Pro Se

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Basis for Strike Related HALT Suspension

In a July 1st Decision and Order, Justice Daniel C. Lynch, New York Supreme Court Justice for Albany County, granted the Plaintiffs' motion for a preliminary injunction in *Alfonso Smalls, et al. v Daniel F. Martuscello III*, Index No. 903926-25 (Sup Ct Albany Co July 1, 2025). The preliminary injunction:

- **Enjoined** (ordered DOCCS to stop its implementation of) the system-wide **suspension** (pause) of the HALT Act (HALT); and

- Ordered DOCCS to publicly set forth the basis for any HALT-suspension on a facility level based on the conditions at that specific facility.

The Prisoners' Rights Project of the Legal Aid Society filed *Smalls* as a **putative class action** (proposed class of negatively impacted plaintiffs) seeking Article 78 and declaratory relief. The lawsuit challenges DOCCS' suspension of HALT due to the officer strike. *Smalls* also sought a preliminary injunction under CPLR 6301 asking the Court to **enjoin** (stop) DOCCS from enforcing or implementing its HALT suspension for the entire Department.

The putative class covers two groups of individuals, described as individuals who are housed in either:

1) general population, yet, in effect, subject to segregated confinement without disciplinary sanctions; and

2) disciplinary confinement who are not receiving the out of cell requirements of the HALT Act.

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.

The HALT suspension, as challenged, was set forth in two policy documents. The first was a February 20, 2025 memo to Superintendents (February Memo) directing a suspension of the "elements of HALT that cannot safely be operationalized under a prison wide state of emergency."

The second was a March 8, 2025 Memorandum of Agreement between the State and the correction officers' union (March Agreement), in which DOCCS agreed to exercise "existing discretion under the HALT Act and continue the temporary suspension of the programming elements of the HALT Act for 90 days due to the ongoing emergency and exigent circumstances…due to the illegal strike and the significant staffing deficit that existed prior to the illegal strike."

Under the March Agreement, DOCCS committed to evaluating staffing levels at each facility to determine whether re-instituting HALT provisions would create an unreasonable risk to the safety and security of the incarcerated population and staff.

To grant a preliminary injunction, the moving party – in this case the six named Plaintiffs/Petitioners (Plaintiffs) – must show:

1. a probability of success on the merits;
2. danger of irreparable injury without an injunction; and
3. a balance of **equities** (factors relating to issues of fairness) in favor of granting the injunction.

Here, Justice Lynch found that the *Smalls* plaintiffs satisfied all three criteria.

Finding that the Plaintiffs were likely to succeed on the merits, the Court stated that the February Memo and the March Agreement were arbitrary and capricious. Correction Law §2[23] allows cell confinement exceeding 17 hours per day only in instances of a "**facility**-wide emergency." Emphasizing the term "facility," the decision highlighted references to *system-wide* issues in both documents. The Court reasoned that because DOCCS' determinations to suspend HALT were not based on facility-specific facts, they were arbitrary and capricious.

The Court also noted that the March Agreement referenced pre-strike staffing deficiencies. As prior to the strike, low staffing was not a basis for HALT suspension at the facility level, the Court found DOCCS had not shown a basis for concluding that the deficiencies were sufficient to justify the HALT suspension after the strike commenced. Additionally, the Court recognized that the March Agreement expired in early June, and Defendant failed to demonstrate any rational basis for HALT suspension after the expiration of the agreement.

Individual Plaintiffs submitted affidavits about the danger that they will suffer irreparable injury if the suspension of HALT is allowed to continue, the second criterion for a successful preliminary injunction. Plaintiffs described mental anguish, physical harm, and missed programming for re-entry needs that they have experienced as a result of their 21 to 24 hour per day cell confinement. Recognizing that economic loss alone cannot support a preliminary injunction, the Court underscored that the HALT suspension resulted in and continues to result in physical and mental injuries sufficient to establish irreparable injury under a preliminary injunction analysis.

Addressing the issue of the balance of the equities, the Court agreed with the Plaintiffs that DOCCS must make facility by facility emergency determinations before it may suspend HALT in any facility. In granting the injunction, the Court compelled DOCCS to "make rational determinations on a facility-by-facility basis" as it committed to in the March Agreement.

Understanding that re-implementation of HALT may take some time, the Court delayed the injunction's commencement until July 11th to give DOCCS time to "take measures to ensure the safety of its facilities and their inhabitants."

The Court required DOCCS to publicly file any finding of a facility-wide emergency with the Court. In a July 14th filing, Commissioner Martuscello stated that his goal was to have all facilities as "close to fully operational" by early Fall and detailed staffing and programming conditions at each facility.

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. The Family Matters Unit attorneys assists eligible parents with child visitation petitions, child support modification petitions, accessing family court records, proximity to minor child transfer request denials, and prison disciplinary proceedings that result in interference with visitation or communication with minor children. 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

A Crisis in Our Prisons—and a Call for Bold, Compassionate Solutions

A Message from the Executive Director, Karen L. Murtagh

Across New York State's prisons, a quiet but devastating crisis continues to unfold. Thousands of incarcerated individuals remain confined in their cells for 21 to 24 hours a day, cut off from critical programs, education and human contact. Despite statutory reforms and repeated warnings from advocates and those inside, the Department of Corrections and Community Supervision (DOCCS) continues to rely on prolonged lockdowns, effectively suspending the implementation of the HALT Solitary Confinement Law—without meaningful oversight, transparency or a viable end in sight.

This state of affairs was brought into sharp focus in the recent case of Smalls, et. al. v. Martuscello. In that case, the plaintiffs submitted affidavits detailing the mental anguish, physical harm and vital missed opportunities for programming and re-entry support they have suffered as a result of these near-total lockdowns. The Court found their descriptions of irreparable injury deeply compelling.

The ruling made clear that DOCCS cannot justify a blanket suspension of HALT without making specific, rational and facility-by-facility emergency determinations—as DOCCS itself committed to doing earlier this year. In his decision, Justice Lynch rightly underscored that the ongoing lockdowns are causing real and lasting damage to human beings—harm that rises to the level of irreparable injury – noting that:

> "Plaintiffs have established that they will suffer an irreparable injury if their motion for a preliminary injunction is not granted . . . In affidavits attached to the hybrid complaint/petition, plaintiffs each state that since the strike began they have spent 21 to 24 hours in their cell without most programming. Each stated that his increased cell confinement has caused him mental anguish including depression, feelings of insanity and thoughts of suicides as well as physical harm such as weight loss, weight gain and trouble sleeping. Plaintiffs aver that the confinement has also caused them to miss out on programming that they hoped to attend to assist their reintegration into society after their release from incarceration."

In response to the granting of a preliminary injunction preventing DOCCS from "enforcing or implementing any suspension of the provisions of HALT in DOCCS facilities without a finding of a facility-wide emergency in each facility as set forth in Corrections Law 2 §23", DOCCS Commissioner Martuscello submitted a 96-page affidavit outlining staffing shortages and DOCCS' safety concerns across the prison system. We believe the Commissioner to be forthright in his assessment of the situation and are left to confront this truth: This "state of emergency" is not going away anytime soon. The simple and painful reality is that our prison system cannot function safely, humanely or lawfully in its current form.

