

Pro Se

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COURT OF APPEALS HOLDS IMPOSITION OF POST-RELEASE SUPERVISION AFTER RELEASE FROM INCARCERATION VIOLATES DOUBLE JEOPARDY

New York's long-running post-release supervision (PRS) saga continued this past February when the Court of Appeals, New York's highest court, ruled that a sentencing court may not add PRS to a defendant's sentence after he has been released from the underlying term of incarceration.

In its decision, People v. Williams, 14 N.Y.3d 198 (2010), the Court held that adding PRS to a sentence after a defendant has been released from custody frustrates a defendant's "reasonable expectation of finality" in the original sentence and violates the Double Jeopardy Clause of the U.S. Constitution. The court summarized its holding as follows:

[O]nce a defendant is released from custody and returns to the community after serving the period of incarceration that was ordered by the sentencing court, and the time to appeal the sentence has expired or the appeal has been finally determined, there is a legitimate expectation that the sentence, although illegal under the Penal Law, is final and the Double Jeopardy Clause prevents a court from modifying the sentence to include a period of post-release supervision.

The Williams decision is the latest judicial reaction to DOCS' practice of "administratively imposing" PRS on determinate sentences where the sentencing court failed to do so.

That practice began in 1998, shortly after PRS was made mandatory for all determinate sentences. For several years after that date, many sentencing courts failed to impose it at sentencing. DOCS therefore began to "administratively" impose it on determinate sentences where the sentencing court had failed to do so.

In a series of opinions beginning in 2006, courts held that DOCS had no legal authority to administratively add a period of PRS to a sentence. Only a judge, the courts held, had the authority to impose a sentence, and therefore PRS added to a sentence by DOCS was "null and void." If a sentencing court had failed to impose PRS, the appropriate remedy was to return the defendant to the sentencing

...article continued on page 3

Also Inside . . .

**Federal Court Holds New York
Predicate Felony Offender Law
Unconstitutional Page 4**

**Law Mandating Termination of Parole For
Some Drug Offenders Applied
Retroactively Page 7**

**Damage Claim For Unjust Conviction
Dismissed Page 13**

Subscribe to Pro Se, see page 13 for details.

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***A Message From the Executive Director
Karen Murtagh-Monks***

In Gideon v. Wainwright, 372 U.S. 355 (1963), the United States Supreme Court held that the Sixth Amendment to the United States Constitution guarantees every defendant "the right to . . . have the assistance of counsel for his defense" regardless of his/her ability to pay for a lawyer. Forty-seven years later, and as many of the readers of *Pro Se* know too well, we are faced with the realization that the system that was established in New York State to institutionalize the Gideon decision has failed. All too often, those who cannot afford an attorney are thrown into our existing system of public justice only to be given short shrift by an overworked public defense attorney resulting in a finding of guilt and the imposition of jail or prison time. All too often, those individuals are young men and women of color.

For years, the flaws in our system of public defense have been acknowledged by lawyers, judges, legislators, advocacy groups and other concerned citizens; and for years, various remedies to this problem have been discussed. But, for the first time this past year, there has been serious movement in the direction of implementing a real fix. The movement got its initial push in 2006, when then-Court of Appeals Chief Judge Judith Kaye convened a commission of experts to study the state of our public defense system. The commission concluded that vast numbers of New Yorkers caught in the system are denied effective of assistance of counsel. The commission called for critical reforms, including the creation of an Independent Public Defense Commission.

Over the past several years, in response to the commission's recommendations, various legislative drafts were introduced, but nothing came to fruition. This year, however, Governor Paterson has proposed legislation to create the Office of Public Defense Services and this legislation is finding strong support in both the Assembly and the Senate. The legislation would create a statewide independent Public Defense office, overseen by a Board that would recommend how State funds should be distributed for public defense. Although some details of the proposed legislation have yet to be negotiated fully, it appears as if the Legislature and the Governor are in agreement with respect to the basic fix: the need for an independent statewide office to oversee the public defense services of our state.

Moving along on a separate track is a lawsuit that was commenced by the New York Civil Liberties Union, Hurrell-Harring, et. al., v. The State of New York, claiming that our failed system of public defense has resulted in defendants effectively being denied their sixth amendment right to counsel. That case had been dismissed by the Appellate Division on the grounds that the issues raised were non-justiciable. However, on May 6, 2010, Judge Lippman of the Court of Appeals issued a decision reinstating the lawsuit and remitting the case. The court held: "This complaint contains numerous plain allegations that in specific cases counsel simply was not provided at critical stages of the proceedings. The complaint additionally contains allegations sufficient to justify the inference that these deprivations may be illustrative of significantly more widespread practices; of particular note in this connection are the allegations that in numerous cases representational denials are premised on subjective and highly variable notions of indigency, raising possible due process and equal protection concerns. These allegations state a claim . . . for basic denial of the right to counsel under Gideon."

Change takes time, even change that most people agree we need. It appears, however, that the time for change in our system of providing public defense services has come - and not a day too soon.

court for re-sentencing. See Earley v. Murray, 451 F.3d 71 (2d Cir. 2006); Matter of Garner v. New York State Department of Correctional Services, 10 N.Y.3d 358 (2008); People v. Sparber, 10 N.Y.3d 457 (2008).

