Pro Se

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Court Awards $20,000 Due to the Miscalculation of Release Date

In Sanabria v. State, 2010 WL 3860614 (Ct. Cl. Oct. 5, 2010), the court found that the defendants had confined the claimant for 91 days beyond his expiration date. The court attributed this delay to the Division of Parole's failure to provide DOCS with the correct date upon which Mr. Sanabria should have been released. The Division of Parole maintained that the additional 91 days of confinement was "privileged" because, in addition to the 90 day misdemeanor sentence, the claimant was being held on a parole warrant and a sentence and commitment order issued with respect to a prior felony conviction. The court however, ruled that it could not consider the parole warrant or the sentence and commitment order because the State had failed to put those documents into evidence. Thus, the only proof relating to how much time Mr. Sanabria was required to spend in prison were the materials submitted by Mr. Sanabria and the State's admission, found in its response to Mr. Sanabria's Notice to Admit, that Mr. Sanabria should have been released after 90 days. Having found that the claimant had proven the first two elements of a claim for wrongful imprisonment – that the defendants intended to confine him and that he was conscious of the confinement and did not consent to it – the court went on to find that the defendants had not shown that the confinement was privileged. Based on these findings, the court concluded that Mr. Sanabria had been wrongfully confined for 91 days. The court then turned to the issue of damages.

Damages Generally

As a general rule, the court wrote, the measure of damages for wrongful confinement is a sum that fairly and reasonably compensates the injured person for the injuries caused by the defendant's wrongful act. These damages can include non-economic damages for mental anguish and loss of liberty. The mental anguish suffered by an inmate while he is in prison encompasses his discomfort, fear, lack of privacy and degradation. See, Baba-Ali v. State, 878 N.Y.S.2d 555 (Ct. Cl. 2009). The loss of

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A Message From the Executive Director Karen Murtagh-Monks

The New York State budget, as it stands today, fails to include any funding of "member items" for 2010-2011. As most of our readers know, PLS has been funded as a "member item" ever since 1995. Without any additional funding, PLS will be forced to close its doors in the near future.

As you are well aware, PLS was created by the State in 1976 in response to the Attica uprising, the bloodiest prison riot in the history of the United States. The events at Attica forced public attention on the inhumane treatment and living conditions of New York State prisoners and helped shape not only our State's public safety and criminal justice policies, but much of the country's as well. Viewed as vital to ensuring the safety of our prisons and preparing people for successful reintegration into society, PLS was funded, almost exclusively, through Governor Mario Cuomo's Executive Budget throughout the 1980's and 1990's. However, with the change of Administration in 1995, PLS was eliminated from the Executive Budget and in response, the State Assembly, understanding the public safety importance and cost saving benefits of PLS to the State, restored funding to PLS as a "member item" but only at 50% of its previous year's budget. As a result, we had to close some offices, but through it all we have successfully satisfied our original mandate of improving conditions of confinement, ensuring prison safety, upholding basic human rights and promoting successful re-entry.

"Member items"- commonly referred to as "pork"- have gotten a bad rap over the years. Why? Because "member items" have long been viewed as "pet projects" for local and State representatives and sometimes garner bad headlines due to fiscal mismanagement or issues involving program merit. Despite such instances, the overlooked reality is that the majority of these allocations provide worthy services and address critically unmet needs such as youth and elder care, community outreach, health care, and civil and criminal legal services for the poor, disabled and disenfranchised. These programs, often championed by local officials who know and understand the needs of their districts, provide vital, direct, measurable services to people in our communities - services that result in safer, healthier communities for all of us and, in turn, provide significant economic savings to our State.

But even more importantly, many of these "initiatives" are a far cry from what is typically understood to be "member items" because they reflect policy rather than parochial concerns. PLS, the New York State Defenders Association, The Osborne Association, the Center for Family Representation, civil legal services, a host of Alternative to Incarceration programs and other re-entry programs are examples of legislative initiatives that are funded by "member item" allocations but provide statewide services. Failing to fund such organizations is economically short-sighted and imperils public safety.

Every year, PLS saves the State of New York millions of dollars in sentence and jail time corrections, good time restorations, and removals from solitary confinement. This past year was no different. In 2009, through administrative advocacy and litigation, PLS was successful in restoring over 353 months of good time, reducing 225 months of inaccurately calculated jail time and 727 months of inaccurately calculated sentencing time and reducing solitary confinement by 436 months. The result was that PLS saved the State over $5.2 million while operating on a budget of a little over $2 million. These savings do not even begin to take into account the fact that PLS also saves the State immeasurable resources by resolving many issues without litigation and actively discouraging the filing of frivolous *pro se* litigation. Nor do they adequately convey the enormous benefit PLS has provided to New York State in helping to better address the needs of those incarcerated, be it conditions of confinement, re-entry or other services that quell the threat to our public safety both inside and outside prison walls.

New York State has a roughly $136 billion dollar budget for 2010-2011. Total member item allocations amount to less that .00132% of the entire State Budget. With all the bad press surrounding "member items" it is time to set the record straight. Abandoning "member items" is counterproductive to maintaining the health, safety and welfare of our State. At times like these, it is important that our State leaders hear from the people who are concerned about sound criminal justice policy to encourage them to do the right thing and continue support of vital programs like PLS.

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liberty suffered by an inmate while in prison includes the loss of the fundamental right to be free and the loss of opportunities to engage in everyday activities as well as the mental anguish that accompanies the loss of liberty. Id.

Claimant's Testimony Regarding Damages

The following is a summary of Mr. Sanabria's testimony about the losses he suffered as a result of unlawful confinement. During the three months of his wrongful confinement, Mr. Sanabria was in four correctional facilities. Being in prison was particularly emotionally difficult because he was aware that he should not have been confined. He was subjected to harassment by other inmates who knew that he could not defend himself for fear that he would be disciplined and that such discipline might have resulted in an even longer period of wrongful incarceration. This harassment consisted of assaults with urine and water.

Further, during the 91 days of wrongful confinement, Mr. Sanabria had no visitors. His phone calls with his wife were upsetting as she was upset because he was not home with her. Both Mr. Sanabria's wife and daughter have disabling medical conditions and depend on Mr. Sanabria's assistance. During the period of wrongful confinement, Mr. Sanabria was unable to attend the funerals of his aunt and uncle. During this period, Mr. Sanabria had difficulty sleeping and eating and lost 50 pounds.

The Court's Fact Finding

In determining the amount of damages to award for mental anguish, the court found that the claimant's testimony was "less than compelling." Mr. Sanabria's demeanor during his testimony about sleepless nights and weight loss persuaded the court that the impact of the wrongful confinement on his mental health and well-being was not as great as he would have had the court believe. The court completely discredited the testimony pertaining to the physical impact of the wrongful incarceration and found that there was scant evidence that he suffered discomfort, fear, or lack of privacy and degradation. The court found that the significant periods of incarceration that Mr. Sanabria had previously experienced rendered the impact of the wrongful confinement on his mental state "modest," particularly as compared to that which might have been experienced by someone who had never been incarcerated.

