

Pro Se

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Developments in the Law Of Post-Release Supervision

In the last issue of *Pro Se*, we reported that in *People v. Williams*, 899 N.Y.S.2d 76 (2010), the New York State Court of Appeals had ruled that once an inmate who is serving a determinate sentence is conditionally released, it is unconstitutional to resentence him to add a period of post-release supervision. This was a long awaited resolution to a problem that had caused many individuals to serve years in prison and on parole when their actually imposed sentences were considerably shorter. Now that the Court of Appeals has decisively handled this issue, what will happen next?

First, the People of the State of New York (the State) applied to the United States Supreme Court for a stay of the order issued by the Court of Appeals. The State asked the Court to stay the order until the Court ruled on the State's petition for a writ of certiorari. The losing party in an appeal involving federal constitutional issues may ask the United States Supreme Court for permission to appeal the decision of the state's highest court. This request is called a petition for a writ of certiorari. On March 24, 2010, Supreme Court Justice Ginsburg denied the State's application for a stay. Less than a month later, when the State asked all nine justices to consider the issue, the justices again denied the stay.

As a result of the Supreme Court's denial of the State's request for a stay, DOCS and the Division of Parole began the process of asking the courts to review the sentences of approximately

1,000 individuals then in DOCS custody or under parole supervision upon whom the courts had imposed post-release supervision after the individuals had been released at their conditional release dates.

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

Last Fall, PLS began a project with the City University of New York Law School (CUNY) and students in the Criminal Defense Clinic. PLS provided training to the students on prison disciplinary hearings and CUNY Law Professor, Donna Lee, supervised the students in their review of two hearings. In both cases, Professor Lee and the students decided to file Article 78 petitions challenging the dispositions. One of those cases is presently pending in the Appellate Division, Irwin v. Fischer. The other, Jamison v. Fischer, Index No. 10584-09 (Alb. Co. Sup. Ct.) (April 9, 2010) (Teresi, J) was recently decided in favor of the petitioner.

In Irwin, the petitioner was charged with violent conduct, assault on staff, weapon possession, interference with employee, refusing a direct order and refusing a search or frisk. Upon being found guilty, he was given a penalty of 30 months in solitary confinement and 30 months recommended loss of good time. The petitioner is claiming that the hearing officer failed to consider his mental health at the time of the incident and with respect to his ability to withstand a punishment of long-term isolation, denied him his right to present a defense, and imposed a penalty that was cruel and unusual. Because the case raises issues of substantial evidence, it was transferred to the Appellate Division.

In Jamison, the petitioner alleged that his right to call witnesses was improperly denied. Mr. Jamison requested nine witnesses. Only one of the requested witnesses testified. Of the remaining eight, one apparently signed a refusal form saying as his reason for refusing to testify, "I'm not in my cell." The remaining seven witness refusal forms were unsigned and six of those stated that when asked to provide a reason for the refusal, the proposed witness "refused to provide further information." One of the forms had nothing on it but an inmate's name at the top. There was no testimony presented at the hearing by the corrections officers who obtained these forms. In reversing the hearing and expunging the charges, Judge Teresi found that the "corrections officer's hearsay refusal reports provide[d] an insufficient basis for the hearing officer's denial of Petitioner's right to call witnesses." The respondents, however, have filed a Notice of Appeal which results in an automatic stay. Thus, Mr. Jamison is still being held in solitary confinement and will remain there until the Appellate Division decides his case or his SHU disposition time expires.

I share this with the readers of *Pro Se* to highlight a number of developments that impact on our client population. First, PLS is working hard to create and nurture partnerships with various agencies, law schools and private attorneys in order to provide representation to more incarcerated individuals and to extend the reach of our limited resources. Second, by working on cases involving incarcerated individuals, law students are exposed to the culture of incarceration and begin to learn, first-hand, about a society that exists behind closed doors. The often amorphous concepts they learned during their first year Constitutional Law course begin to take shape and take on a practical meaning as the students learn what "due process" really means. Such experiences as a law student help to shape the way in which a lawyer approaches all aspects of the practice of law and, in my view, makes for better lawyers and stronger advocates. Finally, our partnership with CUNY reinvigorates the entire PLS staff as we witness the students' passion, dedication and keen interest in ensuring that justice is done. The synergy created by these types of partnerships benefits all involved. It is our hope to continue to expand our outreach in an effort to increase our ability to advocate for our clients and heighten public awareness of the legal hurdles and injustices faced by incarcerated individuals.

... *Post-Release Supervision continued from Page 1*

On May 21, the State filed a petition for a writ of certiorari with the United States Supreme Court. If the Court decides that the Petition has no merit, it will deny the Petition without requesting a response from the defendants/respondents (the winning parties in the N.Y.S. Court of Appeals). If the Court is undecided about whether to grant the petition or thinks that the petition has merit, the Court will direct the respondents to file a response to the petition. In a future issue of *Pro Se*, we will let you know whether the Supreme Court grants the State's cert petition.

Will Prison Officials Have to Pay Damages for Imposing Post-Release Supervision?

In a related pair of rulings, the district courts for the Southern and Eastern Districts of New York issued findings on whether individuals whose rights were violated by DOCS and/or Parole officials when these defendants confined them on the basis of illegally imposed post-release supervision were entitled to damages.

The defendants in both actions raised the defense of "qualified immunity." A correction official is entitled to qualified immunity where a court finds that although he may have violated the plaintiff's constitutional rights, he should not be required to pay damages to the plaintiff because, at the time that he engaged in the allegedly unconstitutional conduct, a reasonable correction official would not have known that the conduct was wrongful. In order to be held liable for damages, a defendant's conduct must violate clearly established statutory or constitutional rights about which a reasonable person would have known. The Second Circuit has held a right is clearly established if the law is defined with reasonable clarity, the Supreme Court or the Second Circuit has recognized the right, and a reasonable defendant would have understood from the existing caselaw that his conduct was unlawful.

In Ruffins v. DOCS and the Division of Parole, et al. [and others], 2010 WL 1267810 (E.D.N.Y. Mar. 31, 2010), the United States District Court for the Eastern District of New York considered whether Mr. Ruffins, who in 1999 was sentenced to a determinate term of 8 years, was entitled to damages for two periods of re-incarceration – one in April 2007 and the other in April 2008 – for violations of administratively imposed post-release supervision. At the time that he filed this action, Mr. Ruffins had been released from DOCS custody after his sentencing court, when given notice of the defective sentencing, decided not to impose a term of post-release supervision. The defendants argued that even if the court ultimately determined that they had violated Mr. Ruffins' rights, they were entitled to "qualified immunity."