So where do we go from here?

We must look beyond the walls and reimagine the purpose and function of our corrections system. If staffing shortages make it impossible to operate within the bounds of law and dignity, then we must reduce the number of people in prison.

There are actionable steps we can take right now:

1. **Sentencing Reform**

- Reduce mandatory minimums for nonviolent offenses, particularly drug-related crimes.
- Expand alternatives to incarceration, such as restorative justice programs and treatment programs.
- Reclassify certain crimes (e.g., low-level property crimes) as misdemeanors or infractions instead of felonies.
- Implement proportional sentencing that aligns punishment more closely with the severity and context of the crime.

2. **Parole and Early Release Reforms**

- Expand work release eligibility.
- Expand parole eligibility (e.g. for older incarcerated individuals or those who've served significant portions of their sentences.)
- Improve the parole process, making it more transparent and fair.
- Grant commutations and clemency more liberally and swiftly.
- Expand merit time credits for education, work or rehabilitative participation.
- Expand medical parole for individuals who are seriously ill or elderly.

3. **Diversion Programs**

- Expand mental health, drug and veterans' courts as alternatives to incarceration.
- Expand supervised release programs to monitor individuals in the community instead of prison.
- Invest in community-based treatment for substance use and mental health disorders.
- Develop crisis response teams (non-police) to handle issues related to homelessness, mental health and addiction.

4. **Re-entry and Support Programs**

- Increase re-entry support to reduce recidivism — housing, employment, healthcare and education access post-release.
- Remove barriers to housing and employment for formerly incarcerated people.
- Expand education and vocational training while individuals are incarcerated.

5. **Legislative and Structural Approaches**

- Close unnecessary or underutilized prisons and reallocate funds to community investments.
- Create sentencing review commissions to recommend reforms and retroactive sentence adjustments.
- Audit and reduce racial and economic disparities in the criminal justice system.

6. **Public Health Approach**

- Treat substance use and mental illness as public health issues rather than criminal ones.
- Increase funding for harm reduction strategies (e.g., syringe exchange, overdose prevention centers).
- Shift funding from incarceration to social services (e.g., education, housing, healthcare).

7. **Educate and Engage the Community**

- Engage impacted communities, victims, advocates and criminal justice professionals in reform efforts.
- Build public awareness campaigns around the costs and impacts of mass incarceration.

At present, over 33,000 people remain incarcerated in New York's prisons, many of whom could be safely returned to their communities with appropriate support. Releasing thousands of them would not only uphold our constitutional and moral obligations—it would save taxpayers millions of dollars and help alleviate the current staffing crisis that is traumatizing individuals and paralyzing our system.

DOCCS states on its website that its mission is to "improve public safety by providing a continuity of appropriate treatment services in safe and secure facilities where the needs of the incarcerated population are addressed and where individuals under its custody are successfully prepared for release." It envisions a system where people return home "under supportive supervision less likely to revert to criminal behavior."

But when people are locked in cells all day, not receiving treatment, programming or even sunlight— we are failing in that mission.

The HALT Act was a vital step forward in ending the inhumane practice of solitary confinement. It was meant to bring New York in line with basic human rights standards. Yet now, we are seeing mass de facto solitary conditions return—affecting people far beyond those formally sanctioned.

In light of this new reality, we in the advocacy world, along with our State partners (elected or appointed) must be willing to think "out of the box" and not accept incarceration as the default response to every challenge. The current crisis is not just one of staffing or logistics—it is one of values.

Let us choose to value rehabilitation over retribution. Let us choose to reduce harm rather than perpetuate it. And let us recommit to building a system that truly helps people to return home and take their places as responsible members of society - a goal that I believe we all share.

Now is the time for courage, compassion and change.

NEWS & NOTES

The Evolving Impact of *Erlinger* on the Constitutionality of New York's Predicate Felony Sentencing Statutes

David Bentivegna

In March 2024, the Supreme Court decided *Erlinger v United States*, 602 U.S. 821 (2024). That case considered whether, for purposes of imposing an enhanced sentence under the Federal Armed Career Criminal Act (ACCA), a jury was needed to determine if a defendant's past offenses were committed on separate occasions, or if a Judge could be the sole fact finder on this issue.

Answering this question required the Court to review both the Fifth and Sixth Amendments to the U.S. Constitution and consider the effect of these amendments on the enhanced sentencing provisions of the ACCA. Ultimately, the Court concluded that factual determinations which could lead to an enhanced sentence must be made by a jury and not a judge alone.

In the year since *Erlinger* was decided, New York Courts have begun to apply its rationale to proceedings involving the State's own predicate felony offender sentencing schemes, potentially calling into question the constitutionality of those predicate sentences imposed without fact finding by juries.

To better explain the still developing effects of *Erlinger* on NY criminal sentencing, it's important to understand what happened in that case. Paul Erlinger initially pleaded guilty to being a felon in possession of a firearm, in violation of federal law. At that time, he had three prior convictions, which allowed for an enhanced sentence.

Shortly after being sentenced on the enhanced sentence, the 7th Circuit for the US Court of Appeals, in an unrelated decision, held that two of Mr. Erlinger's prior convictions no longer qualified as predicates under the ACCA. Erlinger's sentence was vacated and, at re-sentencing, prosecutors again pursued an enhanced sentence, now using different convictions, specifically three past burglaries also committed by Erlinger.

Erlinger claimed that the three burglaries were part of a single episode and not separate acts, a fact issue that only a jury could decide under the Fifth and Sixth Amendments. The District Court disagreed, holding that a judge, acting as a fact finder, could make that determination; it was not legally required that a jury make the finding. Mr. Erlinger appealed and the US Supreme Court took on the matter.

First, the Court reviewed the history of the Fifth and Sixth Amendments. Notably, the Fifth Amendment promises that individuals may not be deprived of their liberty without due process of law. Likewise, the Sixth Amendment guarantees criminal defendants the right to trial by an

impartial jury and carries the inherent assurance that guilty verdicts flow only from unanimous jury decisions.

Based on these principles, the Court found, Supreme Court **precedent** (prior decisions addressing the issue) had established that sentence enhancing provisions trigger a liberty interest. As such when an enhancement is based on a factual determination about the defendant's motive (e.g. if it was racially motivated) only a jury can make that factual determination. This is called the *Apprendi* rule, after *Apprendi v New Jersey, 530 U.S. 466 (2000).*

In deciding Mr. Erlinger's case, the Court expanded the *Apprendi* rule, holding that sentence enhancements premised upon virtually any factual determination – such as whether a series of past offenses constituted a single episode or separate acts – must be made by a jury alone.