The court gave greater credence and weight to the injuries resulting from Mr. Sanabria's loss of liberty. During the 91 days that he was wrongfully confined, Mr. Sanabria was deprived of the opportunity to participate in many of the activities in which non-incarcerated individuals – including those on parole – engage. He was wrongfully separated from his family, denied the comforts of living in his own home, and was unable to enjoy the freedoms that remained unrestricted by the conditions of his parole. The court concluded that Mr. Sanabria experienced "a manifest and profound loss of liberty" during his confinement, as would anyone else so situated.

Determining the Award

Given the claimant's extensive criminal history and lengthy periods of incarceration, the court did not think he should receive the same rate of compensation as individuals who had been wrongfully confined for the first time following a false arrest. Many of these individuals experienced a degree of psychological trauma, shame and humiliation that was not present in this case. The court was therefore unwilling to assess damages in the amount of $66.00 a day.

Nor did the court think – as the defendants argued – that the claimant's loss of liberty was the equivalent to that endured by inmates who are wrongfully subject to SHU confinement, labeling such a comparison "simply misguided."

Relying instead on its own judgment, the court awarded the claimant $20,000 for his mental anguish and loss of liberty.

News and Briefs

Magistrate Finds Parole Policy Unconstitutional and Orders Agency to Determine the Actual Relationship of Local Sentences to Undischarged Felony Sentences

Other than an outright dismissal of the charges, often the best result for a parolee facing misdemeanor charges is a local sentence that runs concurrent to his or her unexpired felony sentence. Such a sentence means that no additional time will be added to the time that a parolee owes on his/her prior sentence. All too frequently however, when a parolee with concurrent local time returns to DOCS custody, his/her legal date computation is calculated on the assumption that the new misdemeanor sentence runs consecutively to the time that s/he owes on his/her prior felony sentence. This occurs because the Division of Parole takes the position that 1) in the absence of a sentence and commitment order to the contrary, a subsequent misdemeanor sentence runs consecutively to a prior undischarged felony sentence and 2) it is the parolee's responsibility to collect proof showing that the local sentence runs concurrently to the prior undischarged felony sentence.

After being held past their release dates as a result of the Division of Parole's failure to run local sentences concurrently to time owed on felony sentences, Terence Sudler and Timothy Batthany filed suit against a number of employees of the Department of Correctional Services, the Division of Parole, and the NYC Department of Correction seeking a change in the policies that led to this result and damages. In October 2010, a magistrate judge assigned to the two cases issued a report and recommendation finding the challenged policies to be unconstitutional but, on the basis of qualified immunity, declining to award damages. The cases are known as Sudler v. Goord, 08 Civ. 11389 (S.D.N.Y.) and Batthany v. Horn, 09 Civ. 6510 (S.D.N.Y.).

In their complaints, plaintiffs Sudler and Batthany claimed that the Division of Parole (DOP) employees had violated their 4th and 14th Amendment rights by failing to ascertain whether the plaintiffs' local misdemeanor sentences were imposed to run concurrently with the time remaining on their undischarged felony sentences and, by denying them parole jail time credit without knowing whether their local sentences were imposed to run concurrently or consecutively, unlawfully transforming those concurrent sentences into consecutive sentences. The plaintiffs sought class certification.

The defendant employees argued that their policies and practices did not violate the plaintiffs' 4th or 14th Amendment rights, and that even if they did, the alleged constitutional violation was not clearly established with the requisite level of specificity at the time that the violation occurred to warrant the imposition of personal liability on the defendants. They also opposed the motion for class certification.

The Unconstitutionality of the Defendants' Conduct

The defendants acknowledged that a prisoner has a liberty interest in being released upon the expiration of his maximum term of imprisonment. The defendants also admitted that P.L. §70.25 permits a sentencing judge to impose a sentence that is concurrent to a previously imposed sentence. However, the defendants argued that the language in P.L. §70.40(a)-(c) gave them the authority to credit against prior undischarged sentences only that amount of time spent in local jails which exceeded the length of any local sentence. The DOP defendants thus urged the court to find that notwithstanding the sentencing judge's authority to determine the relationship between the prior sentence and the local sentence, they had the authority to control how any time spent in custody would be credited against the outstanding parole term and against any new sentence.

The magistrate rejected the defendants' argument, holding that under New York law, the sentencing judge has the authority to decide whether a sentence is concurrent or consecutive, except where the *sentencing* statutes limit that authority, and that under federal law, a jailor's authority to confine a prisoner begins and ends with the sentence pronounced by the judge.

The magistrate then found that where prison officials decline to award a returned parole violator jail time credit for time spent in local custody when the sentencing judge expressly ordered that such time run concurrently to the returned parole violator's undischarged felony sentence, the practical effect is to lengthen the imposed sentence.

The court also found that the defendants' argument that they have no duty to seek out any inmate's sentence and commitment order was, as the plaintiffs argued, both abhorrent and absurd. Because the authority to detain inmates derives exclusively from the sentence or judgment of the court, the court wrote, it is axiomatic that parole and prison officials know, or should know, the nature and duration of each prisoner's sentence.

The court concluded that because of a policy that transferred the burden of proving the sentencing facts from the Division of Parole to the plaintiffs, the Division of Parole ran plaintiff's local and undischarged felony sentences consecutively despite contrary orders from the sentencing judge and complaints from plaintiffs. In doing so, the court stated, the Division of Parole defendants violated plaintiffs' rights to be released from prison at the expiration of their sentences.

Qualified Immunity

The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable state official would have known. That is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in light of pre-existing law, the unlawfulness of the defendants' conduct must be apparent.

In Sudler and Batthany, the defendants contended that in running the plaintiffs' local and undischarged felony sentences consecutively, their reliance on Penal Law §70.40(3)(a)-(c) was supported by state court decisions in their favor. This argument, the court commented, is analogous to the argument currently being made by the Department of Correctional Services defendants in cases where the plaintiffs request damages for time spent confined as a result of wrongfully imposed post-release supervision. In one such case, Scott v. Fischer, 616 F.3d 100 (2d Cir. 2010), the federal appeals court ruled that prior to its decision in Earley v. Murray, 451 F.3d 71 (2d Cir. 2006) – holding that the administrative imposition of post-release supervision was unconstitutional – a reasonable DOCS defendant could have relied on state court decisions finding the administrative imposition of post-release supervision to be lawful. Similarly, the court in Sudler and Batthany wrote, there are state court decisions adopting the reasoning advanced by the Division of Parole defendants in Sudler and Batthany, see e.g., Strozak, v. State of N.Y., Cl. No. 115280 (Ct. Cl. Apr. 15, 2010); Rivera v. State of N.Y., Cl. No. 114133 (Ct. Cl. Aug. 24, 2009); Mickens v. N.Y.S. Div. of Parole, 1/5/2007 N.Y.L.J. 25 (col. 1) (Sup. Ct. Nassau Co. Jan. 5, 2007). Citing Scott v. Fischer, the court concluded that where, as here, even the state court judges do not recognize that particular conduct violates the law, it cannot be said the law was clearly established for purposes of qualified immunity.