In determining whether a reasonable correction officer or official in the defendants' position would have known that his conduct was illegal in 2007 and/or 2008, the court looked at the series of decisions that ultimately resulted in the New York State Court of Appeals decisions in People v. Sparber, 859 N.Y.S.2d 582 (2008) and Matter of Garner v. NYS Department of Correctional Services, 859 N.Y.S.2d 590 (2008), decided in 2008.

The court first considered the state of the law in 1999, when Mr. Ruffins was sentenced. At that time, the state courts uniformly had held that every determinate sentence automatically had attached to it a period of post-release supervision, regardless of whether the sentencing court orally pronounced this at sentencing. In June 2006, in Earley v. Murray, 451 F.3d 71 (2d Cir. 2006), the Second Circuit, a federal appeals court, citing a U.S. Supreme Court decision from 1936, held that DOCS's practice of administratively imposing post-release supervision was contrary to federal law that was established in 1936. Then, in 2008, the New York State Court of Appeals, in People v. Sparber, held that the administrative imposition of post-release supervision violated the state criminal procedure law requiring that all sentences must be orally pronounced in the presence of the defendant. And in Matter of Garner v. NYS DOCS, the Court issued a writ of prohibition barring DOCS from adding periods of post-

release supervision as the practice violates the New York State sentencing law requiring that sentences be orally pronounced by judges in the presence of the defendant.

Thus, the court found, for the purposes of qualified immunity analysis, there were three periods to consider: the period before Earley was decided (pre-Earley); the period between the Earley decision and the Sparber and Garner decisions, (middle period); and the period after the Sparber and Garner decisions (post-Sparber/Garner). With respect to each period, the court asked whether the defendants had violated clearly established federal statutory or constitutional rights of which a reasonable person would have known.

The court held that during the pre-Earley period, a reasonable prison official would not have known that the imposition of post-release supervision by anyone other than the sentencing judge was contrary to federal law. The court commented that it would be difficult to say that DOCS and NYS Parole Officials were obligated to understand the constitutional ramifications of a Supreme Court decision from 1936 with respect to the recently enacted state determinate sentencing statute when the state and federal courts apparently could not do so. Thus, prior to the Earley decision, it was objectively reasonable for defendants to rely on the state caselaw saying that DOCS had the authority to add a mandatory period of post-release supervision to the sentence and commitment orders of prisoners.

The court then turned to the middle period (June 2006 through June 2008) and held that during this period, the defendants continued to be entitled to qualified immunity. The basis for this determination was that during this period, the New York State courts offered no clear guidance regarding the Earley decision or its application. Some state courts followed the Earley decision, but many did not. Thus, during this period, a reasonable correction official would not have known that he was violating the United States Constitution when he administratively imposed post-release supervision. Based on this reasoning, the court held that it was objectively reasonable for the defendants in Mr. Ruffins'

case to have continued to enforce his post-release supervision term and to re-arrest him for a post-release supervision violation in 2007. Based on this analysis, the court granted the defendants qualified immunity as to Mr. Ruffins' re-incarceration in 2007.

Finally, as to Mr. Ruffins' 2008 violation of wrongfully imposed post-release supervision, the court requested additional briefing on the issue of qualified immunity. After Sparber, the court wrote, it was clear that an individual who was still in prison on the incarcerative portion of his sentence could be re-sentenced to add a term of post-release supervision. It was not clear, however, whether individuals who had completed service of their actually imposed sentences could be resentenced. The Court did not think that the parties had addressed this issue sufficiently in their briefs – to the point that it was unclear whether the 2008 re-incarceration occurred before or after the Sparber and Garner decisions were issued.

In Hardy v. Fischer, 2010 WL 1325145 (S.D.N.Y. Mar. 31, 2010), five former inmates alleged that the defendants had violated their 14th Amendment right to due process of law by subjecting them to be administratively imposed post-release supervision and requested damages for the time that they spent in prison on violations of wrongfully imposed post-release supervision. As in Ruffins, the defendants moved to dismiss the complaint based on qualified immunity. The court identified the question before it as whether the right to be free from the administrative addition to their judicially imposed sentences had been clearly established at the time that the defendants allegedly violated the plaintiffs' rights, i.e., when DOCS, as opposed to a judge, imposed post-release supervision on the plaintiffs. In formulating the question, the Hardy court, unlike the Ruffins court, used only the date upon which DOCS had added post-release supervision to the plaintiffs' sentences as the date for determining whether a reasonable correction official would have known that administratively adding post-release supervision was illegal. DOCS added post-release supervision to the sentence of each of the plaintiffs at the time that he entered DOCS

custody. As all of the plaintiffs had entered DOCS custody before June 2006 – the date that Earley v. Murray was decided – and as that was the earliest date upon which it was even arguably clearly established that the administrative imposition of post-release supervision was unlawful, the court held that the defendants were entitled to qualified immunity.

The Ruffins and Hardy courts used different dates to determine whether the defendants' conduct was objectively reasonable. The Ruffins court considered the reasonableness of the defendants' conduct on the date that Mr. Ruffins first came into DOCS custody and then on the dates upon which he was alleged to have violated the illegally imposed post-release supervision. The Hardy court considered the reasonableness of the defendants' conduct only as of the dates that the plaintiffs entered DOCS custody. The Hardy court did not specify why it did not also consider whether the unlawfulness of the defendants' conduct had been clearly established at the time that the plaintiffs were alleged to have violated the conditions of their illegally imposed post-release supervision. None of the Hardy plaintiffs were in a situation that was identical to that of Mr. Ruffins, that is, having a court decision that the court will not impose post-release supervision, but several had court orders finding the parole violations based on administrative imposition of post-release supervision were unlawful. *Pro Se* will keep you informed about future developments in cases seeking damages for the injuries caused by the wrongful imposition of post-release supervision.

News and Briefs

U.S. Supreme Court Finds Attorney Ineffective For Failing to Advise Client of the Immigration Consequences of His Plea

For many years, the courts have held that a defense lawyer who fails to inform a criminal defendant that due to his immigration status, his

guilty plea may lead to deportation, is not ineffective. In New York State, in a major turn about, the United States Supreme Court, in Padilla v. Kentucky, 130 Sup.Ct. 1473 (2010), recently held that advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel. Thus, in deciding Mr. Padilla's claim, the Court applied the Strickland test. The Strickland test asks first whether counsel's representation fell below an objective standard of reasonableness. The prevailing norms of practice, as reflected in the American Bar Association standards and the like, are guides to determining what is reasonable. If the court finds that counsel's representation did fall below that standard, the second question is whether there is a reasonable possibility that but for counsel's unprofessional errors, the result of the proceeding would have been different.

