Neal in this habeas corpus petition.

For information about parole revocations and judicial challenges to parole revocations, 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 Revocation Proceedings and Related Sentence Computations" and "Habeas Corpus Proceedings in State Court."

On Appeal, Parole Board is Responsible for Record

With respect to judicial appeals of parole revocations, the Syracuse City Court held in *NYS Dept. of Corrections and Community Supervision v. Antwan Smith,* 230 NYS3d 552 (Syracuse City Ct 2025), the Parole Board, not the parolee, is responsible for providing the record on appeal.

Under Less is More, the parolee challenging a parole revocation decision – known as the appellant – must file a notice of appeal as outlined in Criminal Procedural Law 460.10. This filing triggers the Executive Law 259-i(4-a)(b) requirement, that the Board serve a transcript and the records considered by the hearing officer.

The appellant must perfect the appeal by filing briefs, record materials and argument in accordance with the rules of the applicable court. If the appellant does not perfect, the appeal may be dismissed. Similarly, the City Court reasoned that if the Board does not file the record, the appellant may seek relief to compel production.

Nhi K. Truong of the Hiscock Legal Aid Society represented Antwan Smith in this parole appeal.

For information about parole revocations and judicial challenges to parole revocations, 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 Revocation Proceedings and Related Sentence Computations" and "Habeas Corpus Proceedings in State Court."

Sentence & Jail Time

Court's Inaccurate Disclosure of Sentence Risk Renders Guilty Plea Involuntary

During plea proceedings and again at sentencing, Defendant was repeatedly told that he faced up to 45 years of incarceration. In reality, his maximum sentence was capped at 20 years under Penal Law §70.20 (1)(e)(i). The prosecution offered 6 to 8 years for his guilty plea.

In his pre-sentencing interview, Defendant, who was 23, stated that he pled guilty because "if he lost at trial, he could face significantly more time." Based on statements in the pre-sentencing interview, which the Court interpreted as denial of guilt, the Court imposed an enhanced sentence of 15 years instead of the 6 to 8 years. On appeal, the Defendant asserted that his plea was not knowing, voluntary or intelligent due to the many misstatements of the maximum possible sentence.

The Appellate Division held that the challenge to his plea was not preserved but nonetheless, based on the harshness and severity of the sentence, reduced the sentence to 10½ years. The case then went to the Court of Appeals.

The Court of Appeals, in *People v. Scott*, 2025 WL 835467 (Ct Apps Mar. 18, 2025), considered whether, in his direct appeal to the Appellate Division, Defendant could raise for the first time his claim that his plea was not voluntary, and whether an exception to the preservation doctrine applied. Ordinarily, to appeal a plea, the defendant must first move to withdraw his plea or vacate the judgment of conviction. These steps provide an opportunity for the lower court to correct the sentencing error.

However, where the error is "so clear from the record that the [sentencing] court's attention should have been instantly drawn to the problem," the Court wrote, these steps are not required. In this case, the Court noted, Defendant showed that:

- the sentencing court had provided incorrect sentencing information;
- the sentencing court failed to correct the incorrect information on the record; and
- Defendant had no reason to question the sentencing court's statements with respect to the permissible sentencing range.

In rejecting the dissent's argument for a more limited application of the exception, the Court opined that "the court has an 'independent obligation,' grounded in due process, 'to ascertain whether the defendant is pleading guilty voluntarily.'"

In reversing and remitting to the trial court, the Court noted that Defendant was 23 and had no prior criminal history. These factors, the Court noted, contributed to Defendant's ignorance of the assertions about his possible sentence. In offering Defendant a 6–8-year sentence or facing potentially 45 years, the Court stated that Defendant was not actually

presented with a choice. "With the apparent stakes so high, defendant's plea was not voluntary, knowing, and intelligent as a matter of law."

Legal Aid Bureau of Buffalo, Inc represented Marquese Scott in this appeal.

Court Reduces Sentence in Accordance with DVSJA

In *People v. KD,* Indictment No. 884/15, (Sup Ct Bronx Co March 3, 2025), a long history of domestic violence and psychological abuse, perpetrated by the victim of Defendant's crime and others earlier in her life, supported Defendant's request for resentencing under the Domestic Violence Survivors Justice Act (DVSJA). The criteria for such a reduction are set forth in Penal Law 60.12 and the PLS Memo referenced at the end of this article.

In support of Defendant's motion, the defense relied on testimony submitted during the criminal trial. A witness for the prosecution testified that she had seen the victim hit Defendant on numerous occasions, including punching her in the face and leaving visible injuries, and that Defendant would not leave the home without the victim's permission. Other trial witnesses described similar psychological and physical abuse by the victim.