Further, the court noted, it is the placement on the parole violator of the burden of producing proof that his sentences are concurrent that makes the defendants' conduct unconstitutional. There is no case that the court could find clearly establishing the unlawfulness of requiring parole violators themselves to prove the concurrent nature of their sentences. For this reason, the court held that while the unconstitutionality of this burden seems obvious, in light of Penal Law §70.40(3)(c)(iii)'s directive to run local time consecutively to parole time owed, a reasonable

state official could have concluded that requiring a returned parole violator to demonstrate the concurrent nature of his sentence before awarding parole jail time credit for the time served in local custody was not unlawful. Thus, the court concluded that the Division of Parole Officials are entitled to qualified immunity and granted their motion for summary judgment.

The plaintiffs in Sudler v. Goord and Batthany v. Horn were represented by attorneys Jeffrey Roth of New York City and Matthew Brinckerhoff of Emery Celli Brinckerhoff and Abady, LLP, also of New York City.

Appeals Court Rules New York's Persistent Felony Offender Law is Constitutional

In ***Pro Se***, Vol. 20, No. 2, we reported on Besser v. Walsh, 601 F.3d 163 (2010). In this decision, the Second Circuit Court of Appeals held that New York's discretionary persistent felony statute (PFO statute) was unconstitutional. The statute in question, Penal Law §70.10, applies only to discretionary persistent felony offenders; it does not apply to mandatory persistent felony offenders who have been convicted of three violent felony offenses and were sentenced under P.L. §70.08. The basis for the court's decision in Besser was that the PFO statute required judicial fact finding which violated a defendant's 6th Amendment right to trial by jury. The Supreme Court decisions upon which the Besser decision was based are Apprendi v. New Jersey, 530 U.S. 466 (2000) and Blakely v. Washington, 542 U.S. 296 (2004).

After the decision was issued, a majority of the judges on the Court of Appeals called for a **rehearing en banc** (a hearing that takes place before all the judges on the court). Eleven judges convened to hear oral argument on the issue of whether New York's discretionary persistent felony offender statute runs afoul of the Supreme Court's decision in Blakely v. Washington. Eight of the justices vote to reverse the Besser decision. In this habeas corpus action, now known as Portalatin v. Graham, 2010 WL 4055571 (2d Cir. Oct. 18, 2010), the majority of the justices found the state court decision holding that the Sixth Amendment principle announced in Blakely did not prohibit the type of judicial fact finding resulting in enhanced sentences under the state's persistent felony offender statute and that the state court decisions which reached that conclusion were not contrary to or an unreasonable application of clearly established federal law as determined by the United State Supreme Court. On this basis, they ruled that Petitioner Portalatin's habeas petition should be denied and affirmed the lower court's decision denying three other petitions which were heard with Petitioner Portalatin's petition.

The New York State PFO statute allows judges to impose enhanced sentences on persistent felony offenders. The statute provides that when a defendant has been convicted of a felony, the prosecutor must prove that he had previously been convicted of two other felonies. The court is then required to assess whether a PFO sentence is warranted, taking into account the defendant's history and character and the nature of his criminal conduct. If the judge decides that in light of these factors an enhanced sentence is justified, regardless of what the sentencing range would have been for the crime that he was convicted of committing, the defendant will be given an A-1 sentence of between 15 years to life and 25 years to life.

In state court, the petitioners in Portalatin alleged that the PFO statute was unconstitutional because it required judges to engage in fact finding. The 6th Amendment provides that criminal defendants are entitled to trials by jury. First in Apprendi and then in Blakely, the Supreme Court ruled that when a sentence is enhanced as a result of judicial fact finding other than the fact of a prior conviction, the defendant's 6th Amendment rights are violated. The state court ruled that the state PFO statute did not require judicial fact finding beyond a finding that the defendant had two prior felony convictions and that this form of judicial fact finding is expressly permitted by Apprendi and does not run afoul of Blakely.

In their habeas actions, plaintiff Portalatin and the other petitioners argued that the state court decision was contrary to or involved an unreasonable application of clearly established federal law as determined by the U.S. Supreme Court. They argued that because the PFO statute requires the sentencing court to consider the defendant's history and character and the nature of his criminal conduct, the court had engaged in the type of fact finding that was prohibited by Apprendi and was therefore contrary to, or involved an unreasonable application of, clearly established Supreme Court precedent.

The en banc decision concluded that the state statute, as it has been interpreted by the state courts, does not involve impermissible judicial fact finding. According to the decision, it is the fact that the defendant has been convicted of three felony offenses that leads to eligibility for enhanced sentencing. Because the factors that the judge is then required to consider do not increase the range of permissible sentencing beyond what can be imposed on the defendant by virtue of having been convicted of three felonies, the court found that the sentencing scheme does not violate the principles established in Apprendi and Blakely.

There was a dissent in the case which **strenuously** (strongly) disagreed with the analysis of the majority. The petitioners plan to appeal to the U.S. Supreme Court.

Disciplinary Hearings

Court Finds Violation of Inmate's Right to be Present During Witness Testimony

In Matter of Ross v. Bezio, 907 N.Y.S.2d 520 (3d Dep't 2010), after allegedly writing a sexually explicit letter to a female counselor, petitioner Ross received a misbehavior report charging him with stalking, threatening an employee and harassment. At his Tier III hearing, the petitioner testified and then requested 5 witnesses but refused to tell the hearing officer the questions he wanted to ask four of the witnesses. After seeking the questions several times, the hearing officer closed the hearing to consider the evidence. Subsequently, he sought out the witnesses and reopened and closed the hearing several times as witnesses were located. Three of the witnesses refused to testify, one testified that he had no information about the incident and the fifth testified as to what he had observed. Petitioner was not present for the testimony of the two witnesses who testified, but was permitted to listen to their tape recorded testimony. The hearing officer then closed the evidence and found the petitioner guilty.

In this Article 78 challenge to the hearing, the court considered whether the hearing officer had violated petitioner's right to be present during his witnesses' testimony. The court concluded that the petitioner's refusal to provide questions for the witnesses whom he wished to call justified the hearing officer's decision to close the evidentiary portion of the hearing. However, the court went on, the hearing officer's decision to re-open the hearing and call the petitioner's witnesses, "reinvoked" petitioner's right to be present. As there was no basis in the record for excluding petitioner from the re-opened hearing, the court found that the hearing officer's failure to allow petitioner to be present for the testimony of his witnesses violated his right to be present. The court ordered the determination of guilt annulled and all references to the hearing expunged from the petitioner's record.