Referencing numerous sources – including the National Legal Aid and Defender Association's Performance Guidelines for Criminal Representation, The Department of Justice's Compendium of Standards for Indigent Defense Systems, and the American Bar Association Standards for Criminal Justice, Pleas of Guilty – the Court found that where counsel fails to advise his or her client of the immigration consequences, representation falls below the objective standards of reasonableness.

Further, the Court noted, in Mr. Padilla's case, the terms of the relevant immigration statute were "succinct and explicit" in defining the removal consequences for his conviction: "Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States or a foreign country relating to a controlled substance . . . , other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable." Thus, the Court concluded, simply by reading the text of the law, Mr. Padilla's lawyer could have easily determined that his plea would make him eligible for deportation. Instead, his lawyer falsely assured him that his conviction would not lead to his deportation. Accordingly, the Court said that this was not a hard case in which to find deficient representation.

The Court noted that in many situations, the consequences of the plea will not be as clear as it was here. In such cases, the lawyer's responsibility is to advise the non-citizen client that pending criminal charges may carry a risk of adverse immigration consequences. But, when the deportation consequences are clear, the duty to give correct advice is equally clear.

The Court remanded the case to the state court to determine whether Mr. Padilla can show that he was prejudiced by his lawyer's failure to advise him of the immigration consequences of the plea.

Changes to Adoption and Safe Families Act For Families Separated By Incarceration

In June, Governor Paterson signed a bill that allows the Department of Social Services to take into consideration the special circumstances of an incarcerated parent in determining whether a child is "permanently neglected" under the Social Services Law. Previously, social services agencies were required to begin proceedings to terminate parental rights when a child had been in foster care for fifteen of the most recent twenty-two months.

This resulted in a disproportionate impact on families with mothers in prison as more children of incarcerated mothers are placed in foster care than children of incarcerated fathers. Under the original statute, in order to prevent termination of parental rights, an incarcerated parent was required to fulfill the same responsibilities as a non-incarcerated parent without regard to the significant obstacles incarceration imposes, such as limited and costly visitation and phone calls. The statute as amended takes more of these obstacles into consideration.

The new amendment to Social Services Law §384-b allows the foster care agency to delay filing for termination of parental rights where the child's placement in foster care for fifteen of the most recent twenty-two months is due to a parent's incarceration or participation in a residential substance abuse treatment program. In most cases, the foster care agency is required to

demonstrate that it made diligent efforts to assist, develop, and encourage a meaningful relationship between the parent and child. For parents in prison or in residential drug treatment, this diligent effort includes providing information to the parent about his/her legal rights and obligations as a parent in prison or in a residential substance abuse treatment program, information on any social or rehabilitative services in the community including any family visiting services to aid in the development of a meaningful relationship, and where possible, any information concerning transitional and family support services in the community where the parent will be released. These new efforts add to the existing diligent effort obligations listed under §384-b (7)(f), such as transportation of the child to a correctional facility for visitation.

In addition, the social service agency previously did not have to show that it had made diligent efforts to assist and encourage a meaningful relationship if the parent failed to notify the agency of his/her location for 6 months. The amendments now permit the court to take into consideration any delays and barriers that a parent in prison or in substance abuse treatment encountered in keeping the court informed of his/her location.

Under the new provisions of §384-b, before a foster care agency files a petition to terminate parental rights, the court may also order the agency to gather input from the child, the parent(s), the child's law guardian, family members, other important persons in the child's life, the parent's attorney, correctional staff, and mental health and substance abuse treatment personnel. Based on this information, the court may find that the agency should not initiate termination proceedings even though the child has been in foster care for fifteen of the last twenty-two months.

The changes to the statute also allow the court to consider the special circumstances of parent(s) in prison or in a residential substance abuse treatment program in determining whether a child is a "permanently neglected child" under the Social Services Law. Factors the court may consider include limitations on contact with family and lack of services to aid in the

development of a meaningful relationship, which interfere with a parent's ability to maintain consistent contact with the child.

Once a child is in foster care, the social services district must work on a family service plan in consultation with the child's parent in person, or where the parent is in prison or in a residential substance abuse treatment program, the statute now allows the consultation and any plan reviews to be conducted by video conference or teleconference. The statute also states that the plan "shall reflect the special circumstances and needs of the child and the family" affected by a parent's incarceration or residential drug treatment.

The bill was sponsored by Assemblymember Aubry and Senator Montgomery.

Pardons to Circumvent Deportation

In May, Governor Paterson announced that he was establishing a state panel to review old and/or minor criminal convictions of legal immigrants in order to determine whether the defendants in those cases should be pardoned. The purpose of these pardons is to prevent legal immigrants who have been convicted of minor crimes, often in the distant past, from being deported. Characterizing the federal deportation laws as embarrassingly and wrongly inflexible, Governor Paterson contrasted these laws with New York's policy of rehabilitation.

The 1996 immigration laws subjected legal immigrants to mandatory deportation even for crimes as minor as misdemeanor drug possession. For many years following the adoption of these laws, there was little enforcement. This led criminal defense attorneys to think that there were no immigration consequences associated with pleas of guilty to minor drug possession charges. Recently the federal government has increased enforcement efforts, leading to the deportation of legal immigrants who were not aware at the time that they pled guilty to minor charges that they could be deported based on the conviction. Many of these legal immigrants are married to U.S. citizens and have children who are U.S. citizens.

It is not known at this time how many people will be eligible to apply for pardons to avoid deportation.

Disciplinary Hearings

Drug Testing Not Required to Support the Charge of Drug Smuggling

In Matter of Quartieri v. NYS DOCS, 896 N.Y.S.2d 485 (3rd Dep't 2010), after the petitioner's wife was found with a large quantity of marijuana during a family reunion visit, the petitioner was charged with conspiring to introduce drugs into the facility and smuggling. His wife had surrendered the drugs and signed a statement acknowledging that the substance was marijuana and that the petitioner had arranged for her to purchase and transfer the drugs into the facility. Her statement also said that she had smuggled drugs to the petitioner on 10 prior occasions. The hearing officer found the petitioner guilty of both charges.

In his Article 78 proceeding, the petitioner challenged the sufficiency of the evidence based on the Department's failure to show that the substance recovered was marijuana. The court held that the drug testing documentation required by 7 NYCRR §1010.5 was not required to support charges of smuggling and conspiring to introduce drugs into the facility. In any event, the court noted, petitioner's wife had admitted that the substance was marijuana. The court found that the wife's recantation of those portions of her written statement wherein she admitted the substance was marijuana and that her husband had organized the drug smuggling operation raised only a question of credibility. Questions of credibility are those where the court must decide which witness statement is more believable. At petitioner's Tier III hearing, the hearing officer had the **discretion** (could use his judgment) to

decide whether to believe petitioner's wife's written statement or her recantation.

