

Pro Se

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DOCS Reviewing Jail Time for “Double Dipping”

The Department of Correctional Services is engaged in a statewide review of jail time to root out what it calls “double dipping”: Time spent in local custody credited as jail time to a new sentence which was also credited as “sentence time” to a previous sentence.

DOCS takes the position that such double credits are illegal.

The jail time review apparently began in DOCS' Office of Sentencing Review about a year ago and is now being carried out by Inmate Records Coordinators statewide. It has resulted in the decertification of the jail time of many inmates and the consequent recalculation of their sentence dates.

Under the review, DOCS is checking jail time certifications against parole delinquency information accessible to it from the Division of Parole's computer system. If it finds that the certification covers a period of time during which an inmate was serving a period of parole or post release supervision on a previous sentence which had not been interrupted by a parole delinquency, it is contacts the local sheriff or jail administrator and asks that the certification be rescinded. In most cases, local jails are complying with DOCS' request.

Despite local jail's compliance, there remain some questions remain about whether double credits are always illegal. Some caselaw from the 1980s suggests that, in at least some cases, they are not.

“Jail time” is governed by Penal Law § 70.30(3) and can be defined as time served in local custody on a charge or charges which result in a sentence. In most cases, it is credited to the sentence which resulted from the charges. The statute specifies, however, that it shall not include time which has been credited to a “previously imposed sentence.”

Ordinarily, when a parolee is arrested on a new charge he or she will be declared delinquent after a revocation proceeding or as the result of a conviction on the new charge. The delinquency will interrupt the running of the previous sentence. Time served in local custody on new charges after a delinquency date can be credited as “jail time” to a new sentence because it is no longer being credited to the “previously imposed sentence.”

In some cases, however, a parolee may receive a new sentence without being declared delinquent on the previous sentence. This may

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

Governor Andrew Cuomo gave his State of the State address on January 5, 2011. In it he spoke of the economic crisis facing this State - but he was not all doom and gloom. Admitting that we have a long road to recovery ahead of us, he presented detailed proposals for consolidating government, increasing jobs, capping property taxes and attracting businesses to New York State. But the most passionate part of his speech came when he spoke of our current criminal justice system as it relates to incarceration. "An incarceration program is not an employment program. If people need jobs, let's get people jobs. Don't put other people in prison to give some people jobs. Don't put other people in juvenile justice facilities to give some people jobs. That's not what this state is all about and that has to end this session."

Finally, a leader who is willing to address the issue of incarceration in New York State head-on. What kind of society are we when we speak of the "prison industry" as if it were the same as the "automobile industry." Implicit in Gov. Cuomo's words is the fact that imprisonment should not be a goal unto itself; it is one of many means to an end – the end being public safety. Indeed, our Penal Law states very clearly that the purpose of our penal laws is to insure public safety and we do this in various ways; through the deterrent influence of sentences, through rehabilitation efforts and through the promotion of successful and productive reentry and reintegration into society. There is no mention in our Penal Law about ensuring job security or using incarceration as an economic development tool for Upstate New York. But sadly, for many years, there have been those who have touted these very reasons to support their opposition to prison closures or to reforming our laws to focus on rehabilitation as well as punishment.

Gov. Cuomo has given us reasons to believe the tide is turning. With Gov. Cuomo's visits to Sing Sing, Manhattan Psychiatric Center and Tyron Juvenile Residential Facility just days after his election, and his subsequent statements regarding incarceration made during the State of the State address, it appears as if Gov. Cuomo is ready to breathe life into our goals of rehabilitation, reentry and reintegration. And it appears as if the Legislature is not very far behind him. Just days ago Senator Betty Little, a Republican Senator from Upstate New York, was quoted as saying that the State should not be "warehousing" prisoners. Perhaps New Yorkers are finally accepting the fact that when over 95% of prisoners will be returned to society, our goals must be to educate and to provide programming and medical and mental health treatment to them so that when they are released they become productive law-abiding citizens.

Our Penal Law states that the goals of reintegration and punishment are equally important. With that in mind, we need to be honest about what works and what does not. We know that excessive use of force, harassment, unjust punishment, solitary confinement and denial of basic privileges, in almost all cases, thwarts the goal of reintegration. We know this not only because statistics tell us this is true, we know this because of what we experienced at Attica – the bloodiest prison riot on American soil. We also know that education, fair treatment, adequate medical and mental health care, proper programming and maintaining family ties promotes the goal of reintegration.

Let us not ignore the statistics; let us not forget Attica. Let us, once again, be an example to the entire country and accept Gov. Cuomo's challenge – a challenge to engage in a cultural change in the way we view the purpose of our penal laws and our criminal justice system. Let us move forward together agreeing that the purpose of a prison is not just to punish and deter but to rehabilitate and prepare for reentry and that it is reprehensible, indeed, barbaric, to tie imprisoning people to the goals of ensuring job security and economic development.

occur if, for example, Parole decides to await court action on the new charges rather than holding a parole revocation proceeding to prove a delinquency but, while awaiting court action, the previous sentence expires. In that case, Parole will lose jurisdiction over the prior sentence and no declaration of delinquency can be issued – even if the parolee is later found guilty of a new crime committed while on parole.