Violation of Right to Call Witnesses Leads to Reversal of Hearing

According to a misbehavior report, while his cell was being searched, Jose Santiago became involved in an altercation with several officers. At the hearing into the charges brought against him, Mr. Santiago requested that the three officers involved in the incident testify. After calling two of the officers, the hearing officer

refused to call the third, finding that his testimony would be redundant. In Matter of Santiago v. Fischer, 908 N.Y.S.2d 139 (3d Dep't 2010), the court found that the reason for the petitioner's request for the third officer – that his report was inconsistent with the reports of the other two officers — undercut the hearing officer's determination that the testimony would be redundant. The court went on to find that because the hearing officer put forth a good faith reason for the denial, the petitioner's constitutional rights were not violated. In the absence of a violation of a constitutional right, the court wrote, the proper remedy is a remittal for rehearing.

Failure to Serve as Directed in Order to Show Cause Leads to Dismissal

In Matter of Abreu v. Vonce, 907 N.Y.S.2d 721(3d Dep't 2010), the Third Department once again reminds litigants that when they use an Order to Show Cause to start an Article 78 proceeding, they must meet the deadlines set in the Order and follow any instruction set forth in the Order. In this case, the petitioner used an Article 78 proceeding to challenge his conditions of confinement in SHU. A Supreme Court justice signed an Order to Show Cause directing the petitioner to serve the petition, exhibits and supporting affidavits upon each respondent and the Attorney General on or before a specific date. The respondents moved to dismiss the petition because the petitioner, by his failure to comply with the service requirements, had not obtained personal jurisdiction over them. Here, the affidavits of service submitted by the petitioner showed that he had not attempted to serve the respondents until more than a week after the date specified by the court. Petitioner contended that he had not received the Order to Show Cause until after the date for serving the respondents had passed. Noting that the petitioner had not submitted proof of the date that he received the Order to Show Cause, the court found that the petition had been properly dismissed.

Parole

Court Finds That Parole Board Misrepresented Petitioner's Conduct

Having been charged with an array of offenses including attempted criminal possession of drugs in the first degree, kidnapping in the second degree, criminal possession of a weapon, and attempted robbery, the petitioner in Matter of the Application of Galan-Martinez v. NYS Division of Parole, 9/21/2010 N.Y.L.J. 30, (col. 1), pled guilty to the criminal possession of drugs in the second degree and to the weapons charge and was sentenced to 9 years to life on the former and 5 years on the latter. After twice being denied parole, Mr. Galan-Martinez filed an Article 78 petition challenging the denial.

In the parole decision challenged by the petitioner, the Board found that the seriousness of the petitioner's offense, his prior kidnapping conviction, and his deportation and an illegal reentry showed a well established pattern of criminal behavior. The Board also found that there was a reasonable probability that the petitioner would not live at liberty without violating the law. Based on these findings, the Board concluded that the petitioner's release was incompatible with the welfare and safety of the community.

While the Division of Parole argued that the court must uphold its decision if the decision was within the statutory requirements, the court found that the statutory requirements had not been met and that the majority of the Board members had not carefully or accurately reviewed the relevant materials. For example, during the hearing, a Board member incorrectly stated that the petitioner had been charged with a drug deal involving 500 pounds of cocaine and with having attempted to murder someone. Neither was true. In fact he had been charged with attempted possession of over 4 ounces of

cocaine and had pled guilty to attempted possession of 2 ounces of cocaine. But, the court noted, a review of the criminal file revealed that the petitioner was never in fact in the vicinity of any cocaine, because the entire incident was engineered by law enforcement: a confidential informant had offered to sell petitioner 500 pounds of cocaine and petitioner had agreed to pay him $2,000,000. However, the confidential informant did not actually have any cocaine and petitioner did not have any money. He had gone to the location of the bogus sale planning to rob the "seller" of the cocaine. The offense actually consisted of petitioner, who had no money, brandishing a loaded gun at the confidential informant who had no cocaine. The court noted that the Board member had concocted his own version of the facts underlying petitioner's conviction and that most of it was simply false.

Further, the court stated, in violation of Executive Law § 259-l(2)(c)(A)(iv), the Board had completely failed to consider petitioner's deportation status. Petitioner had been convicted in federal court of entering the country illegally after having been deported and had been sentenced to 6 years. Thus, if paroled, he would have gone into federal custody. Having elicited these facts, the Board nonetheless based its denial on the conclusion that petitioner would not be able to live at liberty without violating the law and that his release was incompatible with the welfare and safety of the community. Because petitioner's release would lead to 6 additional years of confinement, these conclusions, the court found, were not only wrong, but had absolutely no factual basis.

The court stated that while the Board of Parole has enormous discretion, it must rely on an accurate set of facts and properly apply the law. Here, where the Board ignored the fact that petitioner would serve 6 years in federal custody after he is paroled and distorted the facts of the crime that the petitioner was actually convicted of, reversal and remand were necessary.

Sentencing

Drug Law Reform Act of 2009

In two decisions from Queens County, two Supreme Court Justices concluded that the defendants were not eligible for resentencing under the Drug Law Reform Act of 2009 (2009 DLRA).

In People v. Burnett, 903 N.Y.S.2d 881 (Sup. Ct. Queens Co. 2010), the defendant, who in 1997 had been convicted of a Class B drug felony, failed to appear for sentencing and was returned on a warrant in 2008, after having been arrested for burglary. In March 2009, the court imposed a sentence of 7 to 21 years for the 1997 drug conviction. The defendant also pled guilty to bail jumping and received a concurrent sentence. Approximately 6 months later, he pled guilty to burglary in the second degree, a violent felony offense, and was sentenced to 3½ years and 5 years post-release supervision.

A year later, defendant Burnett moved to be resentenced pursuant to the 2009 DLRA. The 2009 DLRA permits the resentencing of eligible defendants convicted of Class B drug offenses if certain criteria are met. The People argued that defendant Burnett was not an eligible defendant because he had a violent felony conviction. Defendant Burnett argued that because he did not engage in the conduct underlying the burglary conviction until after he had been convicted of the Class B drug felony, the violent felony conviction was not a barrier to resentencing.

Criminal Procedure Law §440.46(5) provides that the resentencing provision of the 2009 DLRA shall not apply to any person who is serving a sentence on or has a predicate felony conviction for an exclusion offense. An exclusion offense is a crime for which the person was previously convicted within the preceding ten years, excluding any time during which the offender was incarcerated for any reason between the time of commission of the previous felony and the time of the commission

of the present felony, which was a violent felony offense.

Under a strict and literal interpretation of C.P.L. § 440.46(5), defendant Burnett was eligible for resentencing because the violent felony offense had not been committed prior to the commission of the drug offense for which the defendant was seeking resentencing. Nonetheless, the court rejected the defendant's argument that he was eligible for resentencing. In doing so, the court noted that resentencing opportunities should not be available where a strict statutory reading would be inconsistent with the legislative intent behind the statute. The court found instructive the Court of Appeals decision in People v. Mills and People v. Then, 872 N.Y.S.2d 705 (2008), in which the Court considered the eligibility of two defendants for resentencing under the 2005 DLRA. The 2005 DLRA permitted resentencing of Class A drug offenders who were in custody but held that defendants who had been released to parole supervision and reincarcerated were not, for the purposes of the eligibility criteria, "in custody." "In custody," for the purposes of eligibility for resentencing meant individuals who had not been released to parole supervision on the sentence for which they were seeking resentencing. "Surely," the Court wrote, "the Legislature did not intend for fresh crimes to allow for resentencing opportunities?"