After a 5-hour proffer meeting, the parties could not come to agreement on the re-sentencing term. The defense then re-submitted its motion, decided by the court in the above cited opinion, referencing additional instances of abuse not that were *not* in the trial record. Seemingly implicating the credibility of these additional examples, the prosecution noted that Defendant did not raise the additional examples of abuse during the parties' proffer session. The prosecution, in support of a longer sentence, maintained that during the proffer session, Defendant took some responsibility for the relationship violence, yet in this re-submission, claimed limited responsibility.

Notwithstanding the prosecution objections, the parties agreed that Defendant met the criteria for DVSJA resentencing in that:

1) At the time of the offense, she was a victim of domestic violence and had been subjected to substantial physical and/or psychological abuse;
2) The abuse was a significant contributing factor in her commission of the offense; and
3) The original sentence – 18 years to life – was unduly harsh.

Also in support of the motion for resentencing, the defense submitted a mitigation report that described the abuse, Defendant's growth in prison, her reentry plans and her supportive family network.
The Court resentenced Defendant to 11 years with 5 years post-release supervision (a sentence that was between what each party sought). To support the decision, the Court looked at the seriousness of the crime, but also considered:

- Defendant's remorse;
- Defendant's young age at the time of the offense;
- Defendant's growth;
- Defendant's participation in prison programs;
- Defendant's reentry plans; and

- Defendant's absence of a prior criminal history.

Roland T. Acosta and Briana Walsh of Pillsbury, Winthrop Shaw Pittman LLP and the Center for Appellate Litigation represented the Defendant in this DVSJA Motion.

To obtain a copy of this decision, please send your request to Aleta Albert, Prisoners' Legal Services of NY, 114 Prospect Street, Ithaca, NY 14850.

For information about the Domestic Violence Survivors Justice Act, write to the PLS office that provides legal services to individuals incarcerated at the prison from which you are writing and request the memo: "Domestic Violence Survivors Justice Act: Resentencing Options."

Court of Claims

Permission for Late Claim Granted Where DOCCS Cut Incarcerated Rastafarian's Hair

In *Tyrone Cooper v. State of New York*, 85 Misc3d 1264(A) (Ct Clms March 25, 2025), the New York State Court of Claims decided a motion to file a late claim in favor of the incarcerated Claimant. This motion was filed after the Claimant, through discovery in a related section 1983 case in federal court, learned the names of the officers involved.

The papers supporting the motion alleged that at DOCCS intake, Claimant presented a signed court order exempting him from the initial haircut requirements due to his religious status as a Rastafarian. Officers ignored, the proposed claim continued, ripped up the order and cut his hair. Shortly after the incident, Claimant twice grieved the unauthorized haircut and then filed a *pro se* Section 1983 complaint.

In the federal case, Mr. Cooper obtained a **Valentin Order**. Issued under *Valentin v. Dinkins*, 121 F.3d 72 (2d Cir. 1997) – a decision that empowers the Court to assist *pro se* litigants in identifying unnamed defendants – the federal court judge ordered that the Office of the Attorney General identify the officers who performed the haircut. Upon their identification, Claimant amended his federal complaint, naming the Defendant-officers.

Claimant then filed a motion to file a late claim in the Court of Claims. The proposed claim seeks to hold the State of New York liable for the officers' conduct, based on the state's failure to train, supervise, discipline and retain officers who are fit for employment. (The federal action sought to hold liable the officers who cut Mr. Cooper's hair in violation of his First Amendment rights.)

In considering Claimant's late claim motion, the Court looked at each of the factors set forth in the Court of Claims Act 10(6). Section 10(6) provides that in deciding a motion to file a late claim, among other factors, the court must consider:

1. Whether the delay in filing the claim was excusable;

2. Whether the state had notice of the essential facts constituting the claim;

3. Whether the state had an opportunity to investigate the circumstances underlying the claim;

4. Whether the claim appears to be meritorious;

5. Whether the failure to file or serve upon the attorney general a timely claim or to serve upon the attorney general a notice of intention resulted in substantial prejudice to the state; and

6. Whether the claimant has any other available remedy.

Weighing against the Claimant's motion, the Court found that the Claimant's excuse that he was unaware of the Court of Claims until he retained counsel on the federal claim, and thereafter Claimant and his attorney were awaiting FOIL records, to not constitute a reasonable excuse for failing to timely file a claim or notice of intention. Although not addressed by the State, the Court also noted that the Claimant had other available remedies under 42 USC 1983 and potentially Correction Law §610 "Freedom of worship."

More importantly, however, the Court agreed with Claimant that he had sufficiently established the appearance of merit of his claim that:

1. the State had negligently failed to train, supervise, discipline and retain officers who were fit for employment; and
2. the State is liable for the intentional conduct of its correction officers who committed an assault and battery by cutting Claimant's hair.

The Court also observed that the State did not provide factual basis for its conclusory assertions that the it did not receive notice of the claim or that it would be substantially prejudiced by a late claim.

After weighing all factors, the Court granted the application to file a late claim.

