

# Pro Se

Vol. 20 No. 1 Winter 2010; Published By Prisoners' Legal Services of New York

## *Dangerous Contraband*

In June 2008, the Court of Appeals issued a decision that, for the purpose of P.L. §205.25, promoting prison contraband in the first degree, clarifies the definition of dangerous contraband. Penal Law §205.25 criminalizes the possession of dangerous contraband and is a class E felony. Penal Law §205.20 criminalizes the possession of contraband and is a class A misdemeanor.

In People v. Finley and People v. Salters, 862 N.Y.S.2d 1 (2008), the Court considered the appeals of two prisoners who had been convicted of promotion of prison contraband in the first degree. In their appeals, the appellants claimed that they should not have been convicted of felony promotion of prison contraband because that offense requires that the defendant possess dangerous contraband in a detention facility. The contraband that defendants Finley and Salters were convicted of possessing were 9 grams of marijuana and three joints of marijuana, respectively. They argued that the small amounts of marijuana which they were found to have possessed did not constitute **dangerous** contraband. After examining the statute and its history, the Court of Appeals agreed with them and reversed their convictions.

First the court looked at the language of the statute which defines “dangerous contraband.” Penal Law §205.00(4) defines dangerous contraband as contraband which is capable of such use as may endanger the safety or security of a detention facility or any person therein.

... *Contraband article continues on page 3*

### Also Inside . . .

Parole Rescission Based on  
Victims' Statements . . . . . Page 9

Court Awards \$3,600 For  
Wrongful Confinement . . . . . Page 10

Challenges to Grievance  
Denials . . . . . Page 15

Wrongful Imposition of PRS . . Page 19

*Find out how to subscribe to Pro Se on  
Page 22.*

*A Message from the Executive Director,  
Karen Murtagh-Monks*

**Successful Reintegration Should Be Everyone's Goal**

It is crucial to successful reintegration that re-entry services begin *before* an incarcerated person leaves prison and continues until that person has been given the tools that will allow him/her to succeed. The way in which a person is treated in prison, the educational and treatment programs he/she is provided, the medical and mental health care that is offered and the timely release of that person, are all factors that affect an individual's ability to reintegrate into society. If a person is abused or neglected, prevented from obtaining the education and programming they need, denied adequate medical and mental health care or confined beyond the sentence that was legally imposed, the likelihood of recidivism is extremely high. On the other hand, if a person is treated humanely, provided education, programming, medical and mental health care and released in compliance with the orders of our courts, the chances for successful reintegration are significantly increased.

PLS works hard to increase the chances of successful reintegration for our clients. An example of this is the advocacy PLS recently did for a mentally ill client who was being held in the special housing unit (SHU) and was scheduled to be held there through his maximum release date. PLS successfully advocated for this client to be released from SHU two months prior to his maximum release date so that he could participate in discharge planning for his return home. In addition, since 2006, PLS has been assisting the Department of Correctional Services (DOCS) in its Reentry Program at Orleans Correctional Facility. The program services between 60 and 90 inmates who are transferred to Orleans from other facilities across the State, all of whom have set dates for release to the Buffalo area. On a quarterly basis PLS, together with the Legal Aid Bureau in Buffalo, makes presentations to the Orleans group on employment, parole, and family law issues. In 2009, DOCS implemented a similar program at Hudson Correctional Facility. In December 2009, PLS presented information on various legal issues associated with issues related to re-entry for 32 incarcerated individuals at Hudson Correctional Facility who were scheduled to be released within the next three months to Albany, Schenectady, Columbia, and Rensselaer counties. We are scheduled to make a similar presentation in March 2010.

In an effort to engage in additional re-entry efforts, PLS is currently working on developing a re-entry pilot project. Within the next two months, we hope to meet with various individuals to begin setting up the project. Our hope is to focus on incarcerated individuals who are scheduled to be released within the upcoming year to the Capital District Region. Our plan is to focus on assisting those individuals in preparing for release by addressing a wide-range of issues from ensuring that those individuals are receiving the proper programming, education, medical and mental health care that they need to prepare them for release, to obtaining proper identification, to ensuring that education, programming, housing, employment and medical and mental health care are available to those individuals when they are released. We are hopeful that our efforts in this area will help to reduce recidivism and help our clients succeed in adjusting to life outside the prison walls and re-enter society as law-abiding, productive members of society.

*. . . Contraband article continued from page 1*

In reaching the conclusion that the defendants were not guilty of possessing dangerous contraband, the Court considered the evidence used to prove dangerousness at the defendants' trials. In Defendant Salter's trial, the prosecution's expert testified that 9 grams of marijuana could be sold and lead to altercations and disobedience that could endanger the safety and security of staff and inmates. At Defendant Finley's trial, the officer who recovered the three joints from the defendant testified that the circumstances of the recovery could have caused him to be assaulted by inmates or to have left a large group of inmates without sufficient security.

The Court noted that the allegedly dangerous consequences were not related to the specific nature of the item of contraband, but would hold true of any form of contraband, including food and cigarettes. Thus, the Court found, if it were to accept the People's definition of dangerous contraband, it would capture any unauthorized item that, when present in a prison, could lead to altercations and inmate disobedience.

But ultimately fatal to the People's construction of term, the Court found, was that it would effectively nullify P.L. § 205.20, the misdemeanor crime of promoting prison contraband in the second degree. Even the People's experts had conceded, when any contraband is introduced into the prison barter system – whether it is perishables or marijuana – it brings with it the potential for disruption that could endanger safety and order. Thus, if testimony as to these possibly **pernicious** (harmful) secondary effects were sufficient to establish the felony promoting contraband offense, then every item of contraband could be classified as dangerous and possession of any form of contraband would be a felony.

The Court was unwilling to presume that the Legislature intended such a result when it mandated harsher consequences for the possession of dangerous contraband. It concluded that the test for determining whether an item is dangerous contraband is whether its particular characteristics are such that there is a substantial probability that the item will be used in a manner that it likely to cause death or other serious physical injury, to facilitate an escape, or to bring about other major threats to prison safety or security. The Court found no evidence that such drastic results were likely to occur with the small amounts of marijuana at issue in these two cases.

Finally, the Court stated, the conclusion that small amounts of marijuana – in both cases under 25 grams – are not dangerous contraband is supported by the Legislature's more lenient treatment of possession of 25 or fewer grams of marijuana. The legislature has decriminalized possession of marijuana in amounts under 25 grams. In light of this, classifying the possession of small amounts of marijuana as non-dangerous contraband is consistent with the legislative view of this matter.

The Court did not pass on whether possession of amounts of marijuana greater than 25 grams could be deemed to be dangerous contraband. However, in People v. Cooper, 67 A.D.3d 1254 (3d Dep't 2009), the Third Department affirmed a conviction for promoting prison contraband in the first degree, based on the defendant's possession of 30.5 grams of marijuana and .06 grams of heroin. The Court stated that in Cooper, unlike in Finley, the defendant possessed marijuana and heroin in amounts that constituted crimes. In addition, the evidence showed that defendant's wife was paid by other inmates in advance to import illegal quantities of marijuana and heroin into Southport C.F., a maximum security prison for

“problem” inmates, where possession of heroin and marijuana could lead to dangerous confrontations involving inmates and prison staff. Further, the evidence showed that this was not the first time that the defendant had arranged to have drugs brought to him to distribute to other inmates. Under these circumstances, the court held that the weight of the evidence supported the conviction.