In response, the Legislature enacted Correction Law §601-d, which provided a mechanism to allow courts to correct their sentences, either by adding PRS to the sentence or, in some cases, affirming that PRS is not part of the sentence. Under section 601-d courts throughout the state have been re-sentencing thousands of defendants improperly sentenced without PRS. That undertaking is still ongoing.

The Williams decision, however, now imposes a sharp time limit on the sentencing court's authority to add PRS. Under Williams, it is now clear that a sentencing court may not re-sentence a defendant to PRS once he or she has been released from imprisonment on the underlying term.

Impact of Williams

The Williams decision will have an immediate impact on persons who were re-sentenced to PRS after they were released from their original sentence. Under Williams, those PRS terms must now be removed. For some inmates now in DOCS custody based on a violation of PRS, that will mean immediate release.

Indeed, shortly after Williams was decided, DOCS issued a list of some 139 inmates in its custody being held based on a revocation of a PRS period imposed after the inmate was released, in violation of Williams. The Division of Parole developed a similar list of some 874 persons presently in the community serving periods of PRS imposed in violation of Williams. On March 5, 2010, the New York Office of Court Administration sent a memo to all state judges explaining the Williams decision. The memo set out a process by which persons affected by the decision could have their PRS periods vacated. According to the OCA memo, all 139 persons on the DOCS' list were to be immediately returned to their sentencing

judge for a "scheduling conference" with the defense attorney and prosecutor. If, after reviewing the case, the prosecutor agrees that the term of PRS was imposed in violation of Williams, the court can sign an order vacating it. The order can then be faxed to DOCS for sentence recalculation. (A comparison of some of the names on DOCS' list with information available on DOCS' website shows that many of the inmates on the list have already been released as of the date this issue of *Pro Se* went to press. Others are still presumably being processed.)

The OCA memo did not discuss how persons serving illegally imposed PRS in the community should proceed. The editors of *Pro Se* understand that the OCA intends to calendar those cases as soon as the "custodial" cases have been addressed.

However, nothing in either Williams or the OCA requires any person affected by Williams to wait for the courts to act. Any such person may bring an appropriate motion, such as a 440 motion, at any time to request that their PRS periods be vacated.

Moreover, it is likely that there are people who will be affected by Williams who are *not* on the DOCS or Parole lists. For example, PLS has received letters from inmates who had PRS added to a *prior* sentence after they were released, but who are now serving a new sentence. Under Williams the PRS added to the prior sentence must be vacated. In many cases, doing so would result in recalculation of the time owed to the current sentence. In some cases, it would even mean immediate release. Such persons, however, do not appear on DOCS' list.

Williams may also have implications beyond the PRS issue. This is because the decision was not limited to PRS re-sentencing. It holds that *any* change or modification of a sentence after a defendant has been released from custody violates the double jeopardy clause. PLS is aware of at least one case in which the sentence of a predicate offender was altered after his release to run consecutively his prior sentences, which resulted in his re-incarceration. (The court had originally ordered the sentence to run concurrently to his prior sentences, which

resulted in an illegal sentence.). Under Williams, the re-sentencing was probably illegal.

If you believe you may be affected by Williams, write to your local PLS office.

NEWS AND BRIEFS

Second Circuit Holds New York's Predicate Felony Offender Law Unconstitutional

The Second Circuit Court of Appeals, the federal appeals court with jurisdiction over New York, held this past March that New York's persistent felony offender statute, Penal Law § 70.10, was unconstitutional. The case, Besser v. Walsh, 601 F.3d 163 (2d Cir. 2010), will likely have significant consequences for some, though not all, persons convicted as persistent felony offenders.

The Besser decision was rooted in an earlier Supreme Court case called Apprendi v. New Jersey, 530 U.S. 466 (2000). In Apprendi, the Court held that any fact which may result in the enhancement of a sentence, other than a prior conviction, must be decided by a jury on proof "beyond a reasonable doubt."

New York's persistent felony offender (PFO) law permits a judge to enhance the sentence of a person convicted of two or more prior felonies if the judge is "of the opinion that the history and character of the defendant and the nature and circumstances of his criminal conduct indicate that extended incarceration and life-time supervision will best serve the public interest." Under Criminal Procedure Law § 400.20, the facts pertaining to the defendant's history and character and the nature and circumstances of his criminal conduct are decided by a judge, not a jury, and need only be proved by a preponderance of the evidence, not beyond a reasonable doubt. Thus, the statute would appear on its face to be in vio-

lation of the Apprendi rule. Indeed, in a 2004 case, Blakely v. Washington, 542 U.S. 296, the Supreme Court held that a California sentence enhancement statute which was very similar to New York's PFO statute was unconstitutional under Apprendi.