The Court left open only one very narrow exception to this rule, in which a judge may still find "the fact of a prior conviction" on their own. Anything more than merely identifying that a prior conviction exists, however, requires the sort of factual determination that only a jury may make. Mr. Erlinger's enhanced sentence was thus vacated and **remanded** (sent back) to the District Court for further resentence proceedings.

Since *Erlinger* was decided, questions immediately arose regarding New York's predicate felony offender sentencing schemes. Similar to the ACCA, New York's Penal Law contains sentence enhancing provisions for individuals found to have been previously convicted of certain felonies.

For example, depending on the type of past felony conviction and when it was committed, defendants can be adjudicated as second felony offenders (Penal Law §70.06), second violent felony offenders (Penal Law §70.04), persistent felony offenders (Penal Law §70.10), or even persistent violent felony offenders (Penal Law §70.08).[1]

In order for a prior felony conviction (or convictions) to 'qualify,' most of these sentence enhancing statutes also require the past felony to have been committed within 10-years of the date on which the defendant committed the new felony. Of particular note, as it relates to *Erlinger*, is that any time spent incarcerated between the old and new felony commission dates is excluded from this 10-year statutory look-back period. The exclusion of periods of time from the look back period is known as "tolling."

As a result, in New York State, tolling calculations are often necessary to determine if a defendant can be adjudicated as a predicate felony offender and thereby receive an enhanced sentence. Post *Erlinger*, New York's trial courts have been repeatedly asked to consider if such a determination is factual and thus whether juries (and not judges alone) must make them. To date, judicial opinions on the matter have been split.

In July 2024, a New York County Supreme Court in *People v Lopez*, 85 Misc. 3d 171 (Sup Ct NY Co 2024), was among the first courts to take on this question. There, prior to sentencing, the prosecution submitted a predicate felony offender statement, alleging Mr. Lopez had prior convictions such that he qualified for persistent violent felony offender sentencing.

Citing *Erlinger*, however, the *Lopez* Court concluded that tolling determinations regarding Mr. Lopez's prior felonies could no longer be made by the Court and now required a jury. Moreover, the Court concluded, since New York's Criminal Procedure Law (CPL) prohibits juries from making tolling decisions – see generally, CPL 400.15 which assigns that function to judges alone – it was unable to sentence Mr. Lopez as a persistent violent felony offender and could only impose a sentence within the range available to first felony offenders.

Citing *Lopez*, another New York County Court, in *People v Banks*, 85 Misc.3d 423 (Sup Ct NY Co 2024), agreed that it could not sentence a defendant as a persistent violent felony offender since, per *Erlinger*, only a jury could make the necessary tolling determinations.

Similarly, in November 2024 a Queens County Court in *People v Gardner*, 86 Misc.3d 252 (Sup Ct Queens Co 2024), granted a CPL 440.20 motion, vacating a second violent felony offender sentence on the same grounds. Notably, the Court in *Gardner* further found that, upon re-sentence, a jury could not be empaneled under New York's Criminal Procedure law to consider the tolling issue and that Mr. Gardner could only be re-sentenced as a first-time violent felony offender.

Building on the decisions in *Lopez* and *Banks*, in January 2025 an Erie County Supreme Court in *People v Oaks*, 86 Misc.3d 615 (Sup Ct Erie Co 2025), agreed that *Erlinger* prohibited it from making the required tolling determinations to sentence a defendant as a persistent violent felony offender.

Interestingly though, Erie County Supreme Court concluded it could still sentence Mr. Oaks as a second violent felony offender because his prior felony fell within the 10-year look back period. Since this required no fact finding, the Court took judicial notice of the prior felony and opined that second felony offender sentencing was within the narrow exception still permitted by *Erlinger*.

Conversely, other trial courts have reached conflicting opinions on *Erlinger's* impact on predicate sentencing in New York State.

In October 2024 another New York County Supreme Court in *People v Rivera*, 85 Misc.3d 1032 (Sup Ct NY Co 2024), concluded that it could make tolling determinations and thus sentenced the defendant as a persistent violent felony offender. There, the Court found "no logical distinction" between a judge being allowed to find *the fact of a prior conviction's existence* (which *Erlinger* still permits) and a judge finding *the fact of a prior period of incarceration*. The Court in *Rivera* expressed skepticism that the use of a DCJS rap sheet would be constitutional for one finding, but unconstitutional "for a different, but closely related finding."

Moreover, as recently as June 2025 another New York County Supreme Court, in *People v Hernandez*, 2025 N.Y. Slip Op. 25135 (Sup Ct NY Co 2025), denied a CPL 440.20 motion and refused to set aside a 16-year to life sentence imposed on a defendant who had been found to be a persistent violent felony offender. While the defendant argued his tolling determinations had also not been made by a jury, the Court found that since the defendant had been sentenced a year prior to the issuance of the *Erlinger* decision, and since he had otherwise raised no constitutional challenges at his sentencing pursuant to the *Apprendi* rule, he was precluded from doing so now.

Hernandez addresses the issue of retroactivity, or whether *Erlinger* applies to sentences that were imposed before that decision was made. Generally, prior U.S. Supreme Court precedent has held that, whenever the Court creates a new rule of Constitutional criminal procedure, that rule is not retroactive. *Teague v Lane*, 489 U.S. 288 (1989). In December 2024, one New York County Supreme Court considering the retroactivity of *Erlinger* specifically, and concluded, that, based on *Teague*, it was not. *People v Rodney*, 85 Misc.3d 852(Sup Ct NY Co 2024).

The *Rodney* Court denied a CPL 440.20 motion seeking to vacate a second felony drug offender sentence that had been originally imposed in 2017, holding that *Erlinger* was not retroactive to past predicate felony offender determinations. Indeed, in addition to not being retroactive under federal jurisprudence, the Court in *Rodney* further found that *Erlinger* was also not retroactive under State law, due in part to the sheer volume of cases a retroactive application would upend.

As a result of these various decisions, it is currently unclear what *Erlinger's* ultimate effect will be on New York's predicate felony offender statutes. At minimum, the constitutionality of sentences subject to the tolling provisions are in potential doubt.[2] Appellate Courts will very likely need to address the split among trial courts and resolve whether judicial tolling calculations are permissible under *Erlinger's* narrow exception to the constitutional mandate that juries must otherwise make all factual determinations in a criminal proceeding.

If the courts ultimately rule that tolling calculations by judges are not possible under *Erlinger*, the legislature may also need to address the CPL, modifying the purposes for which juries can be empaneled in New York. Should you have questions about whether *Erlinger* may apply to your own sentence, you should contact your defense or appellate attorney. Since this is a rapidly evolving area of law, future developments will also be covered by this publication.

Footnotes:

[1] Note that these are not all of New York's predicate felony offender sentencing types.

[2] Notably, predicate felony offender statutes which contain no tolling provisions, such as Penal Law 70.10's persistent felony offender finding, would appear unaffected by *Erlinger*. See also *People v Perry*, 85 Misc.3d 982 (Sup Ct Kings Co 2024).

PRO SE VICTORIES!