## News and Briefs

### Court of Appeals Accepts Cases Raising Issues Related to PRS

On January 7, 2010, the Court of Appeals heard oral argument on the issue of whether its decisions in Garner v. N.Y.S. Department of Correctional Services, 859 N.Y.S.2d 590 (2008), and People v. Sparber, 859 N.Y.S.2d 582 (2008) – which led to a statewide re-sentencing initiative to have post release supervision imposed on hundreds of individuals whose sentences had not originally included PRS – permit the state to re-sentence individuals whose actually imposed sentences had already expired at the time of the re-sentencing. As of the writing of this issue of *Pro Se*, the decisions in these five cases had not been issued. We will let you know the results of these appeals.

### Phone Surcharges Not Tax

In January 2007, following the 2004 filing of Walton v. N.Y.S. DOCS, a lawsuit alleging that the **exorbitantly** (unreasonably) high rates charged to the recipients of collect calls made by N.Y.S. prisoners was an unjust tax, then Governor Spitzer announced a 50% reduction in the cost of collect calls from prisoners. The NYS legislature later limited DOCS’s right to generate operating revenue by charging inmate families more than the reasonable cost of running the inmate phone service. As these developments occurred, the lawsuit seeking refunds of the excess fees that DOCS had collected from the families and friends of prisoners in DOCS custody, continued to make its way through the courts. In November 2009, the Court of Appeals affirmed the Appellate Division decision holding that the surcharges were not an unconstitutional tax and the families and friends of inmates were not entitled to refunds for overcharges paid between 2003 and 2007. Walton v. N.Y.S. DOCS, 2009 WL 4016122 (Nov. 23, 2009).

### Commissioner Fischer Lowers Phone Charges

In the Autumn issue of DOCS TODAY, Commissioner Fischer announced a new contract that significantly reduces the rates for collect calls made by prisoners. There will be no connection fee for the calls – formerly there had been a connection fee of \$1.28 – and the per-minute fee will drop from 6.8 cents to 4.8 cents. The result will be a 64% decrease in call costs. The price of a 20 minute call will fall to 96 cents from \$2.48.

The new phone system is expected to be installed this year, and the new charges will take effect facility to facility as the installation proceeds.

## **Best Wishes to Betsy Sterling, Director of Special Litigation and Projects**

After fifteen years of dedicated service to prisoners throughout New York State, Betsy Sterling, Director of Special Litigation and Projects, has left Prisoners' Legal Services ("PLS") to take on other opportunities. Ms. Sterling began employment at PLS as a Staff Attorney, then became a Managing Attorney, Associate Director and the Director of Special Litigation and Projects. Prior to coming to PLS, Ms. Sterling worked for ten years in civil legal services programs in Alabama and upstate New York.

Coworkers, clients and adversaries alike know of Ms. Sterling's strong commitment to bettering the lives of prisoners and her zealous representation of her clients. Her accomplishments at PLS are numerous and range from individual client advocacy and litigation, to class action work, to legislative reform. Ms. Sterling adeptly collaborated with divergent stakeholders including state agency officials and counsel, legal services programs, community groups, bar associations and pro bono attorneys to accomplish positive results for her clients.

Working collaboratively with colleagues at The Legal Aid Society Prisoners' Rights Project, Disability Advocates, Inc., and pro bono counsel, Ms. Sterling engaged in systemic and class action litigation resulting in significant improvement in treatment, conditions and housing for prisoners with mental illness. (Anderson et al. v. Goord et al., and Disability Advocates, Inc. v. New York State Office of Mental Health and Department of Corrections.) As a result of this work, New York State is allocating resources at levels never seen before to prisoners with disabilities, improving their lives within prison and paving the road to their successful community reentry.

Ms. Sterling also worked with numerous community groups, family members, and legal services programs to obtain bipartisan support for the passage of the "SHU Exclusion Law" making New York the first state in the nation to pass legislation limiting the confinement of prisoners with mental illness in solitary confinement.

At PLS, Ms. Sterling leveraged significant resources and funding for the agency, provided legal training, supervision and support to numerous attorneys, paralegals and law interns and obtained agency Continuing Legal Education accreditation. Ms. Sterling also provided expertise on a broad range of central management functions including management training and support, fiscal operations, personnel management, and media relations.

Please join the community of prisoners' rights advocates in wishing Ms. Sterling all the best in her future endeavors and in thanking her for her many accomplishments on behalf of prisoners throughout New York State.

### **Disciplinary Hearings**

## **Doctor's Testimony Would Not Have Been Redundant**

In Matter of Townes v. Fischer, 890 N.Y.S.2d 708 (3d Dep't 2009), the petitioner defended the charge that he had used drugs with a claim that his medication had caused a false positive. Both the officer who ran the test and a nurse testified that the drugs that the petitioner was taking could not have caused a false positive, but, the court found, there was no evidence that they were qualified to render such an opinion. The petitioner had also asked that his doctor testify, and stated that the doctor would state that the

medication could have caused a false positive. The court found that the hearing officer's denial of the request that the doctor be called as a witness, based on the conclusion that his testimony would be redundant to that of the nurse and the officer, was improper. The offer of proof for the doctor's testimony was that it would have contradicted the testimony of the other two witnesses and therefore would not have been redundant. As the testimony could have affected the outcome of the hearing, the court ordered that the hearing be reversed and that a new hearing be conducted.

### **No Constitutional Right to Production of the Hearing Tape**

Following a Tier III hearing determination that the petitioner was guilty of possessing a weapon, the petitioner in Matter of Holmes v. Fischer, 885 N.Y.S.2d 654 (3d Dep't 2009), made a FOIL request for a copy of the hearing tape. When he did not receive the tape in time to use it to prepare his administrative appeal, petitioner filed an Article 78 challenge to the hearing, alleging, among other claims, that his right to due process of law had been violated by the failure to produce the tape. Noting that the explanation for the delay was apparent from the record – the petitioner had requested a copy of the tape from the prison where he was at the time of the request rather than from the prison where the hearing was held – the court went on to hold that for the purposes of preparing an appeal, the Constitution required only that an inmate be given a statement of the evidence relied upon. As the petitioner had that, the court held that his rights to due process of law with respect to preparing an appeal had not been violated.

### **Reversal Does Not Necessarily Bring Program Restoration**

As a result of a Tier I determination that he had possessed prohibited articles (pornography), the petitioner in Matter of Shearer v. DOCS, 885 N.Y.S.2d 136 (3d Dep't 2009) was removed from the sex offender program. His Article 78 challenge to the hearing was dismissed by the Supreme Court, but between that decision and the appeal to the Appellate Division, DOCS administratively reversed the hearing and expunged all references to it. Petitioner argued that his appeal should not be dismissed, as he had not been re-instated in the sex offender program. The court rejected his argument, holding that because inmates have no constitutional or statutory rights to their prior housing or programming status, and because the petitioner had gotten all of the relief to which he would have been entitled had his petition been granted, the case was moot.

### **Guilty Plea Is Bar to Challenge to Determination of Guilt**

Petitioner was charged with asking other inmates for stamps in violation of prison rules. He pled guilty with an explanation. After he was found guilty, he filed an Article 78 challenge. In Matter of McMoore v. Bezio, 888 N.Y.S.2d 678 (3d Dep't 2009), the court denied his petition, holding that by his plea of guilty, the petitioner is precluded from challenging the determination of guilt with an explanation.