Despite this, the New York Court of Appeals consistently upheld the constitutionality of the persistent felony statute over the last decade, repeatedly distinguishing it from the statutes at issue in both Apprendi and several other Supreme Court cases. See People v. Rosen, 728 N.Y.S.2d 407 (2001); People v. Rivera, 800 N.Y.S.2d 51 (2005) and People v. Quinones, 12 N.Y.3d 116 (2009).

In Besser, the Second Circuit found that New York's interpretation of the PFO statute was an "unreasonable application" of Apprendi. It found that it should have been clear since at least 2004, when the Blakely case was decided, that the New York's statute could not be sustained under the Apprendi rule.

Consequences of Besser

Although Besser declares New York's PFO statute unconstitutional, its consequences for people sentenced as persistent felony offenders will likely vary, for several reasons.

First, the Besser decision affects only people who were sentenced as **discretionary** persistent felony offenders under Penal Law § 70.10. It does not apply to people who were sentenced as persistent **violent** felony offenders under Penal Law § 70.08. Thus, if you were sentenced as a persistent felony offender after the commission of a third **violent** felony offense, the decision does not apply to you.

Second, decisions of the federal appeals court regarding the constitutionality of state statutes are not binding on the state courts. Only decisions of the United States Supreme Court are binding on state courts. As noted, New York's highest court, the Court of Appeals, has decided the exact same issue decided in Besser but to the contrary. Since Court of Appeals decisions *are* binding on state courts, the fact that the federal

appellate court found the statute to be unconstitutional is not a basis for reopening your case in state court.

Therefore, the only way to take advantage of Besser decision would be by means of a habeas corpus petition filed in federal court.

In order to prevail on a habeas corpus petition in federal court, however, an inmate must show that the law he wants applied was “clearly established” at the time the conviction became final. In Besser, the court found that the rule it was applying was not “clearly established” until 2004, when the Supreme Court issued Blakely. Thus, inmates whose convictions were “final” prior to 2004 – that is, they had exhausted their appeals – may not be able to take advantage of Besser even in federal court.

Third, even if the conviction did not become final until after Blakely was decided, to succeed in a habeas corpus petition in federal court, an inmate must show that he or she raised the constitutionality of the discretionary persistent felony statute in the state court proceedings. If the issue was not “exhausted” in state court, the inmate may not raise it in federal court.

These are complicated issues. If you believe you may be affected by Besser, we suggest you contact the attorney or public defender agency that represented you at trial or in appeal for further advice.

DOCS Reverses Hearing Based on Handwriting Samples

In May 2008, the Deputy Superintendent for Security at Cocksackie CF received an anonymous threatening letter. He turned the letter over to a captain, and the captain gave it to the senior counselor. The captain asked the counselor to identify the author of the threatening letter by comparing that letter to handwriting samples in the facility's guidance unit files. The counselor then wrote a misbehavior report stating that after reviewing twelve inmate handwriting samples she determined that the handwriting of an inmate named Victor Woodard was similar to that in the threatening letter, and therefore

that Mr. Woodard wrote the letter.

Mr. Woodard appeared at a Tier III hearing where he was able to view the threatening letter next to copies of letters he had written. He stated the handwriting was not the same. However, the hearing officer said it was the same. At the end of the hearing the hearing officer found Mr. Woodard guilty and imposed a year of SHU.

After exhausting his administrative appeal, Mr. Woodard commenced a *pro se* Article 78. Since the petition raised an issue of substantial evidence, the case was transferred to the Appellate Division, Third Department. The Third Department has decided a number of cases over many years in which it has held that a hearing officer's comparison of a disputed letter or document with handwriting of a known individual can provide substantial evidence that the inmate who wrote the known sample also wrote the disputed writing. *See, for example, Koehl v. Fischer*, 861 N.Y.S.2D 154 (3d Dep't 2008). In the Woodard case, the Third Department relied on its own prior decisions to conclude that the hearing officer's comparison of the threatening letter to known samples of Mr. Woodard's writing provided substantial evidence for the hearing officer's determination that Mr. Woodard wrote the threatening letter. The Court dismissed Mr. Woodard's petition.

Mr. Woodard then made a *pro se* motion for leave to appeal to the Court of Appeals. In November 2009 the Court granted the motion, and agreed to consider Mr. Woodard's challenge to his hearing. After the Court granted the motion, the Court contacted PLS to request that PLS represent Mr. Woodard before the Court of Appeals. Mr. Woodard agreed, and PLS represented Mr. Woodard before the Court of Appeals.

In February 2010, PLS filed a brief in the Court of Appeals arguing that the handwriting comparison did not provide substantial evidence that Mr. Woodard wrote the threatening letter, and requesting that the Tier III disposition be reversed. The brief argued that there was no evidence in the record to show that review of twelve writing samples, in a facility of approximately

1,000, inmates, was an adequate basis to identify the author of the threatening letter. The brief also argued that the hearing officer did not make an independent determination as to who wrote the threatening letter, since he had no information as to how the counselor selected the twelve writing samples she reviewed or how she selected Mr. Woodard's as the one sample that matched the threatening letter. The brief also argued that since the hearing officer did not review the twelve writing samples the counselor reviewed, he could not have independently determined that Mr. Woodard's writing was the best or the only match to the writing in the threatening letter. The hearing officer only reviewed the threatening letter and known samples of Mr. Woodard's writing, and never really explained what led him to believe that the handwriting samples were so similar that they had to have been written by the same person.