Applying this rationale to the facts presented by defendant Burnett, the Queens justice concluded that the legislature did not intend for individuals who commit violent felony crimes after they are convicted of Class A drug offenses to resurrect their eligibility for resentencing opportunities. Here, where defendant Burnett had absconded for close to 11 years, did not return voluntarily for sentencing, and was only returned upon his arrest for burglary, a violent felony offense to which he pled guilty, the court held that it would be contrary to the law's intent to allow the defendant to benefit for resentencing eligibility purposes by absconding and committing a new violent crime subsequent to the drug offense for which he seeks resentencing.

Having decided that defendant Burnett did not meet the eligibility criteria, the court did not have to consider whether substantial justice dictated that his application for resentencing be denied. Nonetheless, the court chose to address this issue. Although defendant Burnett's prison record was positive and he had developed strong community ties prior to the most recent burglary arrest, the court found that his criminal history, which, in addition to the conduct described above included three robbery convictions, warranted a finding that substantial justice dictated that the defendant's application for resentencing be denied on the merits.

In a decision involving another eligibility issue, another Queens justice found that a defendant who had applied for resentencing was not "in custody" as that term should be interpreted in the 2009 DLRA. The court outlined the facts that gave rise to its decision in People v. Hart, 8/23/10 NYLJ 31, (col. 1) (Sup. Ct. Queens Co. 2010), as follows. In 2000, defendant Hart was sentenced as a second felony offender to concurrent terms of 7½ to 15 years for the crimes of criminal possession of a controlled substance in the third degree, a class B felony, and criminal possession of a controlled substance in the fourth degree, a class C felony. In 2009, after being released to parole supervision, violating parole and returning to prison, defendant Hart applied to be resentenced under the 2009 DLRA. The People argued that because the defendant was incarcerated solely because of his parole violation, he is not eligible for resentencing, and even if he were eligible, substantial justice dictates that his application should be denied in light of his criminal history including his parole violations. In support of this argument, the People put in evidence showing that between 1998 and his application for resentencing, Defendant Hart had been paroled 4 times.

Criminal Procedure Law §440.46 provides that a person is eligible for resentencing when he is in the custody of the Department of Corrections, has been convicted of a Class B felony offense and was sentenced to an indeterminate prison term with a maximum term of more than 3 years.

In defendant Hart's case, the court held that even though he was convicted of a class B felony offense and had received a sentence that carried a maximum term in excess of 3 years incarceration, he did not meet the criteria entitlement. The court reasoned that although the defendant was now physically in the custody of DOCS, he was there as a result of a parole violation, and once a defendant is released to parole supervision, he can never again be considered "in custody" and eligible for resentencing within the meaning of the 2009 DLRA. The 2009 DLRA, the court wrote, like its predecessors, was not intended to apply to those offenders who have served their term of imprisonment, been released from prison to parole supervision, and whose parole was then violated with a resulting period of incarceration. "The defendant was relieved of his sentence of incarceration when he was paroled; defendant of his own accord, could have remained at liberty by adhering to his parole conditions." In reaching this result, the court cited to People v. Pratts, 904 N.Y.S.2d 380 (1st Dep't 2010), in which the First Department reached the same result.

Defendant Cannot "Tacitly" Waive Counsel at Sentencing

In People v. Bullock, 904 N.Y.S.2d 629 (4th Dep't 2010), the court re-affirmed the long standing principle that a criminal defendant's right to counsel at sentencing cannot be waived without an inquiry as to whether the waiver is knowing and voluntary. In Bullock, the defendant was initially assigned counsel but then retained counsel. At his plea proceeding, the court indicated that it would sentence the defendant to a 15 year determinate sentence, but would consider a lesser sentence if defense counsel provided a compelling reason to do so. Prior to sentencing, the court permitted the defense counsel to withdraw based on the defendant's indication that he intended to retain new counsel. The court gave the defendant 90 days to find a new lawyer. On the adjourned sentencing date, the defendant appeared pro se and told the court that the lawyer he wished to retain would not be available for another month. The court denied the request for another adjournment, and asked the defendant whether he wished to speak on his own behalf. The defendant informed the court that he was having difficulty obtaining documents that would establish that there were mitigating circumstances entitling him to a lesser sentence. The court ruled that the defendant had waived his right to counsel and sentenced him to 15 years.

The People agreed that the defendant had not waived his right to counsel, but argued that he had forfeited it. The appeals court disagreed, noting that while egregious conduct by the defendant can lead to a deemed forfeiture of the fundamental right to counsel, there was no such conduct by the defendant here. Further, the court found the lower court's actions problematic because the court never warned the defendant that sentencing would proceed on the adjourned date if he did not have retained counsel nor did the court offer to assign counsel if he could not afford retained counsel. Thus, the court wrote, it cannot be said that defendant's conduct in requesting a second adjournment was "calculated to undermine, upset or unreasonably delay sentencing."

The appeals court found the absence of counsel particularly troubling in this case because the defendant had informed the court that he was unable to present any mitigating circumstances for the court to consider and had not received a copy of the pre-sentence report.

Had the lower court either warned the defendant prior to sentencing that if he did not have counsel on the adjourned date, sentencing would proceed, or told him when he appeared on the adjourned date without counsel that if he did not have counsel in two weeks the sentencing would proceed without counsel, the appeals court might have concluded that the defendant had forfeited his right to counsel at sentencing. However, in the absence of such warnings, the court held, appropriate remedy is to remand the case for resentencing.

Federal Court Decisions

Federal Court Solicitude Toward Pro Se Plaintiffs

In its decision in Tracy v. Freshwater, 2010 WL 4008747 (2d Cir. Oct. 14, 2010), the Second Circuit Court of Appeals discussed what factors a lower court should examine prior to withdrawing the solicitude that the federal courts are required to extend to pro se litigants.

This issue arose in the context of a §1983 claim that a deputy sheriff had used excessive force during an arrest. The plaintiff alleged that the force used was excessive in four respects. In response to the defendants' motion for summary judgment, the district court found that resolving all factual disputes in the plaintiff's favor, the officer's actions were objectively reasonable and did not violate the plaintiff's Fourth Amendment rights to be free from unreasonable searches and seizures. On appeal, the Second Circuit found that three of the uses of force did not violate the plaintiff's rights. The claim that the officer sprayed pepper spray in the plaintiff's eyes after he was fully restrained, the court found, should not have been dismissed. The court reversed the district court's dismissal of that claim and remanded the case to the district court for further proceedings.

In addition, the district court withdrew the special **solicitude** (consideration) which courts are required to extend to civil litigants who are proceeding pro se. The reason for this rule is that a pro se litigant generally lacks both legal training and experience and is likely to forfeit important right through inadvertence if he is not afforded some degree of protection. This solicitude has taken the following forms:

- liberal construction of pleadings, motion papers and briefs;
- relaxation of the rules pertaining to amendment of pleadings;
- leniency in the enforcement of procedural rules; and
- deliberate, continuing efforts to ensure that pro se litigants understand what is expected of them.