Stephanie Panousieris of Rickner PLLC represented Tyrone Cooper in this motion for Leave to File a Late Claim.

For information about the Court of Claims and Filing a Late Claim, write to the PLS office that provides legal services to individuals incarcerated at the prison from which you are writing and request the memos: "Lawsuits in NYS Court of Claims" and "Requesting Permission to File a Late Claim in the Court of Claims."

Miscellaneous

Third Department Orders Traverse Hearing on Service

In this Article 78 challenging DOCCS' failure to produce records requested through the Freedom of Information Law (FOIL), the Court ordered Petitioner to serve his filings on Respondent (former DOCCS Acting Commissioner Annucci) and the Attorney General by first-class mail or personal service.

Instead of answering the petition, DOCCS moved to dismiss based on an employee affidavit **averring** (swearing or affirming) that DOCCS did not receive the Petitioner's

filings. Petitioner submitted his affidavit of service averring that he had served Respondent and the Attorney General as directed by the Court. The Supreme Court dismissed the petition, and Petitioner appealed.

The Third Department found that the submissions raised "issues of fact as to whether petitioner fulfilled the service requirements," remitted the matter back to Albany County Supreme Court and ordered the lower court to conduct a **traverse hearing** (a hearing held to determine whether service was proper). *Matter of White v. Annucci,* 237 AD3d 1333 (3d Dept 2025).

Paul White represented himself in this appeal.

FOIL

NYPD Sued Over Redacted FOIL Records Related to the Death of Eric Garner

In 2023, Petitioners Gwen Car, the administrator of Eric Garner's estate, and an advocacy group, requested records pertaining to Mr. Garner that were in the possession of the New York City Police Department (NYPD). In response, the NYPD produced numerous records, many of which were completely or largely redacted. When in 2023, Petitioners judicially challenged the redactions, their motion was denied. Recently, Petitioners asked the Court for permission to renew or reargue the motion concerning the redactions.

In *Matter of Gwen Carr, et al. v. NYC Police Dept.*, Index No. 158461/2021 (Sup Ct New York Co March 14, 2025), the Court first analyzed the distinction between Petitioners' motion to renew and their motion to reargue the 2023 decision. The Court dismissed the motion for leave to renew their argument because the motion did not raise new facts. The Court agreed to consider the motion for reargument on the basis that the Court's earlier order overlooked "key aspects" of the FOIL law.

In granting the motion to reargue, the Court took notice of multiple pages of redacted material. Commenting that there were "almost no pages with meaningfully legible information." Further, the Court found, the Respondent had failed to provide justifications for each reaction. Although the Court recognized that extensive redaction, in some cases, may be appropriate, the Court directed NYPD to conduct a new review process, subject to judicial review, evaluating each record and determining whether a particularized and specific justification exists for exempting the material from public access.

Gideon Orion Oliver and The Legal Aid Society represented the Petitioners in this motion.

That Personnel Records Are "Voluminous" is an Inadequate Basis for Denying Production

The decision in *Matter of Robert Rodriguez v. Edward A. Caban*, Index No. 100272/2024, 85 Misc3d 1259(A) (Sup Ct NY Co April 10, 2025), concerns a FOIL denial of a request for personnel and other records related to the investigations of certain retired New York Police Department (NYPD) detectives, including Louis Scarella, who had been involved in Mr. Rodriguez's arrest. Petitioner Rodriguez made the request because he was aware of several exonerations based on Detective Louis Scarella's misconduct that had resulted from investigations conducted by the Kings County District Attorney's Office Conviction Review Unit.

In its response to Mr. Rodriguez's request, the NYPD provided redacted "Central Personnel Index" histories and resumes of the named investigators, which ended up being fewer than 10 pages of material. Petitioner administratively appealed the decision. Denying the appeal, the NYPD stated that after a diligent search, no additional records had been located.

In response to the Article 78, the NYPD "extended their search," and identified over 15,000 records . Curiously, NYPD argued that they had satisfied the FOIL request by providing 10 pages of the "requested disciplinary records," *and* that NYPD does not have the staffing to review and produce the full set of responsive records.

Although the Court recognized that a request involving the production of 15,000 records is voluminous, the Court noted that the NYPD did not in fact perform a diligent search as it initially stated, which was "in violation of lawful procedure." As a result, the Court ordered NYPD to produce responsive records on a monthly basis until complete.

Robert Rodriguez represented himself in this Article 78 petition.

FEDERAL COURT DECISIONS

Second Circuit Allows First Amendment Retaliation Claim

In his §1983 complaint, Carlton Walker alleged Defendant Senecal, one of the two Defendant-officers, grabbed and ripped up portions of Plaintiff's draft complaint. A month after Officer Senecal tore up his legal work, the complaint continued, Plaintiff stated that he was planning to file a grievance about Officer Senecal's conduct. Officer Senecal then threatened that Plaintiff would "end up dead or in the Box" if he filed a grievance.