## **Denial of Right to Review Evidence Leads to Reversal and Rehearing**

Petitioner Tolliver was charged with using the facility phone system to conspire to introduce marijuana and heroin into the facility. The evidence against him included tape recordings of phone calls during which, an investigator alleged, petitioner used coded language. The hearing officer was given a explanation of the code but refused to provide the code to the petitioner. In Matter of Tolliver v. Fischer, 2009 WL 4678382 (2d Dep't Dec. 8, 2009), the court held that because the explanation of the code was relevant to the petitioner's defense that the conversations were not about drugs, the failure to provide it to the petitioner violated his right to due process of law. The court ordered a rehearing at which the hearing officer would either provide the explanation to the petitioner or not rely on it.

## **Transcript of Log Entries Reasonable Substitute For Log**

When Petitioner Brown was charged with violent conduct, assaulting staff, and creating a disturbance, he requested that the hearing officer provide him with copies of certain log book entries. The hearing officer produced a transcript of the entries rather than a photocopy of the actual entries. Petitioner then challenged the determination of guilt in an Article 78, raising the failure to produce a photocopy of the log as a due process violation. Dismissing the petition, in Matter of Brown v. Fischer, 888 N.Y.S.2d 682 (3d Dep't 2009), the court held that production of a transcript instead of a photocopy did not violate petitioner's right to due process of law as it did not prejudice his preparation of a defense.

## **No Transcript Required Where Tapes Were Played At Hearing**

In Matter of Sanders v. LaClair, 67 A.D.3d 1226 (3d Dep't 2009), the petitioner was charged with drug possession, smuggling, and unauthorized third party calls. Tape recordings of the calls were played at the hearing, but the petitioner was not provided with transcripts of these calls. In his Article 78 challenge to the determination of guilt, petitioner claimed that the failure to provide him with a transcript of the calls impaired his ability to prepare a defense. The court rejected this claim, ruling that playing the tapes was an adequate substitute for production of transcripts of the recordings.

## **Parole**

## **Court Dismisses Challenge to Condition of Supervision For Failure to Exhaust Administrative Remedies**

As a condition of parole supervision, F.B. agreed to submit to periodic **polygraph** (lie-detector) examinations. This condition was imposed due to a 1962 arrest for kidnapping and rape, which led to a conviction of assault in the third degree and a one year prison sentence. As a result, F.B. was determined to be a "Discretionary Sex Offender." This status imposes a greater amount of supervision on F.B. than would be imposed on an ordinary parolee. Requiring parolees to take polygraph exams can serve several purposes, but in F.B.'s case, the purpose was to aid the Division of Parole (DOP) in deciding whether F.B. should continue to be supervised as a sex offender, or

be supervised as an ordinary parolee. One of the conditions of the exam was that the results would only be used to detect untruthfulness and not to discover evidence to be used against F.B at a parole revocation procedure.

F.B. was notified that he was to appear for a polygraph exam. He refused to take the exam, and then filed an Article 78 proceeding claiming that requiring that he take a polygraph exam was a violation of his fifth amendment right not to incriminate himself. In Matter of F.B. v. NYS Executive Department, 2010 W.L. 97994 (Sup. Court. Bronx Co. Jan. 11, 2010), because F.B. had not exhausted his administrative remedies, the court dismissed his petition without reaching the merits of his argument. According to the court's decision, prior to filing an Article 78 challenge to the condition that he take polygraph exams, F.B. had to appeal the initial imposition of the condition.

## **Majority Finds That DOP Properly Considered Statutory Factors; Dissent Thinks Not**

In Matter of Comfort v. N.Y.S. Division of Parole, 890 N.Y.S.2d 700 (3d Dep't 2009), the court once again examined whether the denial of parole to an individual who had served a significant number of years beyond his minimum – here, 28 years of a 21½ years to life sentence – was the result of giving improper weight to one factor – the seriousness of the defendant's crime. Here, the majority found that the Board of Parole had properly considered the statutory factors, including, “the seriousness of the petitioner's crime, his prior criminal history, positive program achievements while incarcerated and postrelease plans.” The majority noted that

the Board had reached its conclusion after weighing the petitioner's criminal history – he had been a drug dealer for 10 years, was a high level cocaine trafficker, and his criminal activity had directly led to the violent death of one police officer and serious injury to a second officer – against his accomplishments in prison and found that its conclusion was supported by the record and did not display irrationality bordering on impropriety.

The dissenters noted that petitioner, unlike other individuals who had been denied parole numerous times due to the seriousness of their crimes, had never been convicted of a violent crime and had a short criminal history. In addition, petitioner's institutional record was **exemplary** (could serve as an example for others). He had had a perfect disciplinary record for 15 years, had completed all of the recommended programs required by DOCS, had overcome drug and alcohol addiction and participated in Alcoholics Anonymous for 20 years, and had engaged in several other volunteer service projects as well as vocational and educational programs. The petitioner's post release plans included participation in a veterans' employment program and volunteering in programs for substance abusers.

The dissenters pointed out that the court had twice directed the Board to conduct a de novo hearing after it was established that the Board had improperly considered and relied upon convictions that had been reversed on appeal. They found that a strong inference arose upon the record – where the Board gave only fleeting acknowledgment to the statutory factors other than the seriousness of the crime – that the Board may have again been improperly influenced by factors outside the scope of the statute, commenting:

While the determination . . . includes no explicit reference to the reversed convictions, in light of the lack of detail provided, the history of

petitioner's prior appearances, the extensive evidence of his rehabilitation and remorse, the cursory nature of the Board's acknowledgment of these factors and the absence of record support for its conclusion that petitioner is likely to re-offend cumulatively render the decision 'so irrational under the circumstances as to border on impropriety.'

### **Rescission of Parole Based on Victims' Statements Did Not Exceed DOP's Authority**

A decision to grant parole may be rescinded based on significant information which existed but was not known by the Board of Parole. 9 N.Y.C.R.R. 8002.5(b)(2)(I). While substantial evidence must support a decision to rescind parole, 9 N.Y.C.R.R. 80002(5)d)(1), only the existence of significant new information is required to support the Board's decision to hold a rescission hearing, 9 N.Y.C.R.R. 8002.5 (b)(2)(I). Under Executive Law §259-i(2)(c)(A)(v), the Board of Parole is required to consider any statement made by the victim of a crime committed by the inmate being considered for parole. In Matter of Raheem v. Board of Parole, 888 N.Y.S.2d 631 (3d Dep't 2009), the court considered the interplay of these regulatory and statutory requirements when it determined that the Board's decision to start a proceeding to rescind its decision to release Petitioner Raheem to parole supervision was not in excess of its authority and was supported by substantial evidence.

Underlying this decision were the following facts. Following a robbery that led to hostage taking, the shooting death of one police officer and injury to others, petitioner was found

guilty of, among other crimes, several counts of murder and sentenced to 25 years to life. He was denied parole five times before being granted parole in 2007. In its decision to release petitioner, the Board noted that petitioner was 58 years old, had earned several college degrees and had participated in service organizations and that a co-defendant had been released 10 years earlier.

After the Board issued its decision, but prior to petitioner's release, a number of victims of petitioner's crimes were allowed to submit statements, and a victim impact hearing was conducted at which a hostage, injured police officer and members of the slain officer's family testified about the impact of the crime on their lives. The Board then scheduled a hearing to determine whether the decision to parole petitioner should be rescinded on the basis of information that was not previously known to it, namely the information provided by the victims.

The petitioner brought an Article 78 proceeding seeking to prohibit the Board from conducting the hearing, alleging that the initiation of a rescission proceeding was in excess of its jurisdiction. The Supreme Court dismissed the petition, and the Appellate Division affirmed that decision.