***Bernard Patterson v. State of New York*, Claim No. 133453 (Ct of Claims Albany Co Dec 20, 2024).** Bernard Patterson filed a claim in the NY Court of Claims for damages related to wrongful confinement. Mr. Patterson received a ticket charging him with multiple charges and was placed in keeplock status pending resolution of the hearing. At his hearing, the hearing officer found him guilty of only one charge and released Mr. Patterson from keeplock. The facility kept Mr. Patterson in keeplock status for 19 more days.

In response to Mr. Patterson's claim, the State did not put forth any evidence to rebut his proof. To prove wrongful confinement, Mr. Patterson was required to prove the following:

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

To reach its conclusion, the Court relied on an exhibit **appended** (attached) to Mr. Patterson's Claim showing that the hearing officer had ordered his release from keeplock. The Court found that:

- the State did not release him;
- Mr. Patterson was aware of his keeplock status; and
- Mr. Patterson's complaints reflected his lack of consent.

The Court noted that the State did not offer any justification for holding Mr. Patterson in keeplock, and as such awarded Mr. Patterson $45 for every day in illegal keeplock status, with interest and recovery of any filing fee paid by Mr. Patterson.

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

Third Department Declares Extended SHU an Unlawful Practice

The Petitioner in *Peterkin v. NYS Dept of Corrections and Community Supervision,* 2025 NY Slip Op 03617 (3d Dept 2025), challenged a Tier III hearing, seeking review of:

1. Whether the hearing officer's finding of guilt was supported by substantial evidence;
2. Whether Petitioner received adequate employee assistance;
3. Whether the hearing officer's failure to give Petitioner a copy of the hearing disposition at the hearing violated Petitioner's right to due process of law; and
4. Whether the 730-day sanction imposed by the hearing officer violated the HALT Act.

The Petitioner filed in Albany County, and the matter was transferred to the Appellate Division because it raised the question of whether the decision was supported by substantial evidence.

The Third Department found that the misbehavior report, videos, reports and other evidence provided substantial evidence for the hearing officer's findings. The Court, noting the Petitioner's argument that he acted in self-defense, did not find any evidence to support his **narrative** (version of events). For this reason, the Court wrote, "Petitioner's contrary account that he acted in self-defense after the officers initiated the altercation was unsupported by any evidence and presented a credibility issue for the hearing officer to resolve."

The Third Department also rejected the Petitioner's due process claims. With respect to his employee assistance claim, the Court noted that the hearing officer adjourned the hearing so that Petitioner could meet with his employee assistant. When the hearing resumed, Petitioner did not object to the assistance he received.

Petitioner also argued that he was prejudiced when he did not receive a copy of his written disposition within 24 hours of when the hearing ended. The Court rejected this argument stating that before the hearing ended, the hearing officer read the disposition into the record; the Petitioner received a copy of the disposition six days after the end of the hearing; and the Petitioner failed to demonstrate how he was prejudiced by the delay. Additionally, the Court took note that the Petitioner's attorney submitted a request for reconsideration, affording him a "second administrative opportunity to challenge the disposition."

With respect to the Petitioner's sanctions, the Attorney General (AG) represented that the Petitioner's penalty was amended in accordance with the limits of the HALT Act and *Fuquan F. v. D.F.M. III, 2024 WL 5681961 (Sup Ct Albany Co June 18, 2024).* The AG did not dispute that the original penalty did not comply with HALT but argued that because the penalty had already been served, the issue was moot. Notwithstanding such mootness, the Third Department wrote, this case merited an exception to the mootness doctrine. Stating that SHU penalties in excess of HALT

limits are likely to be repeated, evade review and present "significant [and] important questions," the Court reviewed the hearing officer's initial penalty and as modified on appeal. The Third Department found that both the original and the modified penalty violated the HALT Act's prohibition against more than 15 consecutive days of SHU confinement.

The Attorney General argued that the hearing officer's decision was a recommendation for the maximum penalty. The Court rejected this view, stating that the statute does not provide any authority for a hearing officer to disregard the limits of HALT in setting penalties.

In its concluding paragraph, the Court stated, "[h]earing officers have no authority to disregard the HALT Act's statutory limitations and requirements by substituting their own judgment and imposing penalties beyond those which the law allows – for whatever reason... To the extent this unlawful practice is continuing, it must cease."

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."

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Roger V. Archibald, PLLC, Brooklyn NY represented the Petitioner in this Article 78 proceeding.

Sentence & Jail Time

DVSJA Re-Sentencing and Post Release Supervision

The Defendant in *People v Brenda WW.*, 2025 WL 1688473 (Ct Apps June 17, 2025) moved for re-sentencing under the Domestic Violence Survivors Justice Act (DVSJA). The County Court denied her motion. While the County Court acknowledged the domestic violence in Defendant's relationship with the victim and in her prior relationships and family history, it found that "the abuse was neither substantial nor a significant contributing factor to her offense."

The Defendant appealed to the Appellate Division, which reversed the County Court decision, finding that the Defendant had satisfied both prongs required for relief under the DVSJA: the Defendant's abuse was substantial and her conduct was significantly attributable to the abuse.

In re-sentencing the Defendant, the Appellate Division took notice that she had already served 15 years of her 20-year sentence. The Court then reduced the Defendant's sentence to eight years with five years of post-release supervision (PRS), the maximum term of PRS permitted. In a footnote, the Court stated that the excess time Defendant had spent incarcerated beyond the new sentence of eight years – that is, seven years – should be credited to her PRS term. The People appealed the decision to the Court of Appeals.

In affirming the portion of the Appellate Division's decision finding that the Defendant met the criteria for resentencing under the DVSJA, the Court of Appeals rejected the People's argument that the Appellate Division had exceeded its authority. The Appellate Division, the Court noted, has the same fact-finding ability as a trial court, in so much as the Appellate Divisions may conduct independent assessments of the record and make factual findings that differ from the lower court's findings.

The Court of Appeals, however, did agree with the People's argument that the Appellate Division had erred in crediting time spent in prison to the Defendant's term of PRS. In reaching this conclusion, the Court of Appeals looked to the language of Penal Law 70.45 (5)(a), which states that PRS commences upon release, and when a sentence is reduced, a mandatory term of PRS attaches.

The Appellate Division's intent in ordering the maximum term of PRS, the Court noted, may have been based on its erroneous assumption that the Defendant would not actually serve any term of PRS. Given the language of the decision (and the language in the above referenced footnote), the Court of Appeals questioned whether the Appellate Division had intended to impose the maximum PRS term. As such, the Court of Appeals remitted to the Appellate Division for modification in accordance with the Court's holding that the Defendant's excess sentence time would not be credited to the Defendant's PRS term.

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."

Veronica L. Reed, Esq. Schenectady NY represented Brenda WW. in this appeal.