On the same day as Defendant Senecal threatened Plaintiff with retaliation if he filed a grievance, the allegations in the complaint continued, another officer repeated the threat, stating that "Senecal is crazy and means what he said." The next day, two unnamed officers followed the Plaintiff into the bathroom and slapped and pushed him around, while referencing the earlier threat. Plaintiff also alleged that a

week or so later, Officer Benware gave him a false misbehavior report and fired him from his position as a law clerk in retaliation for his grievance.

Plaintiff named Officers Senecal and Benware as Defendants in his 1983 lawsuit. In the complaint, Plaintiff raised First Amendment, due process and equal protection claims. The Federal District Court Northern District of New York dismissed all claims. With respect to the First Amendment claim, the district court held that Plaintiff failed to assert an adverse action.

When prisoners allege that prison staff retaliated against them for engaging in conduct protected by the First Amendment, in their complaint, they must allege facts showing that:

1. They were engaging in constitutionally protected activity;
2. Prison staff took adverse action against them;
3. There was a causal connection between the conduct protected by the First Amendment and the adverse action, that is, but-for the protected conduct in which the plaintiff engaged, the defendants would not have engaged in the adverse action.

The adverse action must be sufficiently serious to deter a person of ordinary firmness from exercising their constitutional rights, and the constitutionally protected conduct must be the motivating factor for the retaliatory adverse action.

In *Walker v. Senecal*, 130 F4th 291 (2d Cir 2025), the Second Circuit vacated the district court's judgment as to only the First Amendment retaliation claim against Defendant Senecal. With respect to this claim, the Court wrote, there was a genuine issue of material fact as to whether Plaintiff's allegations that Officer Senecal ripped up Plaintiff's legal work and threatened Plaintiff with harm if he filed a grievance plausibly suggested Defendant's conduct was an adverse action that was causally related to Plaintiff's protected speech.

The Second Circuit stated that the district court "erred in failing to consider the aggregate deterrent effect" of Defendant Senecal's conduct. While minor and infrequent incidents cannot meet the constitutional retaliation standard, a "pattern of nearly constant harassment" may satisfy the standard.

Here, the Court reasoned that the destruction of legal documents, threats to deter the plaintiff from pursuing a grievance, and an assault by officers who repeated Officer Senecal's threat established "a genuine question as to whether 'a similarly situated individual of ordinary firmness' would have been deterred 'from exercising his or her constitutional rights.'"

The Court, however, did not disturb the district court's dismissal of Plaintiff's retaliation complaint against Officer Benware. Plaintiff alleged that Officer Benware had given him a misbehavior report and fired him from his law library position in retaliation for Plaintiff's

grievance against Officer Senecal. However, the Court noted that Plaintiff's complaint suggested that there was a factual basis for the misbehavior report and firing from his job, and thus no retaliatory motive for the third officer.

Mehwish Aslam Shaukat and Gregory Cui, Roderick & Solange MacArthur Justice Center, Washington, DC, represented Carlton Walker in the appeal.

Court Denies Motion to Overturn a Jury Verdict in Plaintiff's Favor

In *John Willis Richard v. Jennifer Dignean, et al.,* 6:11-CV-06013, EAW, 2025 WL 794384 (WDNY Mar. 13, 2025), following a trial on claims related to denial of a job outside the Plaintiff's housing block, the jury found DOCCS Defendant Tanea had violated Plaintiff's right to equal protection under the law and dismissed the claim against Defendant Dignean. The jury awarded Plaintiff $1.00 in nominal damages.* It is likely that the verdict, in part, resulted from an "adverse inference" jury instruction concerning the existence and relevance of documents destroyed by Defendants.

Prior to the trial, the Court granted Plaintiff's motion to compel discovery and imposed sanctions for Defendants' failure to respond to Plaintiff's request for logbook pages and cellblock move sheets, which Defendants admitted having destroyed after a five-year retention period had expired. Noting that Plaintiff had requested the production of certain documents that should have been preserved because of the filing of the lawsuit, the Court concluded that Plaintiff was entitled to an adverse inference instruction which allowed – but did not require – the jury to find that had the destroyed documents been preserved, they would have been relevant and favorable to Plaintiff's claim.

Plaintiff alleged two types of equal protection claims. First, he alleged that he was a "class of one," which as the Court explained to the jury, requires proof that Plaintiff "was treated differently than similarly situated inmates," and that such treatment was arbitrary or irrational.

Second, Plaintiff claimed that he was subject to "selective enforcement" – another type equal protection claim – requiring Plaintiff to "prove that he was treated differently than similarly situated inmates, and that the differing treatment was intentional and based on malice or bad faith."

With respect to the "similarly situated" element of any equal protection claim, the Court explained to the jury, the Plaintiff has the burden of proving:

- the existence of similarly situated people;
- that he was treated differently than those individuals by one or more of the Defendants; and
- that his circumstances were substantially similar to the circumstances of others not impacted.