The Appellate Division held that the remedy of prohibition is available where an agency proceeded, or is about to proceed, without or in excess of its jurisdiction. This remedy cannot be used, the court said, to seek collateral review of an error of law in an administrative proceeding; that is, where a petitioner has access to another legal remedy, prohibition "will not lie." Here the court found, the Board of Parole has authority under the regulations to conduct rescission proceedings based upon significant information which was not known to the Board and was required by the statute to consider any statement made by the victims. The court also noted that it had previously held that

victim impact statements can be significant information, which when submitted to the Board even after its determination, may justify the rescission of parole. Here, none of the victims had submitted statements before and had not given statements to the Probation Department. Thus, the court held, the statements were new evidence, the existence of which was not known to the Board when it made its decision to release petitioner to parole supervision. Under these circumstances, the court found that the Board had not exceeded its jurisdiction by scheduling a rescission hearing.

## Court of Claims

### Court Awards \$3,600 For 120 Days of Wrongful Confinement

In DuBois v. State, 887 N.Y.S.2d 448 (Court of Claims 2009), the claimant sought damages for two periods of wrongful confinement to keeplock and SHU. In the first incident, claimant was confined in keeplock for 30 days. Claimant alleged that the misbehavior report relating to 30 days of keeplock did not conform to the regulatory requirements and that the hearing officer had wrongfully refused to call a witness without stating a reason for the denial or attempting to obtain the witness's testimony. The hearing determination was affirmed on appeal, following which Mr. DuBois filed an Article 78 that was transferred to the Appellate Division, whereupon Mr. DuBois submitted his brief. Prior to submitting a brief, and after consulting with the Department of Law, the

Superintendent reversed the hearing and expunged it from Mr. DuBois's institutional records.

Mr. DuBois then filed the claim for wrongful confinement. After the State answered, he filed a motion for summary judgment. The State opposed the application, citing Rivera v. State, Clm. No. 102781, Feb. 8, 2006, a decision dismissing a claim of unlawful confinement to SHU because the claimant could not show that had the witness whom the hearing officer wrongfully refused to call actually testified, the result of the hearing would have been different.

Here, the court held, the decision in Rivera v. State was not controlling. Because of the expungement, the court was unable to review the record to determine whether the testimony of the witness whom the hearing officer did not call might have made a difference in the outcome of the hearing. By administratively expunging the disciplinary hearing, the court stated, the State shifted the burden of showing that the testimony would not have made a difference in the outcome from the claimant to the State. Or, the court held, at the very least, the State's conduct allows the presumption that had the witness been called, his testimony would have made a difference in the result of the hearing.

The court concluded that where the hearing officer had violated the claimant's regulatory right to call witnesses by failing to state a reason for not calling the witness, and the only evidence that the State submitted did not show that had the witness testified the result would not have been different, the State had not shown that there were any material facts in dispute. Thus, claimant was entitled to summary judgment on liability.

As a result of the second incident, claimant was confined to SHU for 90 days. Mr. DuBois filed an Article 78 proceeding alleging that the hearing was untimely. The court granted the

petition and ordered the hearing reversed and expunged. Mr. DuBois then filed an action in the Court of Claims for damages for wrongful confinement to SHU. The court first held that the defendant was collaterally estopped from challenging the Article 78 court's determination and then found that 1) claimant had not consented to the confinement to SHU, 2) claimant was conscious of the confinement, 3) the defendant had intentionally confined the claimant to SHU, and 4) because of the untimeliness of the hearing, the confinement was not otherwise privileged. Under these circumstances, the claimant was entitled to summary judgment.

The court awarded damages in the amount of \$30.00 per day for 120 days of wrongful confinement.

## **First Department Rules Claim For Damages For Unlawfully Imposed PRS Lacks Merit**

In *Collins v. State*, 887 N.Y.S.2d 400 (1<sup>st</sup> Dep't 2009), the claimants brought a motion to file a late claim alleging that they were entitled to damages for the period of time that Mr. Collins had been confined due to a violation of administratively imposed post release supervision. To be successful, the court must consider a range of factors, including whether the claim had the appearance of merit. Here, the court denied the claimants' motion, holding that the claim had no merit. The court noted that while there are approximately 250 such claims pending before the court of claims, and that some of the trial courts have found the claims to be meritorious while others have not, this decision is the first decision on the topic by an appellate court.

In reaching its conclusion, the court stated that to establish a claim of unlawful confinement, the claimant must show the

following: the defendant intended to confine the claimant; the claimant was conscious of the confinement and did not consent to the confinement; and the confinement was not otherwise privileged. The court ruled that the claimants would not be able to show that the confinement was not privileged because, "[a] detention, otherwise unlawful, is privileged where the confinement was by arrest under a valid process issued by a court having jurisdiction." In situations where individuals were confined as a result of wrongfully imposed post release supervision, the court noted that the legal process was valid on its face but questioned whether the "Court" (in this case the Division of Parole [DOP]) had jurisdiction over the person and subject matter. With respect to the second prong of the test, the court made a distinction between acts which are in excess of the body's jurisdiction, and acts which are preformed in the clear absence of any jurisdiction, noting that the former is privileged and the latter is not.

To answer the question of whether DOP had acted in excess of its jurisdiction or in the absence of any jurisdiction, the court looked to the Court of Appeals decision in *Matter of Garner v. NYS Dept of Correctional Services*, 859 N.Y.S.2d 590 (2008). There the Court characterized DOCS's imposition of a period of post release supervision where a court had not imposed it as "conduct in excess of DOCS's jurisdiction." Thus, the *Collins* court held, the imposition of a period of post release supervision by the Division of Parole was in excess of its jurisdiction, not in the complete absence of jurisdiction, and the act was therefore privileged.

In further support of this conclusion, the court noted 1) that at the time that PRS was wrongfully imposed on the claimants, there was case law holding that a period of post release supervision was automatically included in a sentence, even if the court did

not pronounce a period of post release supervision, see e.g., People v. DePugh, 791 N.Y.S.2d 234 (1<sup>st</sup> Dep't 2005); and 2) that under certain circumstances, DOCS and the Division of Parole are authorized to clarify the sentence of a defendant without direction from the sentencing court, see e.g., People ex rel. Gill v. Greene, 875 N.Y.S.2d 826 (2009).

Finally, the court held that because of legislation authorizing the re-sentencing of individuals in Mr. Collins's position, the claim did not appear to be meritorious because he could not establish that the DOP's alleged unlawful action had caused him any injury. Thus, if the sentencing court had been alerted to the fact that it had failed to impose a period of PRS, the court would have imposed the same five year period of PRS at the re-sentencing hearing that the DOP imposed.

### **Spousal No Contact Condition Found to Be Arbitrary and Capricious**

In Matter of Sabriel Lamberty v. NYS Division of Parole, Index No. 16945/09, (Supreme Court, Kings County Nov. 4, 2009), the petitioner challenged the respondent's condition that he have no contact with his wife while he was under parole supervision. The Division of Parole (DOP) imposed the condition after petitioner told his parole officer that his wife was responsible for the scratches on his face and petitioner's wife told the parole officer that he had assaulted her in the past and had taken drugs. Concluding that the relationship between petitioner and his wife was volatile, violent and dangerous to both, the parole officer imposed a special condition that petitioner have no contact with his wife.

In its decision, the court found that the evidence supporting the imposition of the condition was "quite inconsequential." There was one incident where petitioner exhibited scratches allegedly inflicted by his wife, but no police report relating to the incident and no order of protection or other legal mechanism to insure the safety of the parties. While the respondent countered this fact with the truism that victims many times do not report their abusers, the court found the truism, when applied to this case – where the evidence of abuse was slight – to be conclusory. The court found that while supervision and monitoring might have been justified, a complete and total separation was arbitrary and capricious and therefore vacated the condition.