The scope of the solicitude afforded, the court wrote, may vary, depending on the procedural context and the demands placed by that context upon the inexperienced litigant. In addition, the appropriate degree of special solicitude is not the same for all litigants; a court should be particularly solicitous of pro se litigants who assert civil rights claims and litigants who are incarcerated. Finally, the degree of solicitude may be lessened where the litigant is experienced in litigation and familiar with the procedural setting presented.

The court also commented that while a pro se litigant should be afforded a substantial degree of solicitude, the amount of solicitude to be afforded depends on a variety of factors. For this reason, the court advised, the district courts should exercise their discretion to determine, based on the totality of the relevant circumstances, when the ordinary approach is not appropriate and what degree of solicitude, if any, should be afforded.

Because the court remanded the case for additional proceedings, it considered whether the district court's withdrawal of special solicitude from Plaintiff Tracy for the remainder of his lawsuit was a proper exercise of discretion. In Plaintiff Tracy's case, based on his participation in ten federal and state actions and the 32 motions that he had filed before summary judgment was granted, the district court withdrew the special solicitude normally extended to pro se litigants. Applying the principles set forth above, the court concluded that the general withdrawal of solicitude for the entirety of the action on the basis of Plaintiff Tracy's repeated participation in only some aspects litigation was an abuse of discretion where there was no showing that he had previously participated in the upcoming stages of litigation. While it may well have been appropriate to withdraw Plaintiff Tracy's special status in relation to the requirements of opposing a motion for summary judgment based on the quality of his papers, the court wrote, this

showing was not sufficient to justify a full withdrawal of special status with regard to all aspects of the litigation. For this reason, the court vacated the district court's decision denying Plaintiff Tracy special status and left it to the district court to determine whether special status should be limited or withdrawn with regard to particular matters.

Court Denies Damages For Unlawful PRS That Was Served Prior to 2008

At this point, both the state and federal courts have held that unless a period of post-release supervision is imposed by a court, it is unconstitutional for the Department of Correctional Services or the Division of Parole to require an individual to serve post-release supervision. Many individuals who were unlawfully required to serve "administratively imposed" post-release supervision are seeking damages in the state and federal courts for the time that they were incarcerated for violations of unlawfully imposed post-release supervision. Thus far, we are not aware of any cases in which the wronged individuals were successful in obtaining damages. Recently, the Second Circuit Court of Appeals, in Scott v. Fischer, 616 F.3d 100 (2d Cir. 2010), decided the issue of whether a reasonable DOCS or Parole employee would have known that it was unlawful to impose administrative post-release supervision prior to the court's decision in Early v. Murray, 451 F.3d 71 (2d Cir. 2006). The court found that prior to the date of its decision in Earley v. Murray – June 9, 2006 – a reasonable DOCS official would not have known that administratively imposing post-release supervision was unconstitutional. The court did not decide on what date a reasonable prison official would have known that it was unconstitutional to require an individual to serve administratively imposed post-release supervision.

The Doctrine of Qualified Immunity

The determination of when a reasonable prison official would have known that imposing administrative post-release supervision was unlawful is the foundation of deciding whether a state actor is entitled to qualified immunity. See, Harlow v. Fitzgerald, 457 U.S. 800 (1982) ("[G]overnment officials performing discretionary functions are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."). After a court determines that a defendant has violated an individual's constitutional rights, it must decide whether to order the defendant to compensate the individual for the wrong that was done to him or her. A court will not impose damages on a defendant who has violated an individual's constitutional rights unless a reasonable government actor in the defendant's position would have known that his conduct was unlawful.

To determine whether a right is clearly established, the court looks at 1) whether the right was defined with reasonable specificity, 2) whether Supreme Court or court of appeals case law supports the existence of the right in question and 3) whether under pre-existing law a reasonable defendant would have understood that his or her acts were unlawful.

When a court finds that a reasonable government actor in the defendant's position would not have known that his conduct was unlawful, the court grants him qualified immunity. That is, although his conduct was unlawful, the court will not require the defendant to pay damages to the plaintiff because there was a basis in the law for his belief that his conduct was lawful.

In the context of the issue presented by the administrative imposition of post-release supervision, the court, citing Deal v. Goord, 778 N.Y.S.2d 319 (3d Dep't 2004); People v. Crump, 753 N.Y.S.2d 793 (4th Dep't 2003), found that prior to the Earley decision, the courts in New York State had routinely found the administrative imposition of post-release supervision to be lawful. Plaintiff Scott,

however, argued that the law that only a judge could impose a sentence was clearly established in 1936 in the Supreme Court decision Hill v. United States ex rel. Wampler, 298 U.S. 460 (1936). The court did not accept the plaintiff's argument. It found that while in Wampler a clerk had added a discretionary penalty to a defendant's sentence, here DOCS officials had added a mandatory penalty. Thus, a ruling that someone who was not a judge could not impose a discretionary element to a sentence did not put DOCS officials on notice that they could not add a penalty which was a mandatory part of the sentence.

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The court also said that although the Earley court had cited Wampler as the reason for rejecting the state's position that the administrative imposition of post-release supervision did not violate clearly established law, the standard used in the Earley case for determining "clearly established" was different from the standard used for determining "clearly established" in the context of a qualified immunity defense. The Earley case, the court wrote, was a habeas action brought under the Anti-Terrorism and Effective Death Penalty Act (AEDPA). In AEDPA actions, the court must determine whether the application of the law by state court judges was an unreasonable application of clearly established law. In that context – determining whether the state court unreasonably applied clearly established law — it was appropriate to require that state court judges have an understanding of the significance of the Wampler ruling. It would be inappropriate to demand the same level of legal understanding from prison officials from whom the plaintiff is seeking money damages. Thus, the court concluded, that the Earley court found in the context of a habeas proceeding that the law that the administrative imposition of post-release supervision was clearly established does not require the same finding with respect to prison officials in an action for damages.

Based on this reasoning, the court found that the defendants in the Scott case were entitled to qualified immunity and the damages claims against them were dismissed. The court refused to reach the question of when the law was clearly established for the purposes of holding prison and parole officials liable for the wrongful imposition, and the enforcement of wrongfully imposed, post-release supervision.

Pro Se Practice

ORDERS OF PROTECTION

Introduction

During the course of legal proceedings, courts sometimes issue "Orders of Protection" – also known as "Restraining Orders" or "Stay Away Orders" – to keep people who are involved in the proceedings from having contact with each other. These orders are related to the issues being heard by the court. An incarcerated individual can violate Orders of Protection by writing or calling the person with whom the order prohibits contact or by communicating with them through third parties.

Orders of Protection can affect your post-release life. For example, while you might think that an ideal post-prison residence would be to live in your former household, an Order of Protection that requires you to stay away from a member of your household will require that you come up with an alternative plan. With respect to post-release plans, also keep in mind that an Order of Protection is discharged when the time specified in the order expires. Because the Order of Protection is not a part of the punishment for the commission of a crime, that time is not necessarily tied to the end of your prison term.