Court of Claims

Court of Claims May Grant Relief in Excess of Demand

After trial, the Court of Claims, in *Bonneau v State*, 239 AD3d 812 (2d Dept 2025), found that the Claimant had sustained a torn rotator cuff after falling down a flight of stairs at Green Haven. Prior to the fall, the Court noted, the State Defendant did not place him in a cell on the first floor and confiscated his cane. The Court concluded that the State was 100% liable for the Claimant's injuries, and awarded damages as requested in his pleadings.

While the Claimant was represented by counsel at trial and on appeal, he had filed his Claim *pro se*. Based on the discussion in the decision, it appears that the original pleading was handwritten. The Court of Claims interpreted Claimant's demand clause for "$10.000.000" to mean $10,000 and awarded the Claimant $10,000. The Claimant appealed the damages judgment to the Second Department.

The Appellate Division made three important findings. First, the Court of Claims erred in concluding that the amount the court could award was limited to the amount requested in the claim. Second, the Court of Claims found that the evidence could support a substantial recovery for past and future pain and suffering. Third, the Second Department opined that an award of $10,000 materially deviates from awards for similar injuries.

Noting that regardless of the amount requested by the Claimant, the Court of Claims is empowered to award an amount that was supported by the Claimant's evidence, the Second Department reversed the award and remitted to the Court of Claims for a new determination on damages.

For information about drafting and filing claims in the New York Court of Claims or to help you determine which court you want to decide your legal 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 the NYS Court of Claims" and/or "Court Systems in NYS: Choosing the Proper Court."

Tracie A. Sundack & Associates, LLC, White Plains, NY represented the Appellant in this appeal.

Multiple Providers and the Continuous Treatment Doctrine

The Claimant in *Curry v. State*, 239 AD3d 1058 (3d Dept 2025) sought permission to file a late claim for damages relating to poor dental treatment between 2006 and 2022, a period of 16 years. The statute of limitations for medical (and dental) claims in the Court of Claims is 2½ years from the date of injury. Claimant asserted that his claim was timely because of the Continuous Treatment doctrine even though the alleged malpractice occurred beyond the 2½-year period preceding the filing of the claim for dental malpractice.

The Court of Claims denied the Claimant's motion, holding that the Continuous Treatment doctrine did not apply to his claim, and that his claim was therefore untimely. The Court of Claims also determined that the claim lacked merit (a necessary factor to proceed with a late claim).

In order for the Continuous Treatment doctrine to apply, a claimant must show that the claimant:

1. continued to seek and obtained an actual course of treatment from the defendant physician during the relevant period;
2. the course of treatment was for the same condition underlying the medical (or dental) malpractice claim; and
3. the treatment was continuous.

Claimant's dental care was performed by multiple providers in six different facilities. Where there are multiple medical providers involved, there must be an agency or relevant relationship between the providers. Although all the providers worked for DOCCS, the Court stated that Claimant must

demonstrate that there was a continuing relationship between each provider and their successor provider that would justify a finding that there is one course of treatment and that the statute of limitations should therefore be extended to include all of the challenged treatment.

In this instance, Claimant submitted evidence of gaps in his dental treatment but did not show any "connection that would tether" the various dentists' care for purposes of tolling the statute of limitations. As a result, the Third Department found that the statute of limitations had expired and affirmed the dismissal of the claim by the Court of Claims.

Shymel Curry represented himself in this appeal.

Miscellaneous

Unlawful Employment Discrimination on the Basis of Criminal History

The employer in *Matter of Janitronics, Inc. v New York State Div. of Human Rights*, 239 AD3d 1190 (3d Dept 2025) challenged a NYS Division of Human Rights (DHR) decision finding that the employer (Janitronics) unlawfully refused to hire an applicant on the basis of her conviction record in violation of Executive Law 296(15). As a result of the decision, the DHR awarded the applicant $20,000 in compensatory damages for her mental anguish and humiliation and $133,860 in lost wages, and imposed a $10,000 civil fine payable to the State.[3] The Third Department concluded that substantial evidence supported the decision. The job applicant disclosed her prior convictions in the application materials that she submitted, but did not disclose a parole violation that led to a period of reincarceration. The employer offered the applicant the job after discussing her convictions in her interviews.

After the employer offered the applicant a job, it found information about the parole incarceration in a background check. The employer telephoned the applicant and asked, without mentioning the parole violation, whether she had any additional information she wanted to provide to the employer. The applicant did not disclose either the parole violation or the resulting reincarceration. Based on the applicant's failure to disclose the parole violation and the resulting re-incarceration, the employer withdrew the employment offer.

During the course of the subsequent administrative proceedings, the applicant explained that she did not believe she needed to disclose the parole violation or the reincarceration because it was not a criminal conviction. The employer explained that the background check appeared to show a conviction that did not match the dates that the applicant had provided. The DHR found that the employment offer was revoked because the employer misperceived that the applicant failed to

Footnotes

[3] The case was transferred to the Appellate Division because the petition raised the issue of whether the decision was supported by substantial evidence.

disclose a criminal conviction, and agreed that a parole violation would not be a criminal conviction under Executive Law 296 (15).

In confirming the DHR determination, the Appellate Division re-stated its long stated position that: "It is as much a violation of the Human Rights Law to discriminate against a person because of an arrest or a conviction for a criminal offense as it is to discriminate against that person because of an erroneously perceived conviction for a crime," referencing, *State Div. of Human Rights v. Sorrento Cheese Co.*, 115 AD2d 323, 324 (4th Dept 1985).

Best Interests of the Child Hearing Required for Visitation Petition

Matter of Jaime T. v Ryan U., 238 AD3d 1257 (3d Dept 2025). involves an appeal from an order granting summary judgment to the mother with respect to her claim that she should have sole legal and physical custody of the child and denying the incarcerated father's motion for visitation. The case arose when the incarcerated father moved for visitation with the couple's child.

The father was charged with having assaulted the mother when she was 7 months pregnant with the child. Before those charges were disposed of, the mother moved for sole custody and the father moved for visitation. When the father was convicted of the charges and sentenced to prison for 10 to 20 years, the mother moved for summary judgment on the family court petition, arguing that there were no issues of material fact as to the alleged family offense and the best interests of the child. The father opposed the motion.

The Family Court found that in light of the father's conviction there was no issue of material fact, granted the mother sole legal and physical custody and suspended all contact between the child and the father until she is 18.

The Third Department ruled that the Family Court had erred in denying the father's motion in favor of granting the mother summary judgment. The Family Court, the Appellate Division noted, was required to hold an evidentiary hearing on the best interests of the child in order to decide the father's motion.

"Plainly stated," the Court wrote, "we do not find that, given the specific circumstances of this case, denying the father any contact with the child until the child's 18th birthday was appropriate on a summary judgment motion."

Generally, there is a presumption that visitation with a non-custodial parent is in the child's best interest. This is true for incarcerated parents as well. The presumption may be rebutted by showing, by a preponderance of the evidence, that visitation would be harmful to the child's welfare or contrary to the child's best interests. In this case, the burden of proof was on the mother to rebut the presumption that the child's visitation with the father was in the child's best interest.