After PLS filed a brief on behalf of Mr. Woodard, DOCS agreed to settle the article 78 by administratively reversing his hearing disposition. As a result, Mr. Woodard's hearing was reversed and expunged, but the Court of Appeals was denied the opportunity to issue a decision that might have established a legal standard for reviewing future Tier III dispositions based on handwriting comparisons. Since the Court of Appeals did not issue a decision in this case, the existing case law from the Third Department remains in effect. Nonetheless, the Woodard case establishes that a Tier III disposition based on a handwriting comparison may, in some cases, be challenged on the ground that the handwriting comparison is not the kind of "relevant proof ... a reasonable mind would accept as adequate to support a conclusion" People ex. rel. Vega v. Smith, 66 N.Y.2d 142 (1985), and therefore that the disposition is not supported by substantial evidence.

State Cases

Parole Cases

Parole Board's Failure To Consider Sentencing Minutes Doesn't Always Mean Reversal

Several years ago New York's appellate courts issued a number of decisions holding that the Parole Board must, in most cases, consider an inmate's sentencing minutes before deciding whether to grant or deny parole. *See, for example, Edwards v. Travis*, 758 N.Y.S.2d 121 (2d Dep't 2003) and *McLaurin v. New York State Bd. of Parole*, 812 N.Y.S.2d 122 (2d Dep't 2006).

The decisions were rooted in Executive Law § 259-i(1)(a), which requires the Parole Board consider the recommendations of the sentencing court, as well as in Correction Law § 380.70, which requires that sentencing minutes – the transcript of the sentencing hearing, which would contain any sentencing recommendations – “be delivered to the person in charge of the institution to which the defendant has been delivered” within 30 days of the date the sentence was imposed.

Despite these statutes, sentencing courts frequently fail to provide the sentencing minutes to DOCS and, as a result, the Parole Board often does not have them when it conducts parole hearings. Is this grounds for obtaining a reversal of a Board decision to deny parole? Not likely, suggest a number of recent cases.

For example, in *Midgette v. NYS Division of Parole*, 895 N.Y.S.2d 530 (2d Dep't 2010), the court considered a case in which an inmate contended that the Board's failure to consider his sentencing minutes was improper. A lower court agreed with the inmate. After finding that the minutes were unavailable, it ordered that either the sentencing proceeding be reconstructed or that a new parole hearing be held at which the Board would be required to assume that the sentencing court had made a favorable sentencing recommendation.

The Appellate Division reversed. The appellate held that the burden was on the in-

mate “to make a convincing demonstration of entitlement to such relief” and that “in the absence of any indication that the unavailable sentencing minutes contained any recommendation as to parole, the failure of the Board to obtain and consider those minutes did not prejudice the petitioner.” Moreover, the court continued, the Board had requested the minutes from the sentencing court several times, both before and after the parole hearing, with no success. “Consequently, the Board is not responsible for the failure of the Supreme Court, New York County, to preserve the minutes.”

Several other, similar cases were decided in the first several months of 2010. These include Ruiz v. NYS Division of Parole, 895 N.Y.S.2d 530 (3d Dep’t 2010), in which the court held that the Board’s failure to consider the sentencing minutes, although erroneous, was a harmless error, where the minutes were subsequently provided to the court and showed no recommendation with respect to parole; Williams v. NYS Division of Parole, 894 N.Y.S.2d 224 (3d Dep’t, 2010), in which the record reflected that the Board had requested the minutes but was informed by the sentencing court that they could not be found, prompting the court to conclude that, “[i]nasmuch as the unavailability of the sentencing minutes is adequately established in the record, the Board’s inability to consider them did not render its decision irrational to the point of impropriety”; LaSalle v. NYS Division of Parole, 893 N.Y.S.2d 706 (3d Dep’t 2010) in which the court held that, “while the Board is generally required to consider sentencing minutes in determining whether to grant an inmate parole, when those minutes are unavailable its failure to do so does not mandate a new hearing”; and Matul v. Chair of the New York State Board of Parole, 894 N.Y.S.2d 200 (3d Dep’t 2010), in which the court found that where there was “proof in the record [that] reveals that a diligent effort to obtain them had been made” and there was no evidence “indicating that any particular parole recommendation was made,” the Board’s failure to consider the minutes was not a basis for annulling its determination.

In Matul, the court wrote: “The Board stated on the record that it had made diligent efforts to obtain petitioner’s sentencing minutes but was unable to do so and the record contains notice from Supreme Court, Kings County, that the sentencing minutes could not be located.” Further, it continued, “there is no indication that a favorable parole recommendation was made beyond petitioner’s assertion that the sentencing court made a favorable recommendation that he serve only the minimum sentence if he were a model prisoner” and “the Board stated that it would consider that recommendation.” Therefore, it concluded, “it cannot be said that the Board’s inability to consider the minutes rendered its decision “so irrational so as to border on impropriety.”