At the close of Plaintiff's case, Defendants moved for a directed verdict or judgment as a matter of law under Federal Rule 50. If

granted, the decision could have ended Plaintiff's case.

Defendants argued that Plaintiff failed to identify similarly situated individuals or show that he was treated differently than others similarly situated because of discrimination. For this reason, they argued, Plaintiff's action should be dismissed. The Court reserved decision on the motion. After the jury returned a verdict in Plaintiff's favor on the Equal Protection claim against Defendant Tanea, the Court turned to his Rule 50 motion.

In upholding the jury verdict and denying the Defendant's motion, the Court relied on Plaintiff's testimony that other people on his block were allowed to work and program outside of the housing block. Addressing Defendant's argument that Plaintiff's claims could not be attributed to the Defendant whom the jury had found liable, the Court pointed to Plaintiff's testimony that documents showing that others were able to program outside of their housing block had been wrongfully destroyed.

Because the Court provided the jury with the adverse inference instruction, the Court held that a "reasonable jury was permitted to infer that information" pertaining to treatment of similarly situated people was in the destroyed cellblock move sheets, and that information would have been relevant and favorable to Plaintiff.

Additionally, because the Defendants' testimonies as to why they denied Plaintiff's job assignment were inconsistent – Defendant Dignean claiming that she relied on an unwritten policy and Defendant Tanea claiming there were no such jobs available – the Court stated a "reasonable jury was permitted to infer from these differing accounts that [Defendant Tanea's reason was pretext or based on some "**nefarious** [immoral] purpose," or that it was arbitrary or irrational.

While the Court agreed with Defendant Tanea that Plaintiff had not provided "overwhelming" proof of similarly situated comparator at trial, the Court held that proof of similarly situated individuals is a fact issue for the jury and declined to vacate the jury's verdict on that ground.

Based on the above analysis of the facts and the law, the Court denied Defendant Tanea's motion to overturn the verdict.

*Nominal damages are awarded when a plaintiff successfully proves that their rights were violated but fails to showthat more than *de minimus* (minor) injuries resulted from the violation of their rights.

John Willis Richard represented himself in this Section 1983 action.

$1.2 Million Settlement for Permanent Injuries from Officer Assault

Upon conclusion of a many years' long discovery process, the Plaintiff in *Matthew Raymond v. Troy Mitchell, et al,* No. 9:18-cv-01467-GTS-MJK, Dkt. No. 209 (NDNY March 28, 2025) settled his claim for $1.2 million for injuries arising from an assault by an Auburn Correctional Facility officer in 2016. As a

result of this assault, Mr. Raymond sustained permanent urological and spinal injuries, requiring permanent catheterization and causing near constant infections related to his injuries.

Katherine Rosenfeld of Emery Celli Brinckerhoff Abady Ward & Maazel LLP, represented Matthew Raymond in this Section 1983 action.

Practice Pointer: Issues Relating to Deposing Incarcerated Witnesses

In response to the *pro se* incarcerated Plaintiff's motion to take telephonic depositions of two fellow incarcerated witnesses, the Western District of New York issued an order requiring that the depositions proceed by telephone. *Devonte Rashad Lee Moorer v. Terrence McCann, et al,* 6:23-CV-06040 FPG CDH, 2025 WL 1191152 (WDNY April 24, 2025).

In attempting to arrange the deposition, Plaintiff sought assistance from his ORC to arrange a space, a phone, a recorder and a notary for the depositions. The ORC stated that he needed the Court to contact the facility about this matter. The Plaintiff then requested assistance from the Court. The Court issued a decision denying the request as, despite the prior order for telephonic depositions, the Plaintiff remains responsible for the deposition cost and arrangements.

The Court referred to Federal Rule 30 "Depositions by Oral Examination." This rule sets forth the requirements for notifying parties, the method of recording, procedures for making objections, time limits, and other matters. Typically, depositions are recorded by written transcript provided by a stenographer that the deposing party hires. The rules also provide for written depositions in front of someone who can administer an oath or who has been appointed by the Court or agreed to by the parties (refer to Fed. Rule 28).