**The Buffalo Office of Prisoners' Legal Services has moved.**

**Their new address is:**

**Prisoners' Legal Services of New York  
237 Main Street, Suite 1535  
Buffalo, New York 14203**

**The facilities that are covered by the Buffalo office are noted in the listing on page 23 of this newsletter.**

## Sentencing Cases

### Court Permits Re-sentencing 25 Years After Sentence Was Originally Imposed

In 1986, Isaac Hudson was convicted of two violent felonies and sentenced to 3½ to 10 years. He was released to parole supervision and in 1992 was re-arrested on robbery charges. Mr. Hudson pled guilty and was sentenced to 10 to 20 years. At sentencing, although questioned about the issue, the District Attorney did not file a predicate sentencing statement and the court did not state that the sentence was concurrent or consecutive to his first sentence.

When Mr. Hudson returned to DOCS' custody, DOCS ran the sentences consecutively. In response to advocacy by Prisoners' Legal Services, DOCS agreed to run the sentences concurrently and as a result, Mr. Hudson was released from prison.

Following his release from prison, Mr. Hudson filed a claim for wrongful confinement for the period September 2005 – the date that he was eligible for conditional discharge when DOCS calculated his sentences as running concurrently – and March 2007 – when he was released after DOCS recalculated his sentence.

In April 2009, DOCS notified the sentencing court that the sentence which it had imposed on Mr. Hudson in 1992 was invalid as a matter of law. DOCS informed the court that it was bringing this to the court's attention in 2009 because of a recent Court of Appeals decision – People v. Sparber, 859 N.Y.S.2d 582 (2008) – holding that there was no statutory limit on a sentencing court's authority to correct an invalid sentence.

At the re-sentencing hearing, the defendant argued that Criminal Procedure Law §440.40(1) provides that motions to re-sentence based on the failure to file a predicate felony statement must be brought by the district attorney within a year of sentencing, citing People v. Medina, 826 N.Y.S.2d 26 (1<sup>st</sup> Dep't 2006). The court found that Medina was not controlling law, as CPL § 440.40(1) limits the authority of prosecutors to bring motions to correct erroneous sentences; it does not limit the court's inherent authority to do so.

In response to other arguments raised by the parties, the court found that even if DOCS did not alert the court to the erroneous sentencing until after the defendant had filed his lawsuit for damages for unlawful confinement, the notification was not vindictive in the sense contemplated by United States v. Goodwin, 457 U.S. 368 (1982). There the defendant claimed that the prosecutor and court had exercised a discretionary function – adding felony charges – only after the defendant elected to exercise his right to a jury trial. In Goodwin, the court found that the presumption of vindictiveness that attaches in such situations had been defeated by objective information and circumstances showing that the district attorney had not acted in bad faith or maliciously. Here, the court found, it was not engaging in a discretionary act. Rather, it was addressing a statutorily mandated procedure that had been ignored and omitted by the prosecutor and sentencing judge.

The court also rejected the argument that CPL 440.40 limited the court's authority to correct an unlawful sentence when it provided that the district attorney's authority to do so was limited to the one year period following imposition of sentencing. Rather, the court held, the sentencing court has the inherent authority to correct its own mistakes – where, for example, the imposed sentence is not in

accord with the plea agreement – and to correct a defective sentence, such as the defendant’s sentence.

Finally, the court wrote, the defect in the defendant’s sentence was similar to the defect which the Court of Appeals in People v. Sparber, recognized was within the court’s inherent authority to correct.

Based on these holdings, the court directed the district attorney to file the appropriate second violent felony offender statement so that the defendant could be arraigned on it, adjudicated a second violent felony offender and then be re-sentenced.

## Miscellaneous State Cases

### Inmate Entitled to 10% of Award That Is Subject to Son of Sam Law

After claimant Gordon, an inmate, agreed to a \$150,000 settlement of his medical malpractice suit and the Court of Claims “so ordered” the stipulation, the NYS Comptrollers Office notified the NYS Crime Victims’ Board (CVB) of the settlement. The CVB notified the victims of Mr. Gordon’s crime and the victims informed the Board that they intended to commence an action to obtain the settlement funds, whereupon the CVB sought a preliminary injunction **enjoining** (stopping) the funds from being paid to the respondent (Mr. Gordon). After ordering the payment of counsel fees and other disbursements, the court granted the injunction. Respondent Gordon then moved to compel payment of 10% of the **net settlement** (the gross settlement reduced by fees and disbursements).

Read together, Executive Law §632-a(3) (the Son of Sam Law) and CPLR §5205(k) provide that 10% of an award of compensatory damages to a “convicted person” is exempt from execution of a judgment obtained by a crime victim pursuant to the Son of Sam Law.

The court however, denied Respondent Gordon’s motion, holding that these statutes did not apply to Respondent because the funds received were as a result of a settlement rather than a judgment.

On appeal, in Matter of NYS Crime Victims’ Board o/b/o Thompson v. Gordon, 887 N.Y.S.2d 283 (3d Dep’t 2009), the Appellate Division reversed the lower court’s decision. The court started by noting that when interpreting a statute, a court should attempt to effectuate the intent of the legislature and to do this, it should first look at the language of the statute itself. Here the issue was whether, for the purposes of the Legislation, a settlement which is so-ordered, is encompassed in the term “judgment.” The court found that the terms “order” and “judgment” are used interchangeably. The court therefore concluded that the use of the word judgment in the legislation did not reveal a clear and unambiguous intent to exclude from CPLR §5205(k) a “so ordered” settlement of pending litigation.

In fact, the court said, the legislative history revealed that the Legislature did not intend to exclude so ordered stipulations from the coverage of §5205(k). In discussing the purpose of the legislation, the legislative memorandum states that, “recognizing that convicted criminals who are themselves victims of tortious or wrongful acts should have incentives to seek redress in the courts, the bill includes a provision allowing them to retain 10% of compensatory damages less attorney’s fees.” Finally, the court noted, if the petitioner’s argument were to be accepted, the

result would be potentially to punish prisoners who settle their claims rather than taking them to trial. This result would be contrary to the State's public policy of encouraging the expeditious settlement of claims. In addition, the petitioner's position would also have a negative effect on victims by reducing the availability of potential funds by essentially eliminating the settlement option from inmate litigation. Thus, the court concluded, where there is a court order that fully resolves the claim and directs the payment of money, it should be treated as **tantamount to** (the same as) a judgment as that term is used in CPLR §5205(k).

*The respondent in NYS Crime Victims Board o/b/o Thompson v. Gordon was represented by Stephen N. Dratch of Franzblau Dratch, P.C.*

## **Funds Held By Surrogate's Court Are Funds of a Convicted Person**

In NYS Crime Victims' Board v. Harris, 891 N.Y.S.2d 175 (3d Dep't 2009), the court addressed the question of whether funds to which the respondent (a prisoner) was entitled prior to the enactment of the Son of Sam Law are subject to that law's provisions. In 1995, a trust was established for the benefit of Mr. Harris. In 2008, in response to inquiries by Mr. Harris, the Surrogate's Court informed him of the existence of the account. While Mr. Harris's petition for release of the funds was pending in that Court, the NYS Crime Victims' Board commenced a proceeding pursuant to the Son of Sam Law (Executive Law §632-a) seeking a preliminary injunction prohibiting respondent from accessing the funds until such time as the claims of respondent's victims could be resolved. The court granted the preliminary injunction and Mr. Harris appealed.