The upshot of these cases appears to be that, to obtain a reversal of a Board decision on the issue of missing sentencing minutes, an inmate will have to show that the Board made an inadequate effort to obtain them. If the Board made an adequate effort to obtain them but was unable to, the inmate will have to present evidence that the minutes contained a favorable sentencing recommendation in order to obtain a reversal.

Law Mandating Termination of Parole After Three Years Applied Retroactively

One of the less noticed reforms of the 2004 Rockefeller Drug Law Reform Act was the addition of a new subdivision, section (3-a), to Executive Law § 259-j. Section (3-a) provides, in part, that the Division of Parole must grant termination of a sentence after three years of unrevoked parole to a person serving an indeterminate sentence for a Class A drug felony. The law was intended to provide some relief to persons convicted of Class A drug felonies and serving life terms under the old Rockefeller drug laws who either were not eligible for or were not granted some other form of relief under the reform laws.

In 2006, the Appellate Division addressed the question of whether the law applied to someone who had served *seven*

years of unrevoked parole, prior to the passage of the law, but whose parole was subsequently revoked. In Ciccarelli v. New York State Div. of Parole, 827 N.Y.S.2d 726 (3d Dep't 2006) the court held that the law did not apply. In that case, the court wrote that the statute's requirement of "three years of unrevoked parole" did not include a period of seven years of unrevoked parole if it was ultimately revoked.

In 2008, however, the law was amended to include persons who were released to presumptive release, as well as those released to regular parole. In passing the amendment, the Legislature specified that the new language would apply "to persons sentenced to an indeterminate sentence prior to, on, and after the effective date of this act...."

The petitioner in People ex. rel. Murphy v. Ewald, Sup Ct, Suffolk County, March 4, 2010, Goodwin, J., was originally sentenced to 5 years to life based on a 1989 conviction of a Class A drug felony. He was released to parole supervision in 1994. Like the petitioner in Ciccarelli, he served more than three years of unrevoked parole between 1994 and 1999. In 1999, however, he was declared delinquent and, since then, he sustained numerous subsequent parole delinquencies. In 2009, while incarcerated on one of those delinquencies, he moved to have his parole terminated on the ground that he had served more than three years of unrevoked parole between 1994 and 1999. He argued that the 2008 amendments to the law, particularly regarding its effective date, distinguished his case from that of Ciccarelli.

The court agreed. The court noted that the Ciccarelli case was decided before the 2008 amendment to the statute and that the amendment explicitly made the statute applicable to those sentenced prior to the effective date of the act. The court also pointed out that there was nothing in the statute that stated that it was inapplicable to parolees who had served three years of unrevoked parole but who had had their parole subsequently revoked. "Reading the precise words of the statute and especially its 2008 amendment," the court wrote, "leads this Court to

[conclude that] Executive Law 259-j(3-a) mandates the termination of parole for those parolees who have achieved three years of unrevoked parole after having been sentenced to an indeterminate sentence for a Class A [drug] felony, prior to the effective date of the statute." Since the petitioner met these criteria, he was entitled to be immediately released, regardless of the fact that his parole had been subsequently revoked. To the extent that result "evinces a statutory gap that the Legislature did not intend," the court continued, "it is for that body, and not the Court, to supply it."

Disciplinary Cases

Witness Denials Result in Rehearings When Seen As Regulatory Rather Than Constitutional Violation

In several recent cases the Appellate Division of the State Supreme Court has emphasized that a prison misbehavior report need not be expunged from an inmate's record merely because he or she was denied the opportunity to present relevant witnesses at the disciplinary hearing. In certain circumstances, the court held, a rehearing, rather than expungement, is the appropriate remedy.

In the case of Buari v. Fischer, 894 N.Y.S.2d 566 (3d Dep't 2010), for instance, an inmate's wife was apprehended inside the prison with five two-ounce bottles of alcohol and eight grams of cocaine, which resulted in her husband being charged with conspiring to introduce drugs into the facility, smuggling and using other inmates' personal identification numbers. At his disciplinary hearing, the accused inmate requested that four inmate witnesses testify on his behalf, including an inmate named McDowell. The hearing officer misunderstood him and requested the testimony of an inmate named McDonald, who refused to testify. Petitioner did not realize the error immediately since he was not allowed to view the unredacted inmate witness refusal forms until after he had

filed an article 78 proceeding.

Because of the hearing officer's error, the lower court reversed the hearing. Instead of ordering the charges expunged, however, the court returned the matter to DOCS for a rehearing. Petitioner appealed to the Appellate Division, arguing that the proper remedy for the denial of his witnesses was reversal and expungement, not a rehearing.

The Appellate Division disagreed. It noted that although an inmate has a constitutional right to call witnesses at a disciplinary hearing so long as doing so would not jeopardize institutional security, the right is also codified in DOCS regulations at 7 NYCRR § 254.5. In some cases, the court held, a violation of the right may be considered merely a violation of the regulation, and not of the constitution. In those cases, it continued, the correct remedy is a rehearing, not expungement.