In a similarly instructive case requesting the Court's assistance with depositions of incarcerated witnesses, the Northern District of New York denied an incarcerated Plaintiff's request stating:

> "the Court is unable to determine if the inmates' testimony will be probative or unreasonably cumulative and duplicative. The Court also does not have any information regarding possible security and logistical concerns. Finally, notwithstanding defense counsel and the Court's requests, plaintiff has not provided information to establish how the fees, costs and expenses (including transcripts) of conducting the requested examinations will be paid. For these reasons, the Court denies plaintiff's request for the issuance of subpoenas to nonparty incarcerated persons."
> *Ako Burrell v. Donald Uhler, et al.*, 9:22-CV1178 (DNH/MJK), 2025 WL 992028 (NDNY April 2, 2025)

In preparing for deposing a witness, *pro se* incarcerated plaintiffs should carefully review the requirements of Fed. Rule 30. At minimum, an incarcerated plaintiff should be prepared to provide notice to all parties and hire a court reporter who can administer the oath and record the deposition. If court intervention is required to depose an incarcerated witness, the *pro se* practitioner should set forth why the witness is needed, addressing potential security concerns, the

arrangements that s/he has already made (notice provided and court reporter) or how s/he will pay for the costs, and be specific about the party's practical needs in order to compel DOCCS to *produce* an incarcerated witness and Plaintiff for the deposition.

DeVonte Rashad Lee Moorer is representing himself in this 1983 action.

Failure to State a Claim for Medical Marijuana

In *Michael Joshua Henderson v. Pam Bondi*, 2025 WL 1078049 (2d Cir April 10, 2025), the Federal District Court for the Northern District of New York dismissed a *pro se* Plaintiff's claim that DOCCS' refusal to allow Plaintiff to use medical marijuana while in DOCCS custody violated Plaintiff's 8th and 14th Amendment rights. Plaintiff appealed to the Second Circuit, and the Second Circuit upheld the lower court's dismissal.

Agreeing with the district court, the Second Circuit found that Plaintiff lacked standing to challenge the categorization of marijuana as a Schedule 1 drug under the Federal Controlled Substances Act, as he had failed to show that his injury would be remedied by a win in this case. Here, Plaintiff could not show that, even if it were not a Schedule 1 drug, DOCCS would allow medical marijuana to be used in its prisons. Thus, even if he could change the drug classification with litigation, it would not change his ability to access medical marijuana.

The Court went on to analyze Plaintiff's 8th Amendment claim of deliberate indifference to a medical need. With respect to this claim, the Court found that Plaintiff had not shown that officials had disregarded a serious medical need. The Court also found the claim was not proven because it actually amounted to a disagreement about proper treatment. Disagreements about proper treatment cannot support an 8th Amendment claim that Defendants were deliberately indifferent to a serious medical need.

Plaintiff also raised an equal protection claim alleging that DOCCS parolees can lawfully (under N.Y. laws) obtain medical marijuana prescriptions, but those incarcerated by DOCCS cannot. The Court rejected this claim because incarceration does not constitute a suspect class, and he did not plead that the government lacked a rational basis for the different treatment of those on parole versus in prison.

Michael Joshua Henderson represented himself in this proceeding.

For information about Section 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 memos: "Section 1983 Civil Rights Actions."

IMMIGRATION MATTERS

Nicholas Phillips

Two recent precedential decisions issued by the Board of Immigration Appeals ("the Board"), Matter of Bain, 29 I. & N. Dec. 72 (BIA 2025), and Matter of Beltrand-Rodriguez, 29 I. & N. Dec. 76 (BIA 2025) are perhaps indicative of this Presidential administration's hardline approach to noncitizens convicted of criminal offenses. Both cases involved noncitizens who were deportable because of criminal convictions, applied for relief from the immigration court, and were granted relief by the immigration judge ("IJ"). In both cases, the Department of Homeland Security ("DHS") appealed the IJ's decision to the Board, and the Board sustained DHS' appeal and vacated the IJ's decision.

The first case, Matter of Bain, concerns the removal proceedings of Gilton Bain, a 35-year-old Bahaman national who has resided in the United States since 1998 and who became a lawful permanent resident ("LPR") in 2011. Mr. Bain attended elementary, middle, and high school in the United States, but he dropped out of high school, and in 2018 or 2019 he became homeless. In 2013, he was arrested for possession of the drug MDMA, but the case was dismissed after he participated in a drug court program. In 2018, he was convicted for driving without a license, and in 2019 and 2020, he was convicted for selling controlled substances, including cocaine, fentanyl, and heroin, on multiple occasions.

At some point thereafter, Mr. Bain was placed into deportation proceedings, where he applied for a form of relief from deportation known as "Cancellation of Removal." Cancellation of removal is a defense to deportation that is available to LPRs who (1) have obtained LPR status lawfully; (2) have not been convicted of an "aggravated felony," which are serious offenses such as rape, murder, and crimes of violence; (3) have been an LPR for at least five years; and (4) have accrued seven years of continuous residence in the United States since being admitted. To decide whether to grant cancellation of removal, an IJ "must balance the adverse factors evidencing an alien's undesirability as [an LPR] with the social and humane considerations presented." Matter of Marin, 16 I. & N. Dec. 581, 584 (BIA 1978). Adverse factors include the underlying circumstances of the deportation proceedings; the presence of other immigration law violations; the nature, recency and seriousness of a criminal record; and evidence of a noncitizen's bad character or undesirability as an LPR. Matter of C-V-T-, 22 I. & N. Dec. 7, 11 (BIA 1998). Positive factors include family ties in the United States; residence of long duration in the United States; evidence of hardship to the noncitizen and his or her family if deportation occurs; a history of employment; evidence of value and service to the community; and proof of genuine rehabilitation if a criminal record exists. Id.