The Third Department held that the father was entitled to a hearing to determine what, if any, visitation is in the best interest of the child. The Court also stated that visitation need not always include contact visitation at the prison, but could include updates, photographs or letters if in the child's best interest.

Paul J. Connolly, Delmar, NY represented the father in this appeal.

For information about the rights of incarcerated parents, 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."

FEDERAL COURT DECISIONS

Court Denies Summary Judgment for Failure to Exhaust Administrative Remedies

In *Gayot v. Sued*, 2025 WL 1425918 (WDNY May 16, 2025), an excessive force 1983 action, the DOCCS Defendants moved for summary judgment, arguing that the Plaintiff had failed to exhaust his administrative remedies. In support of their motion, the Defendants submitted a list of what two employees certified were Plaintiff's grievances. Although asserting in their certifications that they had done so, the two certifications failed to attach photocopies of the grievances. In support of the motion, the Defendants also relied on the Plaintiff's deposition.

The Court refused to consider the list of grievances submitted by the Defendants, finding that it was inadmissible. In reaching this result, the Court noted that Defendants had produced certifications of records from two individuals who worked in the facility IRC (IRC Certifications) to **authenticate the records** (show that the records are what they purport to be).

However, the IRC certifications did not include copies of the documents described in the certifications, and one of the certifications suggested that the IRCs were authenticating documents that were not grievances (e.g., the unusual incident report from the incident). As the attorney general lacked personal knowledge of the underlying facts, he could not authenticate the records to make them admissible.

Turning to the Plaintiff's deposition, the Court concluded it was the only admissible evidence in support of the Defendant's motion that the Plaintiff had failed to exhaust his remedies. However, the Court noted that at his deposition, the Plaintiff did not testify that he failed to exhaust his administrative remedies. Rather, Plaintiff testified that he "wrote a grievance and submitted it via the facility mail," and that he was unable to access the grievance process because "some important grievances sometimes magically disappear."

Thus, the Court found that the Defendants were unable to show the absence of a genuine dispute as to a material fact, namely, here, that Plaintiff failed to exhaust the grievance process. As such, the Court denied their motion for summary judgment.

Practical note: Despite the outcome of this motion for summary judgment, it is very important to timely file grievances and to appeal first to the superintendent and then to the Central Office Review Committee. Here, the Court found that there was evidence from the Plaintiff's deposition that he had filed a grievance but did not receive a response.

A motion for summary judgment will only be granted when the evidence on which the moving party – here the Defendants – is undisputed. While the Plaintiff showed that the only admissible evidence did not support the Defendants' motion, if the Defendants decide to pursue this issue and request a hearing, the Court will review the evidence presented at the hearing to determine whether a preponderance of the evidence shows that the Plaintiff exhausted his administrative remedies. Thus, the complaint's survival here does not guarantee that the Plaintiff will ultimately win on the exhaustion issue.

Andrew Gayot represented himself in this 1983 action.

For information about the grievance process or why it is important in a 1983, write to the PLS office that provides legal services to individuals incarcerated at the prison from which you are writing and request the memos: "Incarcerated Grievance Program" and/or "Section 1983 Civil Rights Actions."

Sexual Assault Reform Act (SARA)Vagueness Challenge to Restrictions Permitted to Proceed

Brought by four plaintiffs who have sex offense convictions and live in dense urban areas, the lawsuit known as *M.G. v. Towns*, 2025 WL 1425945 (SDNY 2025) is a putative class action challenging the restrictions on parolee movement imposed pursuant to the New York State Sexual Assault Reform Act's (SARA's) prohibition on sex offenders *knowingly* "entering" any area within 1,000-feet of a school.

The complaint raised three challenges, asserting that:

1) The Defendants arbitrary enforcement of SARA's 1000-foot restriction as to the plaintiffs' movements is unconstitutional under the Fourteenth Amendment;
2) As it is applied by the Defendants, enforcement of the 1,000-foot restriction on plaintiffs' residences is unconstitutionally vague in violation of the Fourteenth Amendment; and
3) SARA unconstitutionally burdens the Plaintiff's right to travel within New York State.

The Court dismissed the second basis for the challenge because the Plaintiffs, in fact, described "clear guidance from parole officers" about their proposed residences through the approval

process, and because the Plaintiffs had not alleged facts showing that the law was unconstitutionally vague as applied to the Plaintiffs. The Court also found that the Plaintiff's did not allege facts that demonstrated that their right to travel was burdened and dismissed the third basis for the challenge.

The Court, however, gave greater consideration to the claims of two of the Plaintiffs who alleged that due to the unconstitutional vagueness of SARA's 1000-foot restriction that put them at risk of arbitrary enforcement, they had altered their movements in visiting areas that might be within 1000 feet of a school. Plaintiff M.G. alleged that he limits the time he spends at his father's church because it is 300 feet from a school, takes a longer commute to avoid bus stops that are near schools, and fears exiting unknown subway stops that may be near a school.

Plaintiff J.M. alleged that the SARA restriction has also forced him to alter his commute to avoid schools, avoid a municipal park because a portion of the park is within 1000 feet of a school, and refrain from going to medical appointments in urban areas out of fear that he will be within 1000 feet of a school.

The Court declined to accept the Defendant's position that such violations would be inadvertent because M.G. and J.M. described "acting cautiously due to their actual knowledge of the proximity of school grounds."

The Court found that the two Plaintiffs had "plausibly alleged conduct that they wish to engage in but have avoided but-for the alleged lack of clarity in how SARA is enforced." As such, the Plaintiff's challenge that the SARA restriction is unconstitutionally vague survived Defendants' motion to dismiss.

M.G., B.Z., J.L. and J.M. were represented by NYCLU in this Section 1983.

Secondhand Smoke Claim and Tolling

In *Fuentes v New York State Dept. of Corrections and Community Supervision*, 2025 WL 1636199 (SDNY June 9, 2025) (*Fuentes* or *Fuentes v. NYS DOCCS*), the Court considered Plaintiff's claim that the DOCCS Defendants had been deliberately indifferent to his serious medical needs by failing to protect him from secondhand smoke. While the decision discusses several issues, this article focuses on the timeliness of the commencement of the action.

Following service of the complaint, the Defendants moved to dismiss the complaint on several grounds, including that Plaintiff's claim was time-barred. In this decision, the Court assessed whether the facts showed that the Plaintiff had commenced the action before the statute of limitations had expired. In the process of making this assessment, the Court also considered whether the period for filing had been extended by various "tolling" provisions.

In New York State, there is a three-year statute of limitations for Section 1983 claims. Such claims include 8th Amendment violations including deliberate indifference to serious medical needs. A Section 1983 claim alleging that the defendants were deliberately indifferent to an incarcerated individual's serious medical needs must be "commenced" within three years of when it "accrues."

A claim generally accrues when the plaintiff knows or has reason to know of the injury that is the basis of the claim. For incarcerated individuals, claims to be adjudicated in federal court are considered commenced when the individual gives the complaint and other documents required to start a federal lawsuit to a prison guard for mailing.