Orders of Protection differ as far as what kind of contact is prohibited and the consequences of violating the order. If an Order of Protection was issued against you, you should be familiar with the terms of your order. The law requires that the court that issued the protective order provide a copy of the order to the local or state correctional facility where the individual who is the subject of the order is detained or imprisoned or, if the individual is under probation or parole supervision, to the supervising probation department or division of parole. See, Criminal Procedure Law (C.P.L.) §530.12(8). If the Order of Protection to which you are subject is not available at your facility, or if you believe an Order of Protection was issued against you in relation to charges for which you are not now in prison, you should write to the court that issued the order and request a copy.

Types of Protective Orders

In New York, the criminal courts may issue Orders of Protection in favor of witnesses and victims of family offenses, see C.P.L. §530.12, and in favor of witnesses and victims of non-family related offenses, see C.P.L. §530.13. The Family Court may also issue Orders of Protection under Article 8 (Family Offense Proceedings) of the Family Court Act, §821-a(2)(b) and §842.

The criminal courts have concurrent jurisdiction with the Family Court over family offense proceedings involving Orders of Protection and have sole jurisdiction to issue Orders of Protection in favor of victims of crimes which are not family offenses. See, Family Ct. Act §§115(e), 812, & 813(3); C.P.L. §100.07. The criminal courts are authorized to punish an individual for violating a Family Court Order of Protection but, when there are Orders of Protection issued by both a criminal court and the Family Court, only one court can punish a defendant/respondent for each act of misconduct. See, People v. Wood, 719 N.Y.S.2d 639 (2000).

An Order of Protection issued by a federal court or by another state, territory or tribal jurisdiction is valid in New York. New York is required to give such Orders of Protection "full faith and credit." See, 18 U.S.C.A §2265; Penal Law (P.L.) §215.51(b). Full faith and credit means that the New York courts must treat these Orders of Protection as they would treat Orders of Protection issued by the New York courts.

Criminal courts have a function that is very different from the function of the Family Court. The goal of the Family Court is to reconcile the parties. The purpose of the criminal courts is to punish people who have broken the law and to protect the public.

Because of their different purposes, the criminal courts and the Family Court operate differently with respect to Orders of Protection. In Family Court, the person seeking an Order of Protection may end the proceeding

at any time by withdrawing the petition. The criminal courts only issue Orders of Protection in the course of criminal prosecutions. In the criminal courts, it is the State of New York who is acting against the defendant; the victim of the crime and/or any other person for whose benefit an Order of Protection is issued is not responsible for the issuance or continuance of an Order of Protection. The District Attorney ultimately has the discretion to request an Order of Protection in favor of the victim or a witness and the court can issue an Order of Protection without the victim's consent. See, People v. Monacelli, 750 N.Y.S.2d 690, 691 (4th Dep't 2002). Once an Order of Protection has been issued, even if the protected person says that the defendant may visit or communicate with him/her, to do so would be a violation of the Order of Protection.

The liberal provisions of Article 530 of the New York Criminal Procedure Law are intended to reduce domestic violence and therefore the law allows a defendant to be confined after arrest for a family law offense "for reasonable cause shown" and to remain confined until a hearing is held. See, C.P.L. §530.12(9). A list of family offenses is set forth in §530.12. These offenses range from Disorderly Conduct, a violation, to Assault in the Second Degree, a Class D violent felony. Pending the resolution of charges, a criminal court can release a defendant by means of an order of recognizance or bail. During the time between the defendant's release and the resolution of the charges, the court also has the authority to issue a **temporary** Order of Protection, in order to protect victims, potential witnesses or members of the defendant's family or household who were the victims of the claimed offenses. See, C.P.L. §530.13.

Upon conviction, a **permanent** Order of Protection may be issued. This order may require the defendant to stay away from the victim, and thus to leave the home (a full Order of Protection) or it may allow the defendant to remain in contact with the victim but require that the defendant refrain from committing a family or criminal offense against the protected person and refrain from acting, or failing to act, in a way that creates an "unreasonable risk to the health, safety and welfare of a child, family or household member's life or health" (limited Order of Protection). The permanent Order of Protection may impose any other conditions that reasonably relate to the underlying conviction, including enrollment in behavioral modification programs or substance abuse treatment.

The Third Department of the Appellate Division recently clarified that Orders of Protection issued for witnesses after a criminal conviction can only be in favor of "those who actually witnessed the offense for which defendant was convicted rather than simply all witnesses who testified at trial." See, People v. Somerville, 900 N.Y.S.2d 468 (3rd Dep't 2010) (Order of Protection vacated where witnesses testified regarding events surrounding assault, but stated they did not see the actual assault), citing, People v. Creighton, 749 N.Y.S.2d 309 (3rd Dep't 2002)(Order of Protection vacated where protected witness testified regarding dismissed homicide charge). However, an Order of Protection may cover family members who live in the same house as the victim.

The failure to specify the address of the protected person in the Order of Protection will not render it invalid under a due process challenge. People v. Bostic, , 807 N.Y.S.2d 280 (Dist. Ct. Suffolk Co. 2005) (explaining that an address specification requirement would subvert the purpose of protecting the victim). While an Order of Protection may impose a condition that requires the respondent/defendant to stay away from a particular location, it may not do so unless the protected person is identified in the order. See, People v. Smith, 782 N.Y.S.2d 596 (Crim. Ct., N.Y. Co. 2004) (holding that an Order of Protection directing a person to stay away from a particular place without identifying the protected person was beyond the scope of §530.13).

Criminal Consequences of Violating Orders of Protection

The issuance of an Order of Protection creates some circumstances that you must avoid. For example, when it comes to staying away from a protected person, if you are eating at a buffet, and the protected person walks into the

restaurant, it is your duty to leave immediately – even if you have not finished your meal. When it comes to having no contact, even when it is the protected person who calls you, it is your duty to end the call as soon as you find out who it is. Having no contact also means that you cannot communicate through a third party. That means you are prohibited from relaying messages through someone else to the protected person. The conditions of Orders of Protection are strictly enforced by the threat of criminal sanction.

The penalties for violating an Order of Protection are not restricted solely to the defendant. The protected person can also be criminally sanctioned for encouraging or helping the defendant to violate the order. See P.L. §115.00, Criminal Facilitation in the Fourth Degree, a Class A misdemeanor. False accusations made by the person seeking the Order of Protection are punishable as Class A misdemeanors. P.L. §210.45 (criminalizing the making of false written statements). Nonetheless, the burden rests largely on the defendant to comply with the order.