In Mr. Bain's case, the IJ found that the positive factors outweighed the negative such that cancellation of removal was warranted. DHS subsequently appealed the IJ's decision to the Board, and the

Board reversed the IJ's decision and ordered Mr. Bain removed to the Bahamas. In so holding, the Board acknowledged that Mr. Bain's removal "may result in a significant level of hardship to himself and his family" and that "[t]he equities and the humanitarian factors present in this case are not insignificant." 29 I. & N. Dec. at 74. However, the Board concluded that Mr. Bain's "criminal record is . . . recent, serious, and recidivist." Id. And while Mr. Bain expressed remorse for his criminal offenses, the Board found that "the record does not support that the respondent has sufficiently demonstrated rehabilitation, particularly in light of his past drug-related criminal activity." Id. The Board concluded that "upon de novo review, we disagree with the [IJ's] favorable exercise of discretion in this case and reverse the [IJ's] grant of cancellation of removal."

The second case, Matter of Beltrand-Rodriguez, concerns an application for release on bond by Christofer Beltrand-Rodriguez, a noncitizen held in immigration detention by DHS. Noncitizens in immigration detention who have been convicted of criminal offenses are often ineligible for release on bond pursuant to 8 U.S.C. §1226(c), which provides for the mandatory detention without bond of noncitizens convicted of certain criminal offenses. But Mr. Beltrand-Rodriguez was detained in the jurisdiction of the Ninth Circuit Court of Appeals, and under the Ninth Circuit's decision in Rodriguez v. Robbins, 804 F.3d 1060, 1087, 1089 (9th Cir. 2015), rev'd, Jennings v. Rodriguez, 583 U.S. 281 (2018), any noncitizen held in immigration detention for more than six months is entitled to a bond hearing at which DHS must prove that continued detention is justified. Mr. Beltrand-Rodriguez was afforded a Rodriguez bond hearing, at which the IJ issued a decision ordering his release upon payment of a $10,000 bond and compliance with certain conditions.

DHS appealed the IJ's decision to the Board, and the Board sustained the appeal, vacated the IJ's decision, and ordered Mr. Beltrand-Rodriguez to be detained. In so holding, the Board noted that Mr. Beltrand-Rodriguez was convicted in 2022 of lewd or lascivious acts with a minor under the age of 14 years, for which he was sentenced to 365 days and county jail, and that he was previously convicted of sending harmful matter to a minor, for which he received a suspended sentence of 4 years' probation. These convictions were based on conduct in which Mr. Beltrand-Rodriguez kissed his 12-year-old half-sister and sent her sexually explicit photographs and videos of himself. As a result of these convictions, Mr. Beltrand-Rodriguez was ordered to register as a sex offender for a period of 10 years, complete a 52-week sex offender course, and stay away from the victim for a period of 10 years.

While the IJ had acknowledged this criminal history, the IJ found that release on bond was warranted because Mr. Beltrand-Rodriguez had no previous criminal history, and DHS did not submit evidence showing that Mr. Beltrand-Rodriguez was likely to violate the

protective order. But the Board disagreed, finding that "[t]he respondent's behavior was dangerous and subjected a person who was particularly vulnerable because of her age and her familial relationship to the respondent to unlawful sexual conduct." 29 I. & N. Dec. at 78. The Board therefore vacated the IJ's decision and ordered Mr. Beltrand-Rodriguez's continued detention.

The fact that Matter of Bain and Matter of Beltrand-Rodriguez were issued as precedential cases is somewhat unusual. Typically, precedent decisions are issued by the Board in cases which involve "the resolution of an issue of first impression; alteration, modification, or clarification of an existing rule of law; reaffirmation of an existing rule of law; resolution of a conflict of authority; and discussion of an issue of significant public interest." Executive Office for Immigration Review Policy Manual, Part 1.4(b)(4)(A). But Matter of Bain and Matter of Beltrand-Rodriguez are both highly fact-dependent decisions, and it is hard to see how their holdings would extend beyond the particular circumstances of each case. It remains to be seen whether Matter of Bain and Matter of Beltrand-Rodriguez signify a new approach under which the Board will now be more closely scrutinizing the facts underlying IJ decisions.

WHAT DID YOU LEARN?

Brad Rudin

1. **Pursuant to the recently passed State Budget Bill, Correction Law 135 requires that as of July 2025, corrections staff manually activate their body worn cameras:**

   a. during any interaction with an incarcerated individual or visitors in any location.
   b. when a correction officer observes any unauthorized activity.
   c. during all uses of force.
   d. all of the above.