In Buari, the court found, the violation of the petitioner's right to call his witnesses should be considered a regulatory violation, rather than a constitutional violation, because it was merely an "inadvertent error" which did not amount to an "actual outright denial of a witness without a stated good-faith reason, or lack of any effort to obtain a requested witness's testimony." Consequently, the court upheld the decision of the lower court to return the case to DOCS for a rehearing.

The court reached a similar conclusion in Roberson v. Bezio, 897 N.Y.S.2d 529 (3d Dep't 2010). In that case, the petitioner was charged in a misbehavior report with creating a disturbance, assaulting an inmate, engaging in violent conduct and being out of place. The charges arose when another inmate identified the petitioner as his assailant from a photo array.

At his disciplinary hearing, the petitioner asked for permission to call the assault victim as a witness. The hearing officer refused, citing "safety and security concerns related to an ongoing criminal investigation" and the desire to prevent possible intimidation of the victim.

After being found guilty of the charges, he filed an article 78 proceeding.

The court reversed the hearing on the grounds that the hearing officer had erred in refusing to allow the petitioner to call the victim as a witness. It noted that the victim clearly would have had information relevant to the charges and that, if permitted to do so, the petitioner could have questioned him regarding the statement he made to correction officers immediately after the attack, as well as the victim's later identification of him from a photo array. It also found that the record failed to support the hearing officer's claim that the goal of protecting institutional safety was furthered by denying permission to call the victim as a witness or that the prevention of witness intimidation was a viable reason for denying petitioner's request – especially since the victim's testimony could easily have been taken out of petitioner's presence (*see* 7 NYCRR 254.5[b]). But, as in Buari, the court found that the error did not constitute a constitutional violation. Rather, the court held, because the hearing officer "put forth a good faith reason" for the denial of the witness there was no "clear constitutional violation." "[I]nasmuch as we find that there was a violation of petitioner's regulatory right to call witnesses [and not the constitution] a new hearing [rather than expungement] is appropriate."

In contrast to both Buari and Roberson, the court in Matter of Diaz v. Fischer, 894 N.Y.S.2d 218 (3d Dep't 2010), found that a hearing officer's failure to call certain witnesses did constitute a constitutional violation.

In Diaz, the petitioner was served with a misbehavior report charging him with assaulting staff, among other things, after he allegedly attacked a correction officer without provocation. At his Tier III hearing he attempted to call an investigator from the Inspector General's office and a psychologist who had examined petitioner shortly after the incident. Petitioner's defense was that, contrary to the accusation that he assaulted the correction officer without provocation, he was actually attacked by the officer in retaliation for his work with the grievance office. Petitioner explained to the hearing officer that the investigator commenced an in-

investigation of the incident shortly after it occurred and had questioned a number of witnesses, including some who had refused to testify at the hearing due to fear of retaliation. The hearing officer never-the-less denied the investigator as a witness on the ground that he was “not in the area of the alleged incident.” The hearing officer also denied petitioner’s request to call the psychologist, despite the fact that an earlier hearing had been administratively reversed based on the fact that the record failed to indicate how petitioner’s mental health status was considered.

The court noted that investigators from the Inspector General’s office routinely testify in prison disciplinary hearings, as do other witnesses who have gained information through investigation, rather than personal observation. Here, the court found, since both the investigator and the psychologist “may have provided testimony that was material, their absence substantially prejudiced petitioner’s ability to present his defense and the hearing officer denied their testimony for reasons other than institutional safety,” the denial was an error. Furthermore, it continued, “[since] the deprivation constituted a violation of petitioner’s constitutional right to call witnesses, rather than merely his [regulatory] right, we find the appropriate remedy to be expungement.”

Inmate Found Guilty Of Conspiring to Smuggle Drugs After Giving PIN # to Other Inmate

In Smiton v. NYS Department of Correctional Services, 894 N.Y.S.2d 567 (3d Dep’t 2010), the petitioner was charged in a misbehavior report with conspiring to introduce controlled substances, violating facility telephone procedures, exchanging his personal identification number (hereinafter PIN) and violating facility package procedures, after it was determined that he had requested that a phone number in the name of a relative be added to his approved calling list and that he subsequently gave his PIN, which is required to make telephone calls to numbers on

your calling list, to another inmate. That inmate, in turn, used the PIN to call the recently added telephone number, which actually belonged to the caller’s brother, and arranged for heroin and marijuana to be smuggled into the facility. Following a Tier III disciplinary hearing, petitioner was found guilty of all charges. He then filed an article 78 proceeding.

The court affirmed the charges, finding that they were supported by substantial evidence. The evidence included the misbehavior report, confidential evidence and hearing testimony. Petitioner’s correction counselor testified that petitioner himself requested that the counselor add the telephone number in question to petitioner’s calling list. The correction officer who authored the misbehavior report testified that his investigation revealed that the phone number was used in an attempt to smuggle drugs into the facility and that petitioner was involved in the conspiracy by agreeing to add the phone number to his calling list and then giving his PIN to a co-conspirator. Petitioner’s claim that he was not involved in the conspiracy and that someone else had added the telephone number to his calling list, by using petitioner’s department identification number and a surname common in petitioner’s family, merely presented a credibility issue which the hearing officer was free to resolve as he saw fit.