The first violation of an Order of Protection can result in a conviction for Criminal Contempt in the Second Degree. See Penal Law (P.L.) §215.50(3). Criminal Contempt in the Second Degree is a Class A misdemeanor punishable by up to one year in jail. Violating a "stay away" order is a more serious criminal offense than violating other provisions in an Order of Protection which would otherwise result in a charge of Criminal Contempt in the Second Degree. See, e.g., People v. Dewall, 790 N.Y.S.2d 182, 184 (2d Dep't 2005) (Evidence that defendant went to complainant's residence while she was not at home was sufficient to support conviction of criminal contempt in the second degree, but not criminal contempt in the first degree; defendant did not violate that part of the Order of Protection directing him to stay away from complainant). If the order specifies that you must stay away from the victim, a conviction for Criminal Contempt in the Second Degree can serve, for the next five years, as a predicate for the charge of Criminal Contempt in the First Degree under P.L. §215.51(c). Criminal Contempt in the First Degree is a Class E felony punishable by an indeterminate sentence of up to 1⅓ to 4 years for first time felony offenders. Note that the above felony charges will serve as predicates for a second felony offender status or for persistent felony offender adjudications in the future.

Criminal Contempt in the First Degree can also be charged without a prior conviction for criminal contempt where, during the violation of the Order of Protection, the victim is threatened with physical injury or death, physical contact is made or attempted, or repeated phone calls are made, for example, under the provisions of P.L. §215.51(b)(i-vi).

Aggravated Criminal Contempt is a Class D felony. P.L. §215.52. For a first time felony offender, the maximum sentence is 2⅓ to 7 years. Aggravated Criminal Contempt can be charged where 1) the victim (for whose protection an Order of Protection was issued) is injured during the course of a violation the Order of Protection, 2) by violating an Order of Protection, the defendant, commits the crime of criminal contempt in the first degree having previously been convicted of the crime of aggravated criminal contempt, or 3) by violating an Order of Protection, the defendant, commits the crime of criminal contempt in the first degree, having been convicted of the crime of criminal contempt in the first degree within the preceding five years.

Early Termination or Modification

All Orders of Protection have an expiration date, even those labeled "permanent." A Family Court Order of Protection may be reconsidered or modified by the Family Court at any time if the moving party shows "good cause" under Family Court Act §844. There is no statue providing a mechanism to end or modify a criminal court Order of Protection. Nonetheless, C.P.L. §530.12 – which governs Family Court Orders of Protection – gives some guidance. When a case is pending, subdivision 3-b provides emergency powers to a criminal court to modify a Family Court Order of Protection upon the request of a

petitioner – generally the victim – without notice. Subsection 15 states:

> Any motion to vacate or modify an order of protection or temporary order of protection shall be on notice to the non-moving party, except as provided in subdivision three-b of this section.

The Appellate Division will also review the terms of an Order of Protection as an appealable issue following sentencing. See C.P.L. §450.10. If you have not yet perfected your criminal appeal and the time for perfecting the appeal has not expired, you may address the Order of Protection in your appeal, seeking modification or termination of the order. See, People v. Nieves, 778 N.Y.S.2d 751 (2nd Dep't 2004). You may have had to object to the Order of Protection at the sentencing court in order to preserve your right to appeal it, however. See, People v. Shewczyk, 897 N.Y.S.2d 663 (3rd Dep't 2010). You may write to PLS for materials about the appellate process if you are not familiar with it.

Criminal Procedure Law §530.13, which governs non-family offenses, does not give any direction on how to end or modify an Order of Protection that was issued in the course of a criminal proceeding. One thing, however, is clear: even where the person for whose protection the order was issued seeks to reconcile with the defendant, the conditions of the order apply and will be enforced with criminal sanctions until the order has been formally modified through the courts. An Order of Protection issued in the course of a criminal proceeding cannot be modified or terminated until the person **against whom the order was issued** makes an application to the court. The court will not entertain an application for a modification that is brought by the person whom the order was intended to benefit.

Many Courts treat motions to terminate or modify Orders of Protection in the same manner as family offense motions are treated. If your case is still pending, or you are beyond the time period for appeal, you may follow the instructions provided in C.P.L. §530.12(15). When you make your application to modify or terminate an Order of Protection, you must give "notice to the non-moving party." This means that you must serve a copy of your motion papers on the District Attorney at the same time that you file your motion with the court. Unless otherwise provided by statute, copies of all the papers and documents included in an application to a court, including a motion to vacate or modify an Order of Protection in Family Court under Family Court Act §844, should be served on the other parties. In criminal cases, the other party is the People of the State of New York who are represented by the County District Attorney. Applying to the court without notifying the other party or parties is considered *ex parte* communication and is prohibited.

Your motion should allege any "change in circumstances" which would support a modification or termination of the Order of Protection. For example, programs such as ASAT, ART, or other rehabilitation or counseling that you have successfully completed in the community or while in prison may help your application. You should explain what you learned from these programs and classes instead of expecting the District Attorney and the court to understand what they are and why your participation in these programs justifies a modification or termination of the Order of Protection. The Court and the District Attorney may not be familiar with the programs that you completed so your application will be more effective if you explain what you learned.

Another change in circumstances that might support an application for a modification or termination of an Order of Protection would be if you and the victim or witness have reconciled. Often, the victim or witness will have already contacted the District Attorney's Office, or the judge to try to have the order changed. You can reference these contacts as evidence that the Order of Protection is no longer necessary. Keep in mind that if you have a no contact order you cannot support your request for a modification or termination by referencing communication that you have had with the protected person; these communications are likely to be violations of the order. As stated earlier, it is your responsibility to make the motion to end or change an Order of Protection because the victim does not have a right to remove the Order of Protection, or even make such a motion to the court.

You may request more than one form of relief in your application. Many courts will not terminate an Order of Protection completely. They may, however, consider modifying the Order of Protection to a partial, or "refrain from" order. You can ask for the termination if you think your case is strong enough, but ask for a modified Order of Protection in the alternative. If you are making the application in preparation for your release, you may also ask for an opportunity to be heard in court if you are being released to the jurisdiction that imposed the Order of Protection.

If the court will not consider an informal application, and it is returned to you, you may consider a formal motion to vacate a judgment under C.P.L. §440.10(3), which states in part:

> Although the court may deny the motion under any of the circumstances specified in this subdivision, in the interest of justice and for good cause shown it may in its discretion grant the motion if it is otherwise meritorious and vacate the judgment.

The court has broad discretion to deny your application, but this section allows you to make a motion for relief that you otherwise could have made through an appeal of your sentence. You may write to PLS for materials on how to file a C.P.L. §440 motion.

Conclusion

Orders of Protection can have significant consequences, and violations can lead to new and serious criminal charges. At this time, assisting inmates in obtaining modifications or terminations of Orders of Protection is not among the type of cases that Prisoners' Legal Services handles. An individual who has made progress rehabilitating his or herself, and wants to have contact with a protected party should consider applying to the court that issued the order to modify or terminate the Order of Protection.

***Pro Se* Staff**

EDITORS: BETSY HUTCHINGS, ESQ., JOEL LANDAU, ESQ., KAREN MURTAGH-MONKS, ESQ.

CONTRIBUTING WRITERS: KEVIN KELLY, ESQ.

COPY EDITING/PRODUCTION: ALETA ALBERT, STACY GRACZYK, ESQ.

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