The Third Department held that the preliminary injunction was rightfully granted. It was not persuaded by Mr. Harris's argument that because he became entitled to the funds before the Son of Sam Law was enacted, the funds should not be subject to the provisions of that law. In rejecting the respondent's argument, the court first noted that the 2001 amendments to the Son of Sam Law broadly defined "funds of a convicted person" as "all funds and property received from any source by a person convicted of a specified crime" and excluded only four types of funds. Funds obtained from a trust account were not among the four excluded types of funds. Thus, the court held, funds held by the Surrogate's Court are "funds of a convicted person," which may be received by respondent upon an order of the Surrogate's Court and are properly subject to the provisions of the Son of Sam Law.

## **Challenges to the Denial of Grievances**

Increasingly, prisoners are using Article 78 proceedings to challenge the denials of grievances. We report here on three such cases.

### **Religiously and Medically Based Request for Strict Vegetarian Diet**

Petitioner Patel brought an Article 78 proceeding to challenge the denial of his grievance requesting fully vegetarian meals. According to DOCS, petitioner was given a vegetarian diet, known as the religious alternative diet. The petitioner, however, grieved the diet because some meals included fish, eggs or chicken, which he does not eat for religious reasons. In its response, DOCS submitted an affidavit from the Assistant Director of Nutritional Services, who stated that if the petitioner eats the foods in the religious alternative menu, but does not eat the

poultry, fish and eggs, he will still be eating a nutritionally adequate diet. The respondent also submitted an affidavit from a physician's assistant saying that a review of petitioner's medical records showed that there was no medical reason for changing petitioner's diet. Accordingly, the court held in Matter of Patel v. Fischer, 889 N.Y.S.2d 113 (3d Dep't 2009), the record supported a finding that petitioner is being provided with a diet that is nutritionally adequate without requiring him to compromise his religious beliefs or his health. Based on this conclusion, the court held that the denial of the grievance cannot be considered irrational or arbitrary and capricious.

### **Hermetically Sealed Containers**

In Matter of Frejomil v. Fischer, 891 N.Y.S.2d 208 (3d Dep't 2009), the petitioner challenged a decision relating to a grievance that he had filed seeking clarification of Directive 4911. That Directive states that "all items except for fresh fruits and vegetables must be received commercially packaged in airtight hermetically sealed containers impervious to external influence (e.g., sealed cans, heat sealed plastic bags, vacuum sealed pouches, vacuum sealed plastic jars, glue sealed paper or cardboard boxes with the inside product being hermetically sealed, etc.)." As examples of the items that he had been denied, petitioner Frejomil attached photographs of what he described as plastic jars of Tasters Choice coffees, with glue sealed foil. He challenged the DOCS interpretation of the Directive, which required that items beneath heat sealed foil must also be in a hermetically sealed wrapping. The grievance was denied by CORC (Central Office Review Committee) which interpreted the directive as requiring that items inside of glue sealed paper (or glue sealed cardboard boxes) be hermetically sealed.

The court stated that to prevail in his Article 78, the petitioner must demonstrate that CORC's determination was irrational or arbitrary and capricious. It framed the issues thus: 1) Whether the products contained in glue sealed paper containers require that the inside product be further hermetically sealed and 2) Whether products contained in other types of containers that are already hermetically sealed, i.e., vacuum sealed plastic jars, require the inside product to be further hermetically sealed.

The court found that the clear intention of the Directive was to ensure that any package received by an inmate has some type of hermetic seal put in place by the manufacturer to insure that the product has not been tampered with prior to its introduction into the facility. Thus, with regard to products contained in glue sealed paper containers – such as candy bars, cookies and potato chips, the determination by CORC is rational, inasmuch as this type of packaging does not render the inside products impervious to external influence.

The court found however, to require a product packaged in a vacuum sealed plastic jar or similar container, that is hermetically sealed using glued paper or foil, to have its inside product also hermetically sealed would be redundant and, therefore, represents an irrational interpretation of the Directive. Consequently, the court held, CORC's denial of that part of the petitioner's grievance was arbitrary and capricious.

### **Court Finds Removal From ASAT Was Not Arbitrary or Capricious**

In Matter of Rivera v. Fischer, 888 N.Y.S.2d 307 (3d Dep't 2009), the court considered the issue of whether CORC's denial of a grievance claiming that 1) petitioner's removal from ASAT was wrongful

and 2) petitioner's placement, after his removal, at the bottom of the waiting list for entry into ASAT was improper. As with the other two cases discussed above, the court stated that it could only reverse CORC's decision if the decision was irrational or arbitrary and capricious.

Here, petitioner alleged that he was removed from ASAT and improperly placed at the bottom of the waiting list for re-entry into the program after he filed grievances against the staff. DOCS's records, submitted to the court, showed that while petitioner was in ASAT, he received three behavior contracts in one month and was put on probation. The next month, he received two behavior contracts and as a consequence, was removed from the program.

The court found that the record demonstrated that petitioner was removed from ASAT due to his failure to comply with the rules, and not because he filed grievances against the staff. Likewise, the court found that because the program guidelines mandate that when an inmate has received two or more unsatisfactory discharges, as the petitioner had, application for re-admission can be made after 90 days, and the inmate's name will be placed on the bottom of the list. Thus, the court ruled, CORC's denial of the petitioner's grievance was not irrational or arbitrary and capricious.

### **Court Finds Action Seeking Damages for Wrongful Confinement is Time Barred**

Plaintiff Jackson sued the Sheriff of Schenectady County for failure to perform a statutory duty – certify jail time – as a result of which plaintiff was held in prison for 9 months more than he should have been. In Jackson v. Buffardi, 887 N.Y.S.2d 733 (3d Dep't 2009), the Appellate Division affirmed a lower court

decision finding that the action was time barred. The court found that the one year statute of limitations began to run either from the time that the sheriff should have certified the jail time, i.e., when plaintiff Jackson was placed in DOCS custody, or when Plaintiff Jackson began to serve the time beyond when he would have been released had the jail time been properly credited. Because the plaintiff failed to file his claim within one year of either date, his action was time barred.

In plaintiff Jackson's case, he was held in the Schenectady County Jail on federal and state charges from January 2001 through approximately March 14, 2003, when he pled guilty to the state charges and the federal charges were dismissed. He was placed in DOCS custody in April 2003, and brought an Article 78 proceeding that led to an order requiring the Schenectady County Sheriff to credit him with 794 days of jail time. As a result of the credited time, plaintiff was released in October 2004, 9 months later than he would have been released had the time been properly credited before he brought the Article 78. About a year after he was released, plaintiff filed the suit for damages. The court held that whether the time was measured from plaintiff's admission to DOCS or when he began to be damaged by the failure to credit the time, more than a year had passed from both of those dates when plaintiff filed his complaint and thus it was time barred.

### **County Did Not Make Diligent Effort to Strengthen Father's Relationship - Court Refuses to Terminate Parental Rights**

Mr. D. was in prison when his son, Preston, was born. Preston, who is now 5 years old, was placed in foster care with Lawrence and Vicky B. when he was one. Preston's foster parents petitioned to adopt

him, however, when the court notified Mr. D., who was by then out of prison, he opposed the application, arguing that the Department of Social Services had failed to make diligent efforts to strengthen and encourage Mr. D.'s relationship with his son while Mr. D. was in prison, and thus there was no basis for finding that he had permanently neglected his son.