Change of Circumstances Does Not Require Change in Penalty

In Matter of Rodriguez v. Director of Special Housing and Inmate Disciplinary Programs, 897 N.Y.S.2d 311 (3d Dep't 2010), the petitioner challenged the decisions of the Inmate Grievance Program and of the Director of Special Housing, denying his request that a disciplinary penalty be modified. In 1997, following a prison-related murder conviction, the petitioner was found guilty of committing an offense under the penal law and received a sentence of 9 years SHU and 3 years recommended loss of good time. In 2006, the Second Department modified the petitioner's conviction from murder in the second degree to manslaughter in the second degree. Petitioner then requested reconsideration of his disciplinary determination and filed a grievance requesting a de novo hearing in light of his modified conviction. The goal of both was to obtain a reduction in the loss of good time. The grievance and the request for reconsideration were denied, following which the petitioner filed his Article 78 challenge to both.

Because the Article 78 was filed more than 4 months after the request for reconsideration was issued, Supreme Court, Albany County, dismissed that portion of the Article 78 as untimely. The Appellate Division affirmed the dismissal of this claim. With respect to the grievance, the Appellate Division found that the proper mechanism for challenging the recommended loss of good time is when the Time Allowance Committee (TAC) meets to decide how much good time an inmate may receive, that is, four months before the inmate's conditional release date. Because the regulations already provide a mechanism by which petitioner will have the opportunity to appear before the TAC to explain that his 1999 conviction was modified, the appellate court affirmed the lower court decision finding that the denial of the petitioner's grievance was neither arbitrary nor capricious.

Failure to Timely Serve Leads to Dismissal

In Matter of Ciochenda v. DOCS, 802 N.Y.S.2d 569 (3rd Dep't 2009), the petitioner filed the petition and a motion for an order to show cause. A motion for an order to show cause is a good mechanism for inmates to use, as typically in an order to show cause, the courts will order service by certified mail, set deadlines by which the respondents must answer and set a return date. The alternative to a motion for an order to show cause is a notice of petition. When a petitioner files an Article 78 using a notice of petition, there is no ready mechanism by means of which the court may grant an alternative to personal service.

In this case, the court granted the order to show cause and ordered the petitioner to serve the order to show cause, the petition, exhibits and supporting affidavits upon the respondent and the attorney general by a certain date. The respondent then moved to dismiss, arguing that the petitioner had failed to comply with the service requirements of the order to show cause.

In fact, the affidavit of service filed by the petitioner stated that he had served only the order to show cause on the respondent and even that service was beyond the date set in the order to show cause. Based on the failure to serve the petition and accompanying documents in the manner required by the order, the Supreme Court, Albany County, dismissed the petition.

The petitioner appealed, claiming that he had had difficulties obtaining notary service. The Appellate Division affirmed the lower court decision, finding that the petitioner had not established a connection between his failure to serve and the lack of access to notary services.

Practice Point: *This decision illustrates how important it is to comply with court orders and rules. Unfortunately, many courts are inclined to dismiss what may be meritorious claims based on a failure to comply with court rules or orders.*

Parole

Court Upholds Condition That Parolee Have No Contact With Wife

Everett Williams was released to parole supervision with a condition that he not have contact with his wife without his parole officer's permission. After his release, Mr. Williams brought an Article 78 challenge to the condition, asking that the court allow him to live with his wife. The Supreme Court, New York County, denied the relief but held that it was arbitrary to deny petitioner visitation with his wife during non-curfew hours, as long as his wife consented to the visit. In Matter of Williams v. NYS Division of Parole, 899 N.Y.S.2d 146 (1st Dep't 2010), the Appellate Division reversed the lower court's decision and dismissed the petition. The court reasoned that because there is no constitutional right to be released to parole supervision, the state has **discretion** (can use its judgment) to place restrictions on parole release. This discretion is ordinarily beyond judicial review, as long as it is made in accordance with the law and no positive statutory requirement is violated. Further, the court wrote, if the condition is rationally related to the inmate's past contact and future chances of recidivism, the Supreme Court has no authority to substitute its own **discretion** (judgment) for that of the individuals in charge of designating the terms of a petitioner's parole release.

Here, the court found, the Division's policy of zero tolerance regarding domestic violence led to the imposition of the challenged condition imposed on Mr. Williams. The condition was made in the lawful exercise of official discretion, violated no statutory requirement and, in view of petitioner's criminal conviction for rape, classification as a level 2 sex offender, violations of protective orders obtained by a former wife and his present wife, and two arrests for assaulting his present wife, was neither arbitrary or capricious.

Sentencing

In Sentencing, As In Life, Timing Can Be Everything

Whether a defendant will be sentenced as a first or predicate felony offender depends not on the dates that the first and second crimes were committed, but on the relationship between the date on which the defendant was sentenced on the first crime and the date upon which the second crime was committed. So held the First Department of the Appellate Division in People v. Acevedo, 901 N.Y.S.2d 239, (1st Dep't 2010). In this case, the court considered the relationship between a re-sentencing for the purpose of adding a period of post-release supervision and the predicate felony offender statute. In 2001, based on a 1993 Massachusetts felony conviction, Mr. Acevedo was sentenced as a second felony offender to 4 years. The court did not impose a period of post-release supervision. Mr. Acevedo did not appeal his conviction. The Department of Correctional Services later imposed 5 years of post-release supervision.

In 2006, having been released to administratively imposed post-release supervision, Mr. Acevedo was convicted of a felony and was adjudicated a second violent felony offender based on his 2001 conviction.

In 2008, Mr. Acevedo petitioned the court to be resentenced on his 2001 sentence. The District Attorney did not oppose the motion, as a result of which the court re-imposed the 4 year determinate term, *nunc pro tunc* to the original sentence date of July 19, 2001. The court did not add a period of post-release supervision to Mr. Acevedo's determinate sentence.

Mr. Acevedo then filed a motion seeking to be re-sentenced as a first time felony offender on the 2006 conviction. He argued that statutory language used to determine whether a prior conviction can serve as the basis for finding a defendant to be a predicate felon – Penal Law §§70.04 (1)(b) and 70.06(1)(b) – state that in

order for a prior conviction to be found to be a predicate felony, the sentencing on that conviction must have occurred before the commission of the more recent crime. Here, the first time that the court imposed a legal sentence on Mr. Acevedo, was two years after the commission of the more recent felony. Thus, the court could not use the 2001 conviction as a basis for finding him to be a second felony offender.