Testimony From Testing Company Official Established That Urinalysis Test Did Not Show a ‘False Positive.’

The petitioner in Almonte v. Fischer, 894 N.Y.S.2d 570 (3d Dep’t 2010), initially entered a guilty plea to charges of using a controlled substance after he failed a urinalysis test, but subsequently testified that he believed that his test result was a false positive attributable to being sick and taking large doses of ibuprofen the night before the test. As a result, the hearing officer called the representative of the urinalysis diagnostic test company who testified that neither petitioner’s claimed illness nor his ingestion of that particular medicine could produce a false positive. In finding petitioner guilty of using

a controlled substance, the hearing officer relied upon both the positive test results and the testimony of the testing company representative refuting petitioner's defense.

Petitioner then filed an article 78 proceeding, arguing that there was insufficient evidence to support the hearing officer's findings. The court found that the test results, in addition to the testimony of the company official, constituted sufficient evidence.

The petitioner also claimed that he initially pleaded guilty only because he was promised, off the record, that his penalty would be between 150 days and nine months in the special housing unit.

The court rejected this argument, as well, noting that there was no evidence that suggested that any portion of the hearing was conducted off the record or that the petitioner was promised anything off the record.

Hearing Officer Who Was Defendant In Unrelated Lawsuit Was Able To Consider Disciplinary Charges

The petitioner in Pettus v. New York State Department of Correctional Services, 897 N.Y.S.2d 263 (3d Dep't 2010), was charged with having sent a letter to a prison employee that contained abusive and obscene language about another prison employee, after which he was charged in a misbehavior report with harassment and violation of facility correspondence procedures. Following a Tier III hearing, he was found guilty of both charges. He filed an article 78 proceeding, challenging the hearing.

In his article 78 proceeding the petitioner argued, among other things, that the hearing officer was precluded from presiding at the disciplinary hearing because petitioner had named him as a defendant in an unrelated lawsuit.

The court rejected that argument, finding that there was no evidence that the hearing officer's determination flowed from any alleged bias rather than the evidence presented.

The court also rejected petitioner's

argument that the hearing officer had erred in denying several of his witnesses on the grounds that their testimony would have been either redundant or irrelevant. "[I]n light of petitioner's admission during the hearing that he authored the letter in question, the Hearing Officer did not err in denying petitioner's request" to call the witnesses.

Confidential Information Lacked Sufficient Detail To Allow Hearing Officer To Conclude It Was Credible And Reliable

The petitioner in Matter of Stone v. Bezio, 896 N.Y.S.2d 477 (3d Dep't. 2010), was charged with selling controlled substances and making threats after a correction officer received confidential information that he had sold marijuana while in the correctional facility and wrote a threatening letter. After being found guilty in a Tier III hearing, he filed an article 78 proceeding.

The court reversed the hearing. The court noted that the confidential information provided the sole basis for both the misbehavior report and the determination of guilt. "It is well settled," the court held, "that hearsay evidence in the form of confidential information relayed to the hearing officer may provide substantial evidence to support a determination of guilt" – but only so long as the hearing officer makes an "independent assessment [of the evidence] and determines that the information is reliable and credible." In some cases, the court continued, "confidential information that is sufficiently detailed and probative may provide a basis for such assessment." In this case, however, "although the confidential information directly implicated petitioner in the sale of marijuana, it did not contain sufficient detail from which the reliability of such information could be ascertained. Furthermore, the alleged threatening letter did not identify the recipient." Since the hearing officer had no basis for making an *independent* assessment of the credibility and reliability of the confidential information, the court concluded that

he must have “impermissibly relied on the correction officer’s assessment.” Consequently, it held, the determination was not supported by substantial evidence and would have to be annulled.

Inmate’s Challenge to Positive Urinalysis Test Fails

The petitioner in White v. Superintendent of Wyoming Correctional Facility, 895 N.Y.S.2d 216 (3d Dep’t 2010), brought a number of challenges to his conviction for drug use based on a positive urinalysis test.

The court rejected all of his challenges. It found, first, that the misbehavior report and positive test results to be sufficient to establish his guilt. Second, it held that the petitioner’s contention that the test results were erroneously introduced into evidence, because the proper documentation had not been supplied was not preserved for judicial review, since the petitioner failed to object to their introduction either at the hearing or on administrative appeal. Third, it rejected petitioner’s claim that he was refused the right to call witnesses, finding that claim controverted by the hearing record, which showed that the hearing officer asked the petitioner several times whether he would like to call witnesses and each time the petitioner declined to do so. Finally, the court concluded that the hearing tape, although it contained “minor gaps and omissions,” was not so incomplete as to preclude meaningful review. The court therefore affirmed the charges.