In Lawrence B. v. Peter D., 11/20/09 N.Y.L.J. 1, (col. 4), the court found that while he was in prison, Mr. D. had done everything in his power to plan for his son's future. He had written the Department of Social Services (DSS) on a weekly basis seeking assistance in arranging visits, expressing a desire to take parenting classes, and stating that he planned on raising his son when he was released from prison. He also proposed to DSS that Preston be placed with his mother (Preston's grandmother), whom DSS considered to be a viable alternative. A DSS caseworker three times brought Preston to visit with Mr. D. while he was in prison. Since his release in 2009, Mr. D. had visited Preston weekly. Mr. D. is employed, has an apartment and hopes to regain custody of Preston in the near future. The court noted that Social Services Law §384-b defines a permanently neglected child as one whose parent "has substantially and continuously or repeatedly failed to maintain contact with or failed to plan for the child's future, notwithstanding the agency's diligent efforts to encourage and strengthen the parental relationship." The threshold issue, the court said, is whether DSS made diligent efforts to encourage the relationship between the parent and the child. Here, the court found, DSS had not shown that it had made such an effort. There was a year when Preston's caseworker failed to respond to any of Mr. D.'s letters, during other periods, correspondence from DSS was "sporadic at best," while phone contact was non-existent, and Mr. D. had received only one update on his

son's development. While acknowledging that the foster parents had a strong bond with Preston, the court ruled that there was insufficient proof of parental neglect and that therefore Mr. D.'s parental rights could not be terminated.

## **Court Grants Order of Protection Relating to Conduct While in Prison**

In Matter of Amy SS. v. John SS., 891 N.Y.S.2d 178 (3d Dep't 2009), the respondent appealed from a Family Court decision determining that he had committed the crime of aggravated harassment in the second degree by sending two letters to the petitioner (his wife) and causing a former inmate to send her a third letter. The respondent argued that where the letters that he sent were not threatening, and there was no evidence showing a connection between him and the former inmate, the court's determination was not supported by the preponderance of the evidence.

The Appellate Division affirmed the Family Court decision. The court found that contents of respondent's letters were alarming and justified a belief that they were sent with the intent of alarming and annoying her. In one letter respondent wrote that he could put petitioner's fiancé away and that if she ever lied to him, she will have the worst nightmares she had ever had. The court found that the letters had an unmistakably ominous tone and provided ample support for the Family Court's decision.

With respect to the letter from the former inmate, the Appellate Court found that it was impossible to ignore that this individual and respondent knew each other and that it was obvious the two had had contact with each other before the former inmate wrote the petitioner. His letter, when viewed in context

with the letters that respondent admitted to having sent, established by a fair preponderance of the credible evidence that respondent had committed the crime of aggravated harassment in the second degree.

## Federal Cases

### **Wrongful Imposition of PRS: Federal Due Process Claim Survives; State Claim of Wrongful Imprisonment Dismissed**

Omar Santiago brought claims for damages on 1) a state wrongful imprisonment theory and 2) a federal theory that his 14<sup>th</sup> Amendment rights were violated when he was arrested and jailed for a violation of administratively imposed post release supervision. In response, the defendants – DOCS Central Office personnel – moved to dismiss the complaint, raising, among other rejected defenses, that these claims were time-barred, that the defendants were entitled to qualified immunity, and that the complaint failed to state a claim upon which relief could be granted.

The facts underlying these claims were that in 2001, Mr. Santiago had been sentenced to a determinate term of 3 years. Although not imposed by the court, upon his release in 2004, plaintiff was also given a 5 year term of post release supervision. In 2008, Mr. Santiago was arrested for violating the terms of his PRS. While these charges were pending, he was returned to the sentencing court for re-sentencing pursuant to Correction Law §601-d. “In the interests of justice and

equity,” the court declined to impose a period of PRS. Shortly thereafter, having been in jail for approximately three months, Mr. Santiago was released pursuant to a writ of habeas corpus. He then filed this complaint.

In reaching its decision, the court provided some relevant background. First, it noted that in 2006, in Early v. Murray, 451 F.3d 71 (2006), the Second Circuit had found that the DOCS’s policy of administratively imposing post release supervision when it had not been judicially imposed was unconstitutional. Second, in 2008, in People v. Sparber, 859 N.Y.S.2d 582 (2008) and Garner v. NYS DOCS, 858 N.Y.S.2d 590 (2008), the New York State Court of Appeals found that this practice was contrary to New York State law mandating that sentencing is a uniquely judicial responsibility, and authorizing re-sentencing in Mr. Sparber’s case. In response to People v. Sparber, the NYS Legislature enacted Correction Law 601-d, thereby codifying the re-sentencing procedure established in Sparber.

#### **Timeliness of Complaint**

With respect to the 1983 claim, the court started its analysis by noting that there was a 3 year statute of limitations for such claims. The court stated that while §1983 claims generally accrue when the plaintiff has reason to know of the injury which is the basis of his claim, under Heck v. Humphrey, 512 U.S. 477 (1994), a §1983 claim for damages attributable to an unconstitutional conviction or sentence does not accrue until the conviction or sentence has been invalidated. Plaintiff argued that the operative date from which the statute of limitations began to run was the date upon which the period of PRS was invalidated by the sentencing court.

The defendants argued that Heck v. Humphrey did not apply because the Plaintiff was challenging only the procedure used to

sentence him, not the actual sentence. They also argued that the date upon which the sentencing court refused to re-sentence Mr. Santiago should not be considered the date upon which claim accrued, as refusing to re-sentence was not an invalidation of sentence. The defendants argued that the date that the claim accrued was the date upon which Mr. Santiago became aware that DOCS had imposed the period of PRS. Under the defendants' theory, the statute of limitations would have run three years from when Mr. Santiago was released to post release supervision – April 4, 2007 – a date which had passed by the time that Mr. Santiago was arrested for the violation of PRS.

The court rejected the defendants' arguments. It held that while technically the sentencing court's refusal to re-sentence was not a finding that the PRS enhanced sentence was invalid, its refusal to re-sentence was premised on the Sparber/Earley decisions finding the practice unconstitutional. Indeed, in March 2009, in Scott v. Fischer, 2009 WL 928195 (S.D.N.Y. Mar. 30, 2009), the court rejected the argument made by defendants in Santiago (that the statute of limitations should run from the day upon which the plaintiff is first released to illegally imposed PRS), holding that the statute of limitations was tolled (did not begin to run) until the date of plaintiff's habeas relief. Likewise, the court in Santiago rejected the defendants' arguments, holding that the claim accrued on the date that the habeas court ordered his release.

With respect to the state claim of false imprisonment, the court found that intentional torts, including the tort of false arrest, are governed by a one year statute of limitations. A claim of false arrest accrues when the individual is detained pursuant to legal process. For Plaintiff Santiago, this occurred in September 2008, when he was arrested for violating the conditions of his illegally imposed PRS. As his claim was filed in April 2009, the court found that it was not time barred.

## Qualified Immunity

Qualified immunity is a doctrine which protects defendants from liability where, although the court finds that their conduct violated an individual's constitutional rights, the court also finds that the rights involved were not "clearly established statutory or constitutional rights of which a reasonable person would have known." To determine whether the defendants are protected by qualified immunity, the court must decide whether the plaintiff has proven three matters:

1. Whether the facts, when viewed in the light most favorable to the plaintiff, show that the defendants' conduct violated a constitutional right;
2. Whether the right was clearly established in a given factual context or situation;
3. Whether it was objectively reasonable for the defendant to believe that his conduct did not violate the law.

Here the court found that Mr. Santiago's complaint accused the defendants of violating the 14<sup>th</sup> Amendment's prohibition against depriving individuals of liberty without due process of law by promulgating, implementing, enforcing and/or failing to rectify DOCS's policy of administratively imposing PRS despite the Second Circuit's finding in Earley v. Murray that the policy was unconstitutional. Assuming that these allegations are true, the court found, a constitutional right has clearly been violated.