The First Department agreed. In People v. Acevedo, the Court extended the analysis it used in challenges to the application of persistent felony offender statutes to the predicate felony statutes. In People v. Wright, 706 N.Y.S.2d 29 (1st Dep't 2000), the court stated that where the resentencing occurs after the date upon which the more recent offense was committed, the prior crime does not qualify as a predicate conviction for purposes of sentencing as a persistent violent felony offender, since multiple offender status is defined by the plain statutory language" The statutory language to which the court refers is the following:

For the purpose of determining whether a prior conviction is a predicate violent felony conviction the sentence upon such prior conviction must have been imposed before commission of the present felony.

Penal Law § 70.06(1)(b)(ii).

Based on the plain language of the predicate felony statute, the court in Acevedo ruled that the State could not use the 2001 conviction as the basis for sentencing Mr. Acevedo as a second felony offender for the 2006 conviction. The court remanded the case for resentencing to "afford the People the opportunity to establish whether his 1993 Massachusetts conviction still qualifies as a predicate felony when the time he has spent incarcerated is excluded from the 10-year limitation imposed by Penal Law §70.06(1)(b)(iv)and (v)."

Where the Sentence As Originally Imposed Was Illegal, There Are Limits On the Court's Authority to Correct

In People v. Williams, 899 N.Y.S.2d 76 (2010), the New York State Court of Appeals ruled that once an inmate who is serving a determinate sentence is conditionally released, it is unconstitutional to resentence him to add a period of post-release supervision. In People v. Woods, 27 Misc.2d 1212(A), 2010 WL 1542530 (Sup.Ct. N.Y. Co. Mar. 18, 2010), the question before the court was whether, where the sentencing judge originally sentenced the defendant to "the maximum post-release supervision time," the court could, after the defendant had been conditionally released, re-sentence the defendant to clarify the amount of time that the defendant would have to spend on post-release supervision.

Relying on the Second Department's decision in People v. Jones, 827 N.Y.S.2d 907 (2d Dep't 2009), the Woods court ruled that because the original sentence did not specify the actual amount of time that Mr. Woods had to serve on post-release supervision, but rather merely stated that he should serve the maximum amount of post-release supervision, the sentence was statutorily insufficient under Article 380 of the Criminal Procedure Law and "contravened the court's duty to pronounce sentence." The court went on to hold that as the defendant had completed the original sentence that was actually pronounced by the sentencing court and had been released from custody, the imposition of an amended sentence including any period of post-release supervision would abridge the defendant's rights under the Double Jeopardy Clause of the federal Constitution.

Court of Claims

Federal Damages Against Officer Do Not Limit Damages In Court of Claims Action

In 2000, Beatrice Morris, then a DOCS inmate, filed a §1983 action alleging that she had been sexually assaulted by a correction officer at Bayview C.F. She sued the officer and several supervisors. In 2003, the federal court dismissed the supervisory liability claims, holding that the supervisory defendants neither were personally involved in the assault nor did they have actual or constructive knowledge of Constitutional violations which would support holding them liable on the basis that they failed to remedy the wrong, created a policy or custom of allowing such violations, were grossly negligent in supervising employees and were deliberately indifferent to unconstitutional conduct. See Morris v. Eversley, 282 F.Supp.2d 196 (S.D.N.Y. 2003). In reaching this conclusion, however, the court also commented, “This case is a troubling one. A correctional officer entered an inmate’s cell at night, while she was sleeping, and sexually assaulted her. Although I am granting summary judgment in favor of [the superintendent and deputy superintendent] on the basis that they cannot be held personally responsible for Eversley’s actions, the issues remain as to whether DOCS, as an institution failed in some respect, and whether the State must bear some responsibility. Surely Eversley should not have been put in a position where he could harm an inmate as he did here.” The federal court suggested that the plaintiff pursue this issue in the State Court of Claims.

The plaintiff followed up on the court’s suggestion. Recently, in Morris v. State, 897 N.Y.S.2d 2010 (1st Dep’t 2010), the Appellate Division, reversed a trial court’s ruling that precluded Ms. Morris from litigating the amount of compensatory damages on the claims

asserted and limited her potential recovery of compensatory damages to the amount awarded in the prior federal court action. The Appellate Division, however, found that there was no identity of issues between those claims relating to injuries allegedly resulting from the sexual assault that were litigated and dismissed against former Defendant Eversley in the federal action and those issues which the claimant is seeking to litigate against the State in the court of claims action. Among the claims that are raised in the state court action that were not raised in the federal action are that the State subjected the claimant to injury by 1) failing to remove officer Eversley from his position following her complaint, 2) failing to promptly investigate her claim, and 3) transferring her to another prison, as well as the claim that the State’s negligent training and supervision of Eversley resulted in a pattern of ongoing harassment and intimidation leading up to and then following the actual sexual assault.

In reversing the lower court’s decision, the Appellate Division noted that at the federal court trial, the court explicitly charged the jury to compensate the claimant only for the injuries that she sustained as a direct consequence of Eversley’s conduct. Thus, the court wrote, there was no basis to conclude that the jury considered in its award the amount by which claimant may have been damaged as a result of the State’s – as opposed to Eversley’s -- alleged misconduct.

Miscellaneous

Waiting for Willard . . .

When criminal defendants, or parolees who are subject to revocation proceedings, plead guilty in exchange for a sentence of 90 days of drug treatment, they do so with the expectation that they will not spend months in jail or at DOCS reception centers waiting to be transferred to Willard Drug Treatment Center (Willard or Willard D.T.C.). The Supreme Court, Seneca

County, has recognized the legal basis for this expectation, and has granted habeas petitions where the delay in accessing treatment was excessive and thereby violated the individual's right to due process of law. Last spring, however, the Fourth Department carved out an exception to the class of individuals who, based on the failure to transfer them to Willard in a timely manner, are entitled to habeas relief. In People ex rel. Kavazanjian v. Williams, 895 N.Y.S.2d 917 (4th Dept March 19, 2010), the court reversed an order granting the habeas petition of a parolee who had been given a 12 month time assessment, which, upon successful completion of a 90 day DOCS drug treatment program, would be modified to "revoke and restore - Time Served." The parolee had not arrived at Willard until 63 days after his parole revocation proceeding. The Fourth Department's decision was based on caselaw denying habeas petitions where the petitioners were not entitled to immediate release. Because Mr. Kavazanjian had an underlying time assessment, the failure to provide him timely access to a drug treatment program did not, in the court's view, give him a right to immediate release if more than 40 days passed between the conclusion of his parole revocation hearing and his arrival at Willard.