Mr. Fuentes' complaint alleges that in 2006, the Defendants adopted a policy banning indoor smoking. Following the adoption of this policy, Mr. Fuentes, who has been in prison since 1998, states that he continued to suffer from Environmental Tobacco Smoke (ETS), sometimes called secondhand smoke. On April 2, 2017, Mr. Fuentes filed a grievance about the adverse effects of ETS on his health. The grievance was denied and on May 25, 2017, Mr. Fuentes filed a timely appeal to the Central Office Review Committee (CORC).

As of October 25, 2023, when Mr. Fuentes commenced his lawsuit, CORC had not decided the appeal. The regulations provide that CORC must respond to the appeal within 30 days. See, 7 NYCRR 701.5(d)(3)(ii). If CORC does not issue a decision on the appeal within 30 days, an incarcerated individual has exhausted his administrative remedies for the purposes of filing a Section 1983 action. See, *Hayes v. Dahlke, 976 F3d 259 (2d Cir 2020).*

The decision in *Fuentes v. NYS DOCCS* documents the Plaintiff's nearly decade long history of complaints about DOCCS' handling of indoor secondhand smoke. Ultimately, certain of the deliberate indifference claims survived Defendants' motion to dismiss on timeliness grounds.

In assessing the Plaintiff's version of the relevant events, which begins in 2017 and involves claims against various Commissioners and Superintendents, the Southern District conducted an informative review of various tolling extensions.

The Plaintiff's complaint alleged, among other claims, that beginning in 2017 and continuing through October 25, 2023 (the date on which he put the complaint in the mail), the Defendants were deliberately indifferent to his health by failing to protect him from secondhand smoke. Because of the three-year statute of limitations, as a general rule, only those claims relating to Defendants' conduct between October 25, 2020 and October 25, 2023 would be timely. To determine whether the claims involving conduct occurring before October 25, 2020, the Court considered whether any of the tolling doctrines might extend the three-year statute of limitations.

The Court first rejected tolling based on the Continuing Violation doctrine. The Continuing Violation doctrine provides a limited exception to the knew or should have known accrual date. Here, Plaintiff failed to allege a cumulative injury based on related incidents but instead pled a *continuing* injury that he encountered at each of his various housing facilities.

Because he failed to describe a series of acts that were so related as to constitute one act, the Plaintiff's claim ripened when he knew or should have known that the Defendants' conduct was harming him. Quoting another secondhand smoke case, the claim ripened when the Plaintiff realized that exposure to secondhand smoke posed "an unreasonable risk of serious damage to his future health."

Furthermore, the Court noted that Continuing Violation tolling does not apply when a plaintiff was aware of the injury well ahead of the statute of limitations. Here, the Plaintiff alleged that he began to understand the potential risk between 2001 and 2007. The Court did not apply the Continuing Violation doctrine to the claims that arose prior to October 25, 2020 (3 years prior to the date of filing).

Nor did the Court find that the Plaintiff's argument that he needed more time for legal and factual research was sufficient to toll the statute of limitations.

The Court also declined to apply the Equitable Tolling doctrine. Equitable Tolling may apply where the plaintiff shows that filing was delayed due the time it took to exhaust administrative remedies (as is required by the Prison Litigation Reform Act or PLRA). Any relevant tolling only extends the statute of limitations deadline to the date on which the plaintiff's administrative remedies are exhausted. The Court did not extend the statute of limitations for the Plaintiff's complaint as he exhausted his administrative remedies in 2017 but filed the action in 2023.

The Plaintiff also argued that COVID-19 Tolling should extend the time for commencing this lawsuit. In 2024, the New York Court of Appeals interpreted the governor's executive orders as having the effect of tolling the filing periods between March 20, 2020 and November 3, 2020. This interpretation has been applied to Section 1983 complaints filed in federal court. The Court dismissed the claims against Defendants that had lapsed before the COVID executive orders but allowed tolling for such claims that accrued on or after March 20, 2020.

With respect to the timely claims against Defendants, the Court found that Plaintiff had sufficiently pled personal involvement because the Defendants plausibly created or maintained an unconstitutional policy permitting or encouraging indoor smoking, and the Plaintiff alleged that the Commissioner Defendants were responsible for enacting and enforcing safety policies.

Plaintiff also alleged sufficient facts to show that the Defendants knew of and disregarded a serious risk. The Court cited allegations in the complaint that document hospitalizations due to excessive smoke of which the named Defendants were likely aware.

The Court also found that the claim arguably violated the Eighth Amendment, deliberate indifference standard. With respect to the secondhand smoke claim, Plaintiff alleged unreasonably high levels of indoor smoke, with specific examples in his housing areas. The Court reasoned that if proven through discovery, a jury could find an "unreasonable risk of harm to his health in violation of the Eighth Amendment."

Jesus Fuentes represented himself in this 1983 action.

IMMIGRATION MATTERS

Nicholas Phillips

A recent opinion issued by the Board of Immigration Appeals ("the Board"), *Matter of Felix Figueroa*, 29 I. & N. Dec. 157 (BIA 2025), directly repudiated several Second Circuit decisions holding that certain New York drug convictions are not deportable offenses under the Immigration and Nationality Act ("INA"), the federal statute which governs immigration cases.[4]

Because the Board cannot disregard binding precedent in cases arising within the Second Circuit, those decisions in question are still good law within Connecticut, New York, and Vermont. *See Matter of Anselmo*, 20 I. & N. Dec. 25, 32 (BIA 1989). However, the *Felix Figueroa* approach will be controlling for cases outside the Second Circuit, provided there are no contradictory precedential decisions arising within that circuit.

Felix Figueroa concerns the application of the "categorical approach," an analytical tool used by courts to determine whether a *state* conviction is a categorical match to a *federal* offense, such that the state conviction carries additional consequences under federal law. The INA defines a variety of negative consequences for state criminal convictions, and the categorical approach is used to determine whether a state offense triggers a criminal ground specified by the INA.

To apply the categorical approach, a court must first analyze the noncitizen's statute of conviction in the abstract to ascertain the "elements" of the conviction, which are "the constituent parts of a crime's legal definition—the things the prosecution must prove to sustain a conviction." *Mathis v. United States*, 579 U.S. 500, 504 (2016) (internal quotation marks and citation omitted). Once the court has identified the elements of a state conviction, the court next determines the minimum conduct criminalized by the elements of the statute. *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013).

The court then compares whether the minimum conduct criminalized by the state offense is a categorical match to a generic federal offense. If every violation of the state offense is necessarily a violation of the federal offense, the state offense is a categorical match to the federal offense. If the state offense encompasses a broader range of conduct than the generic federal offense, then the state offense is "overbroad" compared to that federal offense and there is no categorical match.

While this procedure sounds simple in theory, it has proven fiendishly complex in practice. Several federal judges have publicly bemoaned the categorical approach's difficulty, and one panel of Second Circuit judges went so far as to draft proposed legislation that would abolish it, and include the draft legislation as an appendix to their opinion. *See Chery v. Garland*, 16 F.4th 980, 991 (2d Cir. 2021).