Turning to step 2, the court stated that a right is "clearly established" if "the contours of the right . . . [are] sufficiently clear that a reasonable official would understand that what he is doing violates the right." Normally, a

controlling precedent of the [US] Supreme Court, the particular circuit, or the highest court in the state is necessary to clearly establish federal law. According to the court, the date upon which the right would have needed to be clearly established was the date upon which Mr. Santiago was arrested and incarcerated for the violation of PRS – September 2008. As of that time, a court with the power to clearly establish federal rights had held that administratively imposed PRS violated due process: the decision in Earley v. Murray was issued in June 2006. Because at the time of Mr. Santiago’s arrest there existed a ruling from the Second Circuit, defendants cannot argue that the federal right at issue was not sufficiently clear at the time of their alleged conduct.

Even if the right at issue was clearly established, an officer is still entitled to qualified immunity if officers of reasonable competence could disagree on the legality of the action at issue in its particular factual context. Defendants argued that because until June 2008, when the Court of Appeals decided Sparber and Garner, there was a) a statute, Penal Law §70.45(1), providing that each determinate sentence also includes, as a part thereof, an additional period of PRS, b) numerous Appellate Division cases upholding this statute, and c) they relied on a presumptively valid state statute, their actions were objectively reasonable. The court did not agree with the premise of this argument. It stated that a presumptively valid state statute only provides immunity until the statute is declared unconstitutional. Because Earley v. Murray, the decision finding the process of administratively imposing PRS to be unconstitutional, had been issued in June 2006, the court rejected the defendants’ arguments. For this and several other reasons, the court found that by September 2008 the right in question was defined with reasonable clarity and a reasonable defendant should have

understood that the plaintiff should not be arrested for a PRS violation without first having been brought before the court for re-sentencing. Accordingly, the court rejected defendants’ qualified immunity defense.

### Failure to State a Claim

According to Ashcroft v. Iqbal, 129 S.Ct. 1937 (2009), to survive a motion to dismiss, the claim must contain sufficient factual matter, which if accepted as true, would state a claim to relief that is plausible on its face. To meet this standard, the Second Circuit, in Iqbal v. Hasty, 490 F.3d 143, (2d Cir. 2007), has held that a pleader must **amplify** (add detail to) a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible.

### State Claim of False Arrest

To state a claim for false arrest, the plaintiff must allege four elements:

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

Only the final element was at issue in Mr. Santiago’s case. According to state law, privilege arises when the confinement is based on an arrest warrant that is valid on its face, issued by a court having jurisdiction. An arrest warrant based on a facially valid warrant, which results in an unlawful detention, does not give rise to an action for false arrest even though the warrant was erroneously or improperly issued.

Here the court found that the plaintiff did not allege that the warrant was not valid but rather claimed that the defendants were not privileged to arrest him because they lacked

the authority to impose PRS in the first place. This, the court held, was a formulaic recitation of the elements of a false arrest claim, and was insufficient to survive a motion to dismiss.

### **Due Process Claim**

To state a claim under § 1983, a plaintiff must allege 1) that the challenged conduct was attributable at least in part to a person acting under color of state law, and 2) that such conduct deprived the plaintiff of a right, privilege or immunity secured by the Constitution or laws of the United States. Additionally, personal involvement of the defendants in the alleged constitutional deprivations is a prerequisite to an award of damages.

Plaintiff Santiago alleged that Defendants Brian Fischer and Anthony Annucci were policy makers with respect to DOCS's decision to administratively impose PRS and that they are responsible for ensuring that DOCS personnel obey the Constitution and the laws of the United States. This allegation, the court held, is sufficient to establish (for the purposes of a motion to dismiss) that the challenged conduct was attributable at least in part to a person acting under color of state law.

In addition, Plaintiff further alleged that Fischer and Annucci **promulgated** (put into effect), implemented, enforced and/or failed to rectify a policy, practice and custom mandating the administrative imposition and enforcement of PRS on a person without authorization from the sentencing court. The court found that because the plaintiff was unquestionably imprisoned after administrative imposition of PRS was struck down, the plaintiff's allegations permit the court to infer that he was deprived of a right secured by the Constitution or laws of the United States. The court went on to hold that the same allegations also sufficiently pled personal involvement of Defendants Fischer and Annucci.

Based on these findings, the court found that Plaintiff Santiago's complaint against Defendants Fischer and Annucci contained sufficient factual matter, which if accepted as true, state a claim to relief that is plausible on its face.

### **Subscribe to *Pro Se*!**

*Pro Se* is published four times a year. *Pro Se* accepts individual subscription requests. With a subscription, a copy of *Pro Se* will be delivered directly to you via the facility correspondence program. To subscribe, send a subscription request with your name, DIN number, and facility to *Pro Se*, 114 Prospect Street, Ithaca, NY 14850.

### ***Pro Se* Wants to Hear From You!**

*Pro Se* wants your opinion. Send your comments, questions, or suggestions about the contents of *Pro Se* to: *Pro Se*, 41 State Street, Suite M112, Albany, NY 12207.

Please DO NOT send requests for legal representation to *Pro Se*.

### ***Pro Se* On-Line**

Inmates who have been released, and/or families of inmates, can read *Pro Se* on the PLS website at: [www.plsny.org](http://www.plsny.org).

**PLS OFFICES AND THE FACILITIES**

Requests for legal representation and all other problems should be sent to the local office that covers the prison in which you are incarcerated. Below is a list identifying the prisons each PLS office serves:

**ALBANY, 41 State Street, Suite M112, Albany, NY 12207**

**Prisons served:** Arthurkill, Bayview, Beacon, Bedford Hills, Mt. McGregor, Summit Shock, CNYPC, Coxsackie, Downstate, Eastern, Edgecombe, Fishkill, Fulton, Great Meadow, Greene, Greenhaven, Hale Creek, Hudson, Lincoln, Marcy, Midstate, Mid-Orange, Mohawk, Oneida, Otisville, Queensboro, Shawangunk, Sing Sing, Sullivan, Taconic, Ulster, Walkill, Walsh, Washington, Woodbourne.

**BUFFALO, 237 Main Street, Suite 1535, Buffalo, NY 14203**

**Prisons served:** Albion, Attica, Buffalo, Collins, Gowanda, Groveland, Lakeview, Livingston, Orleans, Rochester, Wende, Wyoming.

**ITHACA, 114 Prospect Street, Ithaca, NY 14850**

**Prisons served:** Auburn, Butler, Camp Georgetown, Monterey Shock, Camp Pharsalia, Cape Vincent, Cayuga, Elmira, Five Points, Southport, Watertown, Willard.

**PLATTSBURGH, 121 Bridge Street, Suite 202, Plattsburgh, NY 12901**

**Prisons served:** Adirondack, Altona, Bare Hill, Camp Gabriels, Chateaugay, Clinton, Franklin, Gouverneur, Lyon Mountain, Moriah Shock, Ogdensburg, Riverview, Upstate.

**EDITORS:** BETSY HUTCHINGS, ESQ.; JOEL LANDAU, ESQ. ;  
KAREN MURTAGH-MONKS, ESQ. ;  
**COPY EDITING:** ALETA ALBERT; FRANCES GOLDBERG; STACY GRACZYK, ESQ.  
**PRODUCTION:** ALETA ALBERT; FRANCES GOLDBERG  
**DISTRIBUTION:** BETH HARDESTY

*Pro Se is printed and distributed free through grants from the New York State Bar Foundation and the Tompkins County Bar Association.*