For purposes of entitlement to habeas corpus relief for excessive delay, there are now three categories of people entering Willard:

1. Individuals who are judicially sanctioned to Willard D.T.C.;
2. Individuals who are sentenced at a parole revocation hearing to "revoke and restore" with a 90 day drug treatment program (usually Willard D.T.C.); and
3. Individuals who are sentenced at parole revocation hearings to time assessments which can be modified to "revoke and restore" after successful completion of a 90 day drug treatment program.

Individuals in the first two categories are entitled to habeas relief if their drug treatment is unreasonably delayed. Individuals in the third category are not entitled to habeas relief until they have served their time assessments.

Sentences to be Executed as Sentences of Parole Supervision

A drug treatment alternative may be imposed on criminal defendants who have been convicted of crimes that are motivated by drug or alcohol abuse and that are listed in Criminal Procedure Law (C.P.L.) §410.91(5). As part of a larger prison diversion effort available for most drug felonies, the 2009 Drug Law Reform Act expanded the list of specified offenses to include class C felony drug offenses (*See, Pro Se*, Vol. 19, No. 2; Spring 2009). Criminal Procedure Law §410.91(5) was also amended recently to include Burglary in the Third Degree, a common class D felony. Criminal Procedure Law §410.91(4), which required that the District Attorney consent to a sentence of parole supervision for a class D felony, was repealed in 2009.

Criminal Procedure Law §410.91 requires that a defendant whose sentence the court directs to be executed as a sentence of parole supervision at Willard Drug Treatment Center be remanded for immediate delivery to the Department of Correctional Services. The Supreme Court, Seneca County, has ruled that "immediate delivery" means that the defendant must be transferred to a DOCS reception center within 10 days of sentencing. (*See, People ex rel. Loster v. Willard Drug Treatment Campus*, 819 N.Y.S.2d 851 (Supreme Ct., Seneca Co. April 27, 2006). In addition, CPL §410.91(1) states that the time between entering DOCS and transfer to Willard is not to exceed 10 days. Thus, in People ex rel. Loster v. Willard Drug Treatment Campus, where 43 days had passed between the defendant's sentencing and his arrival at Willard, the court ordered that the petitioner be released.

Parole Revocations

Caselaw in Seneca County establishes that parolees sent to Willard following decisions to **revoke and restore** to parole supervision have a right to be transferred to Willard within 40 days of their final parole revocation decisions. See, People ex rel. Johnson v. Williams, Index No. 37426 (Seneca County, May 15, 2006, Justice Bender). This type of sanction is mandatory for a “Category 2” violator. A Category 2 violator is a non-Category 1 violator 1) whose underlying sentence is for a drug felony (other than an A-1 felony) and whose violation is not a new felony, or, 2) whose underlying sentence is for a non-drug, non-violent felony (other than a class A felony), whose violation is for non-violent drug or alcohol use, is not a new felony, and who has more than nine months of parole remaining. “Persistent violators” (individuals with two or more prior violations) and individuals with felony charges pending against them at the time that their hearings are completed cannot be classified as Category 2 Violators. See 9 N.Y.C.R.R. §8005.20(c).

Willard is also available as a discretionary alternative for “Category 1” violators. An individual is a Category 1 violator where either his current sentence, or one in the last 10 years excluding incarceration time, is for a violent felony, homicide, sex offense, or class A-1 felony conviction, or, where the violation involves injury or use or threat of a weapon or injury. According to Division of Parole policy, in such cases, the Administrative Law Judge can order that Category 1 violators be given the opportunity to complete a 90-day parole-approved alcohol/drug program, which is usually but not necessarily Willard D.T.C., as a **modification of a time assessment**. Seneca County Supreme Court had been granting habeas petitions with respect to delays in accessing treatment without regard to whether the petitioner’s sentence was a 90 day drug treatment program or a drug treatment program as a modification of a time assessment.

After the Kavazanjian decision, individuals who receive sentences of revoke and restore to Willard will be treated differently than individuals who receive time-assessments with

a Willard or other 90-day treatment program as a modification. Even when the modification to Willard’s 90-day program is to be followed, after successful completion, by a decision of revoke and restore – as was the case with Kavazanjian – the parolee does not have right to release until the time assessment has been completed.

Evidence of Inmate Code of Silence Admitted In Jail Fight Prosecution

Following a fight at the Rikers Island Jail, Brian Henderson was criminally charged with attempted assault. At trial, two officers testified that they had observed Mr. Henderson throw a table on which the victim was sitting and saw him fighting with the victim. The victim sustained multiple stab wounds which the prosecution attributed to Mr. Henderson. Mr. Henderson put on his defense through the testimony of the victim. The victim testified that he and Mr. Henderson were friends, that Mr. Henderson had not assaulted him, and that Mr. Henderson had not come to the location of the fight until it was over. He stated that he had been assaulted by a Hispanic inmate whose name he did not know. On cross examination, the prosecutor elicited testimony that originally the victim had said that he did not know who had assaulted him, had changed his recollection only after being housed in close proximity to the defendant, and established that through his job, it was likely that the victim would have known his assailant. The prosecutor then asked, “What do inmates call individuals who testify against other inmates in court?” In response, the victim testified that he was not scared of the defendant or anyone else.

Mr. Henderson was convicted of attempted assault and sentenced as a mandatory persistent felony offender to 15 years to life. On appeal, the Appellate Division rejected the defendant’s argument that the prosecutor’s cross examination of the inmate-victim, and the portion of the summation where she argued that the victim was lying because he had been intimidated by the defendant, had violated the defendant’s right to a fair trial. See, People v. Henderson, 855 N.Y.S.2d

490 (1st Dep't 2008). A dissenting judge granted the defendant's application for leave to appeal to the Court of Appeals.

The Court of Appeals affirmed the conviction. *People v. Henderson*, 892 N.Y.S.2d 292 (2010). The Court held that the prosecutor's cross examination of the inmate-witness reasonably attacked his truthfulness and explored motives for testimony clearing the defendant of participation in the fight, including intimidation and fear of reprisal. The Court also found that the inmate-victim's contact with the defendant at the time that he decided to testify for the defense was relevant to this point. Finally, the Court wrote, the prosecutor's summation comments were a fair response to the portion of the defense counsel's closing argument in which he asked, "Why in a room full of inmates did not one inmate come forward to say that [defendant] had anything to do with this?" According to the Court, the prosecutor legitimately suggested possibilities other than defendant's innocence; namely, the prospect of retaliation – "snitches get stitches" – or adherence to a code of silence.