2. **If the plaintiffs win in *Smalls, et al. v. Martuscello*, the result will be :**

   a. an award of money damages to the named class members.
   b. an award of money damages to all incarcerated persons.
   c. nullification of the suspension of HALT provisions.
   d. nullification of most provisions of the HALT law.

3. **In *Matter of Pegues v. Martuscello*, Supreme Court, Albany County reversed the challenged disciplinary determination because DOCCS failed to:**

   a. appoint legal counsel for the incarcerated person.
   b. honor the incarcerated person's request for an assistant.
   c. prove guilt beyond a reasonable doubt.
   d. disclose the recording made by officer's body cam.

4. **When DOCCS moves to dismiss an an Article 78 proceeding, the court must:**

   a. presume the falsity of the petitioner's factual claims.
   b. give equal weight to the claims of DOCCS and the petitioner seeking relief under Article 78.
   c. accept the petitioner's allegations as true.
   d. reject claims not proven beyond a reasonable doubt.

5. **A disciplinary determination against an incarcerated person will not be upheld by the Appellate Division unless the determination is supported by:**

   a. substantial evidence.
   b. some evidence.
   c. a clear predominance of the evidence.
   d. evidence that is obviously accurate.

6. **In the first remitted hearing considered in *Bright v. Martuscello*, the Appellate Division ordered a new hearing because DOCCS failed to:**

   a. apply the correct legal standard in determining guilt.
   b. consider whether institutional safety concerns were at issue before it denied the Petitioner access to a video tape.
   c. file its answer to the petition in Supreme Court.
   d. serve and file its answer to the petition in the correct Department of the Appellate Division.

7. **Under Executive Law 259-i, as explained in *Matter of Tripodi,* a parolee faced with an unfavorable parole revocation decision has the right to appeal that decision to:**

   a. City Court and County Court.
   b. County Court only.
   c. City Court with permission of the County Court
   d. The lowest level court in the jurisdiction where the hearing took place or the sustained conduct was alleged to have occurred.

8. Petitioner in *People ex rel. Sloan v. Martuscello* successfully claimed that the parole delinquency determination should be reversed because:

a. at trial, the jury found him not guilty of the criminal charges related to the parole violation.
b. the grand jury declined to indict him on charges related to the parole violation.
c. the local criminal court improperly dismissed his habeas corpus petition.
d. the county court failed to accord him due process of law.

9. In *People ex rel. Savon O'Neal v. Daniel Martuscello*, the Court found that the alleged violation of Penal Law 195.05(1) – failure to charge his GPS unit – did not constitute [amount to] a crime because Petitioner's failure did not:

a. constitute interference with a telecommunications system owned or operated by the State.
b. relate to a parole violation.
c. impair the ability of the State to monitor Petitioner.
d. involve any legitimate State interest in the monitoring of persons under parole supervision.

10. In the case of *People v. KD*, the court modified the sentence imposed on Defendant because the Domestic Violence Survivors Justice Act (DVSJA):

a. required a sentence of no more than five years for defendants satisfying eligibility requirement under the Act.
b. authorized the sentencing court to impose a lower prison sentence for defendants who suffered from domestic violence.
c. prohibited felony sentencing for defendants who suffered from domestic violence.
d. allowed the sentencing court to impose a conditional discharge for defendants who suffered from domestic violence.

Answers

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

The Family Matters Unit

The Family Matters Unit of Prisoners' Legal Services of New York is a specialized unit that assists incarcerated parents with certain family law matters. The FMU assists parents whose county of conviction is *Albany, Bronx, Dutchess*, *Erie, Kings, Monroe, Nassau, New York, Onondaga, Orange, Queens, Richmond,* or *Suffolk*, or who have children currently living in one of those counties.

Family Matters Unit attorneys work with eligible incarcerated parents to prepare child visitation petitions, prepare child support modification petitions, access family court records, challenge denials of proximity to minor child transfer requests, and challenge prison disciplinary proceedings that result in interference with visitation or communication with minor children.

The goal of the Family Matters Unit is to be a resource for incarcerated parents, and help maintain family ties during the parents' incarceration. For parents who are subject to child support orders, the Family Matters Unit also helps to address one of the major barriers to successful reintegration – the accumulation of insurmountable debt because of child support arrears.

If you would like the assistance of the Family Matters Unit and you meet the eligibility requirements described above, please write to the Family Matters Unit at: Prisoners' Legal Services of New York, Family Matters Unit, 41 State Street, Suite M112, Albany, NY 12207.

PREP

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 not 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.

Your Right to an Education

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

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

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

Pro Se
114 Prospect Street
Ithaca, NY 14850

PLS OFFICES

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

PLS ALBANY OFFICE: 41 State Street, Suite M112, Albany, NY 12207
Adirondack • Altona • Bare Hill • Clinton • CNYPC • Coxsackie • Eastern • Edgecombe • Franklin Gouverneur • 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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