One such complexity has arisen when analyzing the "minimum conduct" criminalized under the elements of a state offense. Since the categorical approach deals with convictions in the abstract,

the minimum conduct analysis necessarily involves speculation about what conduct could possibly sustain a conviction. That speculation sometimes veers close to absurdity, as for example in *Singh v. Barr*, 939 F.3d 457, 463 (2d Cir. 2019), when the Second Circuit considered whether a person could be convicted of assault without personally attacking someone, for example, by "electrocuting someone [or] setting a vicious dog loose in an area with the intent of harming someone."

The realistic probability test was intended to counteract such flights of fancy. The test originated in the Supreme Court's decision in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). In that decision, the Supreme Court concluded that the categorical approach "requires more than the application of legal imagination to a state statute's language. It requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime." *Id.* Under this test, "an offender . . . must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues." *Id.*

All of this brings us to *Felix-Figueroa*, which concerns a noncitizen who was convicted of selling a "dangerous drug" in violation of section 13-3407 of the Arizona Revised Statutes. The Department of Homeland Security initiated deportation proceedings against the noncitizen on the grounds that his Arizona conviction was a removable offense under the INA.

The immigration judge ("IJ") terminated removal proceedings, concluding that there was a categorical mismatch between the state conviction and the INA. Specifically, the IJ concluded that Arizona's statutory definition of dangerous drugs included optical, positional, and geometric isomers of methamphetamine, whereas the INA—which defines controlled substances by reference to 21 U.S.C. § 802—includes only optical isomers. The IJ thus found that the state offense was not a categorical match to the INA. In so holding, the IJ declined to apply the realistic probability test, reasoning that the test was inapplicable because the mismatch was apparent from the face of the statutory text alone.

The Board reversed and held that "an alien cannot establish that his or her conviction is not categorically for a controlled substance offense—and thereby eliminate the immigration consequences of the conviction—by simply pointing to a State controlled substance definition including a particular kind of isomer not included in the Federal definition." 29 I. &. N. Dec. at 161. Rather, the Board held that "an [IJ] must apply the realistic probability test whenever a party asserts that a State's statutory definition of a controlled substance is broader than the Federal definition of a controlled substance based on a textual mismatch regarding the isomers of a particular controlled substance." *Id.*

The Board further held that the noncitizen bears the burden of proving that an offender could be convicted of possessing a particular kind of isomer, since "[f]orcing DHS to scientifically disprove every theoretical formulation of a controlled substance's isomers would clog the immigration courts with never-ending evidentiary hearings on organic chemistry." *Id.* at 163 (quotation marks and citation omitted).

The *Felix-Figueroa* decision directly conflicts with multiple Second Circuit cases which have sustained drug overbreadth arguments based on statutory text alone, without applying the realistic probability test. For example, *United States v. Minter*, 80 F.4th 406, 413 (2d Cir. 2023), concluded that New York's definition of "cocaine" is broader than the federal definition because it includes isomers outside of the federal definition, and observed that "the realistic probability test . . . has no place where, as here, the statute's scope is plain."

It is clear, then, that the Board is attempting to place its own imprint on the categorical approach for controlled substance offences under the INA.

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.

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.

WHAT DID YOU LEARN?

Brad Rudin

1. **In the case of *Alfonso Smalls et al v. Daniel F. Martuscello III*, Supreme Court, Albany County issued an order:**
   a. denying Article 78 relief to the proposed class of incarcerated persons.
   b. declaring the HALT Act unconstitutional.
   c. granting the plaintiffs' motion for a preliminary injunction.
   d. allowing DOCCS to issue directives contrary to provisions of the HALT Act.

2. **In the March 2025 agreement between DOCCS and the union representing correction officers, DOCCS agreed to:**
   a. permanently suspend all provisions of the HALT Act.
   b. temporarily suspend operation of the HALT Act.
   c. lobby for legislation abolishing the HALT Act.
   d. withdraw its court filings concerning the HALT Act.

3. **The court in the *Smalls* case found that the March Agreement was arbitrary and capricious because DOCCS sought suspension of the HALT Act:**
   a. only during periods of violent protest.
   b. in prisons designated as maximum-security facilities.
   c. on a system-wide basis.
   d. when requested by local law enforcement or by the Governor.

4. **The case of *Erlinger v. United States* expanded the rule stated in *Apprendi v. New Jersey* by:**
   a. abolishing sentencing enhancement based on predicate convictions.
   b. requiring sentencing enhancements based on predicate convictions authorized by the court presiding over the prior trial.
   c. preventing juries from considering predicate convictions authorizing enhanced sentencing.
   d. requiring that a jury determine which periods of time fall within the tolling periods.

5. **Under the tolling provision of the laws authorizing enhanced sentences based on predicate crimes, calculation of the 10-year tolling period:**
   a. extends the period of time within which a predicate sentence may be imposed.
   b. has no effect on the defendant's time in prison.
   c. reduces the defendant's time in prison.
   d. depends on a determination made by DOCCS.

6. **The *Erlinger* case has no effect on defendants sentenced as persistent felony offenders under PL 70.10 because that statute:**
   a. was declared unconstitutional under *Apprendi*.
   b. does not contain a tolling provision.
   c. contains a tolling provision.
   d. persistent felony offenders are not subject to enhanced sentencing.

7. In *Bernard Patterson v. State of New York*, the court ordered financial compensation because:

a. the State did not present evidence justifying keeplock confinement.
b. keeplock confinement violates the 8th Amendment.
c. the incarcerated person consented to keeplock.
d. DOCCS has abolished keeplock as a sanction for misconduct.

8. In *Peterkin v. NYS Dept. of Corrections and Community Supervision*, the Third Department disapproved of the SHU sentence because the hearing officer:

a. failed to base the disciplinary finding on substantial evidence.
b. deprived the plaintiff of his right to consult with an employee assistant.
c. refused to consider the defense of self-defense.
d. exceeded the Halt Act's limitation on confinement in SHU.

9. The Court of Appeals in *People v. Brenda WW.* affirmed the re-sentencing ordered by the Appellate Division because the trial record showed that the defendant:

a. failed to show that she had been a victim of domestic violence.
b. suffered domestic abuse and her criminal conduct was significantly attributable to the abuse.
c. had been convicted of a crime for which relief could not be obtained under the Domestic Violence Survivors Justice Act.

10. In *Matter of Janitronics, Inc. v. New York State Div. of Human Rights*, the Third Department affirmed the finding of the NYS Division of Human Rights because:

a. a parole violation constitutes a criminal conviction under Executive Law 296[15].
b. disclosure of a parole violation is required under the Human Rights Law.
c. the employer was not authorized to conduct an inquiry about the applicant's criminal history without the applicant's permission.
d. an employer is not entitled to withdraw an offer of employment based on an erroneously perceived criminal conviction.

ANSWERS

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

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PLS OFFICES

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

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

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