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Pro Se Practice

SHY BLADDER AND URINALYSIS TESTING

Introduction

Prisoners who have been found guilty of violating the Standards of Inmate Behavior, Rule 180.14, *refusal to provide a urine sample for urinalysis testing*, frequently write to PLS asking for assistance in challenging their hearings. In some cases, it turns out that the inmate did not actually refuse to provide a urine sample; rather, he or she was *unable* to produce a sample. As you are probably aware, the procedure that DOCS uses to test inmates for drug use requires that an inmate urinate into a specimen bottle while being observed by a correction officer. For some people, the discomfort of urinating in front of another person leads to anxiety, which in turn makes it difficult or even impossible to urinate. This condition -- known as shy bladder -- is common both inside and outside of prison. For the most part, it is a harmless condition, and can be alleviated by allowing an individual to use a private bathroom where, after he relaxes, he will be able to urinate. However, in prison, where a failure to produce a urine sample for urinalysis testing is presumed to be a refusal -- and thus a violation of rule 180.14 -- shy bladder can be a serious issue. This article suggests some strategies which individuals who suffer from shy bladder may find useful in defending themselves against charges of violating the urinalysis testing procedures.

Seeking Accommodation

It is important to keep in mind that drug testing cannot be avoided. Having to produce a urine sample is simply a fact of prison life. If you suffer from shy bladder, the best you can hope is

that DOCS will accommodate you in some way that will allow you to provide a urine sample. PLS has had some success in advocating for such accommodations. Unfortunately, we do not have the resources to advocate for all inmates who suffer from shy bladder. In addition, frequently inmates do not contact us until after they have been found guilty of refusing to produce a urine sample. Most of the time, this is too late. To be successful, much of your advocacy must be done before the hearing is concluded and some of it before you are even requested to produce a sample. Therefore, if you know that you will have trouble complying with the urinalysis testing procedures, we urge you to begin advocating on your own behalf as soon as you become aware that you have difficulty urinating in the presence of others.

Accommodation and the Facility Medical Staff

In seeking accommodation, the first thing you should do is write a letter to the Facility Health Services Director (FHSD). If you are comfortable doing so, you can send a copy of this letter to the facility superintendent so that he or she is also **on notice** (knows about your problem). In the letter, you should explain the nature of your problem and your concerns. Tell the FHSD that you are unable to provide a urine sample while being observed and that this is a problem for you because DOCS' urinalysis testing procedure requires that you produce a sample in the presence of a correction officer. Explain that while your inability to urinate may be caused by nerves or a case of "shy bladder," you would like to see a urologist for further testing to rule out any possible physical problems. You can further explain that you would like to get this resolved through the medical department as quickly as possible, because you fear that you will be charged with refusing to provide a sample if you are selected for urinalysis testing. Lastly, explain that in the event the urologist concludes that there is nothing physically preventing you

from urinating, and thus that your problem is caused by shy bladder, that you would like a note placed in your medical file authorizing the use of a catheter or a private room for urinalysis testing. If you do not get a response from the FHSD within a week, you can request sick call. Explain the difficulty you have urinating in the presence of others to the medical care provider who talks to you at sick call and ask that arrangements be made for you to have a consultation with a urologist.

If your request for a consultation with a urologist is denied, the next step is to file a grievance. Your grievance can be similar to your initial letter to the FHSD. Explain that you cannot comply with the urinalysis testing procedure because of what you suspect is shy bladder, that you would like to have a consultation with a urologist and that you wish to be accommodated so that you can provide a sample. Explain that you are concerned that you will be punished for a urinalysis testing violation and that you hope that you can resolve this issue through the medical department rather than through the disciplinary process. *(If you are unfamiliar with the grievance process, you can request the PLS memo on the Inmate Grievance Program. PLS also has a memo on self-help remedies for obtaining medical care that you might find helpful.)*

Assuming that a consultation with a urologist is arranged, when you meet with the urologist, explain your situation. Tell the urologist whether you are having trouble urinating generally or if you only have trouble urinating in the presence of others. If you have shy bladder, you should be open with the urologist and explain that you become nervous when others are around while you are trying to urinate and that no matter how strong the urge or need to urinate is, you are unable to do so. You should also explain why this is of particular concern to you as a prisoner—namely, because of the potential disciplinary consequences.

Tell the urologist that while you would prefer to be accommodated by using a private room, you would be willing to use a catheter and that you would like the urologist to recommend that during urinalysis test procedures, DOCS either allow

you use a private room or prescribe a catheter and show you how to use it. If you request that a catheter be prescribed, it is essential that you actually be willing to use one, should you be offered this accommodation. Catheters are small rubber or plastic tubes that are inserted through the urethra into the bladder and that allow the bladder to empty automatically. Using a catheter is easy, quick and discreet and should not be painful. However, only you know whether you will feel comfortable using one.

After the consult, the FHSD will review the recommendation of the urologist and should advise you whether he or she will follow the recommendation. If the FHSD accepts the recommendation, he or she will order that you be allowed to use a catheter or private room when you are required to produce a urine sample for drug testing purposes. The FHSD's order should be noted in your medical file and you should receive a communication from the FHSD explaining how to request the private room or a catheter when you are ordered to produce a urine sample for drug testing. If you do not hear anything, you will need to follow up by writing another letter to the FHSD. Again, you may need to file a grievance if the medical staff is unresponsive.

Accommodation and the Office of Mental Health

Another important avenue for assistance is the Office of Mental Health (OMH). You can contact OMH by writing a letter to the OMH Unit Chief at your facility. Explain your situation to the Unit Chief in the same way that you explained it to the FHSD. You should ask to be evaluated by OMH for shy bladder.

Shy bladder is a type of anxiety disorder known as a social phobia. Social phobia is listed in the Diagnostic Statistical Manual of Mental Disorders IV ("DSM"). The DSM is an authoritative guide used by mental health professionals to classify and diagnose mental disorders. Because shy bladder is one of the forms that social phobia may take, after an

evaluation, OMH staff may diagnose you with this disorder. This is important because if the urologist finds that your inability to urinate in front of others is not connected to a physical problem, DOCS medical staff, considering shy bladder to be a psychological issue and not a medical problem, may not give you a diagnosis. You should share with OMH your concerns over the urinalysis testing procedure and ask that OMH assist you in getting some form of accommodation.