Taking Witness Testimony Outside Inmate’s Presence Not Grounds For Reversal, Court Holds

In Matter of Jones v. Fischer, 893 N.Y.S.2d 361 (3d Dep’t 2010), the petitioner was charged with disobeying a direct order, assault, conduct disturbing the facility, failing to comply with frisk procedures, violent conduct and making threats, all of which stemmed from an incident in which he allegedly struck a correction officer in the face while undergoing a random frisk and had to

be subdued. Following a Tier III hearing, he was found guilty of all charges. He subsequently brought an article 78 proceeding.

The court affirmed the hearing. It found that the misbehavior report, together with the unusual incident report, other documentary evidence and the hearing testimony of the correction officers involved, provided substantial evidence of guilt, and the contrary testimony of petitioner and his inmate witnesses presented a credibility issue which was for the hearing officer, not the court, to resolve. It rejected petitioner’s contention that the hearing officer had erred in taking the testimony of inmate witnesses outside his presence because the record revealed that he had done so only because the telephone connection in the SHU hearing room had malfunctioned, causing the witnesses’ testimony to be unintelligible. The hearing officer therefore decided to take testimony using a telephone in another part of the facility, outside the presence of petitioner. However, “insofar as petitioner was allowed to submit questions and hear recorded tapes of the testimony and, after hearing the tapes, informed the hearing officer that all of his questions were asked,” the court found no prejudice to petitioner.

The court agreed that the petitioner should have been allowed to present the injured correction officer’s medical records as evidence, since they were plainly relevant to the questions at issue in the hearing and no finding was made that their disclosure would jeopardize institutional safety. However, the court found, “in light of the overwhelming evidence of petitioner’s guilt and the fact that these records were not relied on by the hearing officer in rendering his determination, we conclude that the error was harmless.”

Sentence Calculation Cases

Inmate Not Entitled To Credit Time Served On Probation Against Later Sentence

The petitioner in Matter of Smith v. Annucci, 891 N.Y.S.2d 917 (3d Dep’t 2010),

contested his sentence calculation in an article 78 proceeding. He had been convicted in July, 1984, of criminal possession of stolen property and sentenced to three years of probation. While on probation, he was arrested as a result of his alleged involvement in a separate crime that occurred in November 1984. As a result, his probationary sentence was converted to a prison term and, in October 1987, he was convicted of his subsequent offense and sentenced to an additional term to run concurrent to the earlier sentence. Petitioner sought to have the time that he had served on probation prior to being resentenced credited to the 1987 sentence.

The court refused. Penal Law §70.30 (1)(a) provides that “when a person is sentenced to concurrent sentences, “the time served under imprisonment on any of the sentences shall be credited against the minimum periods of all the concurrent indeterminate sentences.” Probation, however, is an alternative to imprisonment. Therefore, the time that petitioner spent on probation could not be considered “time served under imprisonment” and petitioner was not entitled to credit that time against the minimum period of his 1987 sentence.

DOCS Not Required To Comply With CASAT Order Where Defendant Not Convicted of Drug Offense

Petitioner in Matter of Ferreri v. Fischer, 891 N.Y.S.2d 732 (3d Dep’t 2010), pleaded guilty to one count of criminal possession of a forged instrument in the first degree and, under the terms of a plea agreement, was sentenced to a prison term of 4 to 8 years. Both the sentencing minutes and the uniform sentence and commitment form indicated that the sentencing court *recommended* that he be considered for the Comprehensive Alcohol and Substance Abuse Treatment (CASAT) program, an intensive six month drug treatment program, the completion of which makes an inmate eligible for work release. The court also signed a separate order *directing* that he be enrolled in the CASAT

program. After petitioner began serving his sentence, DOCS denied his application for admission to CASAT. Petitioner then commenced an CPLR article 78 proceeding seeking to annul that determination. The lower court granted the petition to the extent of ordering DOCS to enroll the petitioner in the first phase of the CASAT program. DOCS appealed.

The court granted DOCS’ appeal. Under Penal Law § 60.04(6) a court may direct an individual’s enrollment in the CASAT program if the individual “stands convicted of a controlled substance or marijuana offense.” Petitioner in this case, however, was convicted of criminal possession of a forged instrument. Under these circumstances, the separate order by County Court directing petitioner’s enrollment in the CASAT program would have to be viewed as a nonbinding recommendation which DOCS was not required to follow.

Court of Claims Cases

Claim for Damages For Unjust Conviction Dismissed

The plaintiff in Warney v. State, 894 N.Y.S.2d 274 (4th Dep’t 2010), was a former prisoner who had been convicted and sentenced based in large part on his confession. His conviction was later reversed when DNA analysis of blood evidence from the crime scene implicated another person. He brought an action against the State of New York for damages for his time in prison.

The court dismissed the claim under New York’s Unjust Conviction and Imprisonment Act, Court of Claims Act § 8-b, a defendant who has been convicted and imprisoned for one or more felonies or misdemeanors which he did not commit may bring an action against the State. In order to prevail in the action, however, the defendant must prove, among other things, that “he did not by his own conduct cause or bring about his conviction.”

Here, the court found, it was the defendant's own confession that had brought about his conviction, and he presented no evidence that his confession was coerced. Under those circumstances, the court concluded, the claim could not survive.

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