Defending Yourself At The Hearing

If you are unable to urinate in front of others and you do not take any of the steps suggested above, you stand little chance of prevailing at a hearing where it is alleged that you violated the urinalysis testing procedures by refusing to produce a sample. This is because without **independent evidence** (evidence other than your testimony) to support your defense, the hearing officer may infer that the absence of such evidence shows that you invented your defense for the sole purpose of avoiding punishment for your refusal to provide a urine sample. For that reason, it is always best to try to address this problem before it becomes a disciplinary issue – even if you are unable to resolve the issue, your attempts to resolve it will **lend credence to** (make more believable) your defense. Remember too, that the disciplinary process starts when you are first approached by an officer for urinalysis testing. When a correction officer asks you to provide a urine sample, you should calmly explain your situation and ask the officer to check with medical about any accommodation you are to receive. If the officer ignores you, you *must* attempt to give a urine sample despite your anxiety. If you outright refuse, you will have no defense at the disciplinary hearing.

In *Matter of Capocetta v. Fischer*, 72 A.D.3d 1377 (3d Dep't 2010), PLS represented an inmate in an Article 78 challenge to three Tier III hearings involving charges that he had refused to

produce urine samples during three urinalysis testing procedures. Unlike the more typical situation -- where the inmate has no medically documented history of shy bladder -- the petitioner in this case had repeatedly complained to DOCS medical staff about his difficulty urinating in the presence of others. DOCS medical staff tested the petitioner for a variety of disorders, and upon finding no physical problem, diagnosed him with shy bladder. He was then subjected to urinalysis testing three times over a period of two months and each time was unable to produce a sample.

When it came time to defend against these charges, the petitioner received little support from the medical staff witnesses. At each hearing, medical staff acknowledged the petitioner's history of shy bladder, but insisted that despite this, he was **physically** capable of urinating, and therefore could have provided a sample for the drug testing procedure. Following this testimony, the hearing officers ruled that our client had willfully refused to provide a sample, sentenced him to several years in SHU and recommended the loss of several years of good time.

The basis of the Article 78 challenge was that the hearing officers drew conclusions that were not supported by the evidence. We argued that if the petitioner had shy bladder -- as was acknowledged by the medical personnel -- he was not guilty of refusal, regardless of the fact that shy bladder is not a physical problem.

The Third Department rejected our arguments, holding that whether or not an inmate could provide a urine sample was a "credibility question" for the hearing officer to decide. Credibility questions arise where there is conflicting evidence presented. In this case, the inmate testified that he could not comply with the urinalysis testing procedure but there was conflicting testimony from the medical staff that he was physically able to provide a sample. The law gives the hearing officer the authority to decide whom to believe, even where there is a factual basis in the record for discrediting the testimony given by some of the witnesses. In this case, the hearing officers chose to credit the testimony of the medical staff in spite of the

evidence that the inmate's condition -- shy bladder -- by definition interferes with his ability to urinate in the presence of others. PLS is currently seeking leave to appeal the decision to the Court of Appeals.

The lesson of Capocetta is clear: if you suffer from shy bladder and are charged with refusing to provide a urine sample, to successfully defend against the charges on the basis of shy bladder, you will need to call as witnesses someone on the medical staff, and possibly an OMH clinician, to testify that you have shy bladder and that the condition prevents you from complying with the urinalysis testing procedure. To establish this defense, you will have to ask the hearing officer to admit your medical records into evidence and will also have to ask that someone from the medical department testify at your hearing. You will need the medical staff to testify that because the urinalysis test procedure requires direct observation, many people who suffer from shy bladder will not be able to comply with the procedure. If you can establish this in your questioning of medical staff, then you stand a much better chance of defending yourself or successfully challenging the decision via an Article 78.

Your line of questioning should go something like this:

1. Ask the witness if he or she can describe the condition known as shy bladder;
2. Ask the witness if your medical records show that you have, or that it is likely that you have, this condition;
3. Ask the witness if he or she understands that DOCS urinalysis testing requires that inmates produce a urine sample while being observed by a correction officer; and
4. Ask the witness if it is reasonable to expect that a person with shy bladder will be able to comply with the requirement in the DOCS' urinalysis testing procedure that he produce a urine sample in the presence of a correction officer.

If the witness insists that you are physically capable of giving a sample, you will need to explain that you are not claiming that a physical condition prevents you from urinating in the presence of others, but rather are contending that a psychological disorder prevents you from doing so. You can then ask whether the witness acknowledges that an individual may suffer from a psychological disorder that prevents him from urinating in the presence of others. This will probably be your last question for the witness from the medical staff.

Next, you will want to explain that because shy bladder is a psychological disorder, you have also sought treatment from the Office of Mental Health. Tell the hearing officer that you would like to have an OMH clinician testify regarding this disorder. Under 7 N.Y.C.R.R. §§ 254.6(b)(1)(viii) and 254.6[f], a hearing officer is required to consider evidence regarding your mental condition at the time of the incident if it appears, based on the your testimony or demeanor, the circumstances of the alleged offense or any other reason, that you may have been mentally impaired at the time of the incident. Note that evidence of your mental state will be given *confidentially* – that is, outside of your presence, by an OMH clinician. However, there is nothing in the regulation that prohibits an inmate from suggesting questions for the hearing officer to ask the clinician. We suggest that you request that the hearing officer ask the clinician to describe shy bladder and its effects and to ask the clinician whether an individual who has difficulty urinating in the presence of others may be unable to produce a urine sample when a correction officer is watching him. Hopefully, if you have been diagnosed with shy bladder, the OMH testimony will confirm the symptoms of shy bladder and your defense will be further strengthened.

Lastly, consider making a final appeal to the hearing officer. The hearing officer may believe that individuals claiming to have shy bladder are simply trying to avoid the urinalysis testing

procedure. Hopefully, the medical and OMH testimony will have the effect of making your defense more credible. You may also want to demonstrate to the hearing officer that you are not trying to avoid urinalysis testing by offering to provide a urine sample via catheter. While the hearing officer may not take you up on this offer, your willingness to self-catheterize is evidence of your good faith.

To conclude, if you follow the advice in this article, you stand a better chance of avoiding or mitigating a disciplinary penalty than if you do nothing. Some inmates who suffer from shy bladder may refuse to be urine tested rather than face the embarrassment of having to admit that they are unable to urinate in front of an officer. However, shy bladder is nothing to be embarrassed about. Many people – including those who do not suffer from shy bladder -- would feel uncomfortable urinating under the circumstances set forth in DOCS' urinalysis testing procedure. Recognizing this, if you are a person who suffers from shy bladder, even if you feel embarrassed, you should seek accommodation and take steps discussed in this article to defend yourself against unfair punishment.

(PLS has a memo describing your rights at a Tier III hearing. The memo describes the discipline process and how to defend yourself. You may write to us to request a copy of this memo.)

Good luck, and please write to our PLS Plattsburgh Office, ATTN: Adam DeFayette, Esq., and let us know how this advice works out for you.

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