In other cases, the parolee may be declared delinquent on a technical violation after an arrest on new charges but then be restored to parole while still in custody on the new charge. This may occur if, for instance, a parolee is arrested on new charges, receives bail, and is re-arrested by Parole on a technical violation. Parole may impose a brief time assessment (or “hit”) based on the technical violation, or simply “revoke and restore” the parolee to supervision. In that case, the previous sentence will resume when the time assessment expires and the inmate is restored to parole, even if he or she remains in local custody on the new charges. Again, if the prior sentence expires before the parolee is convicted on the new charge, Parole would be unable to declare the parolee delinquent.

Frequently, in such cases, the local sheriff or jail administrator will certify all the jail time to the new sentence even though some or all of it was also credited to the previous sentence. This results in the kinds of double credits which DOCS considers to be unauthorized under the jail time statute.

But are such double credits always unauthorized? In Matter of Sparago v. New York State Division of Parole, 518 N.Y.S.2d 75 (3d Dep’t 1987), *aff’d* 71 N.Y.2d 943 (1988), the court held that double credit is authorized when a parolee is in custody on a new charge and not in delinquent status on the previous sentence.

In Sparago, the petitioner had been arrested and convicted of new charges while on parole from a previous sentence. However, pursuant to a stipulation with the Division of Parole, he was not declared delinquent on the prior sentence. The court held that, under those circumstances, he

could apply his jail time to both his previous sentence and his new sentence. “[T]he proscription of double crediting contained in Penal Law § 70.30(3) does not apply,” the court wrote, “where the previously imposed sentence is not interrupted but continues to run during the period that jail time is accruing.”

The facts in the Sparago case occurred before Executive Law 259-(i)(3)(d) was amended to provide for automatic parole delinquency when a parolee is convicted of a new crime while under parole or post-release supervision. DOCS would presumably argue that those facts could not arise today.

Still, Sparago does appear to apply to at least some of the cases in which DOCS has sought decertification of jail time: those in which the parolee was not declared delinquent on his or her prior sentence because the sentence expired before the new conviction was entered. In those cases, the previous sentence was not interrupted and, under Sparago, “the proscription of double crediting contained in Penal Law § 70.30(3)” should not apply. Unfortunately, it appears that only future litigation will resolve that question definitively.

As of the date this article is being written it is unclear how extensive DOCS’ review is. *Pro Se* does not know, for instance, whether DOCS is reviewing all jail time certifications or only select certifications, or how many sentences have been or will be affected. Some indications, however, suggest that DOCS is indeed reviewing all jail time certifications. Sources in the New York City Department of Corrections (DOC) tell *Pro Se*, for instance, that they have received an unusually large number of requests from DOCS over the past year that it rescind previously certified jail time. Prisoners’ Legal Services, meanwhile, has seen an unusual number of requests for services from inmates who complain that DOCS has recently recalculated their sentences based on a rescission of previously certified jail time. In some of the cases reviewed by PLS, the jail time being rescinded dates from as far back as the late 1980s. In other cases, it has resulted in a

a significant extension of inmates' sentences just as they was reaching a previously scheduled parole eligibility or conditional release date. In several of the cases, the review has resulted in the addition of a year or more to inmates' sentences.

Practice pointer: *What can be done if DOCS recalculates your sentence due to a recision of jail time? Under Correction Law 600-a, the responsibility for certifying jail time rests with the County Sheriff in the County in which the time was served or, if the time was served in New York City, with the Commissioner of the New York City Department of Corrections. While DOCS may review jail time certifications, it cannot unilaterally rescind them. It must make a request to the local Sheriff or to the N.Y.C. DOC Commissioner. If you feel that the local Sheriff or DOC Commissioner has rescinded your jail time in error, you should write to them to ask that the decision be reconsidered. If you do not get a satisfactory reply, you can file an Article 78 proceeding against the Sheriff or DOC's Commissioner.*

Branchel Case

Pro Se is aware of only one reported case involving DOCS' jail time review to date. That case, Branchel v. LaClair, --- N.Y.S.2d ---, Supreme Court, Franklin County (September 22, 2010) illustrates both the kinds of fact patterns DOCS' review is intended to address – and the kinds of mistakes that may be made in the process.

The petitioner in Branchel had been on parole from a 1995 sentence when, in February of 1999, he was arrested on new charges. In March of 1999 he was served with a parole violation warrant and declared delinquent as of the date of his February arrest. In early 2000, however, he was restored to parole after being released from custody on th new charges.

Ordinarily, the time the petitioner served in local jail from the date of the delinquency would be credited as jail time to any sentence that resulted from the new charges. However, in this case, no new

sentence had been imposed at the time the petitioner was released from custody. Parole credited the nine months he had served from late March, 1999 (the date the parole detainer was lodged) until early February 2000 (the date he was released) to the 1995 sentence.

It was not until some seven years later, in 2007, that petitioner was sentenced on the 1999 case. The local jail certified the new sentence as being entitled to jail time credit for the entire 11 month period, from 1999 to 2000, that the petitioner had been in jail on the charges that resulted in the sentence and DOCS initially calculated his sentence dates accordingly.

In early 2010, however – some three months before the petitioner was scheduled to “max-out” on the new sentence – DOCS determined that some portion of the time that had been credited to his new sentence had already been credited to his prior sentence. The local jail, on DOCS' request, issued an amended jail time certification reducing his jail time credit by 11 months and resulting in 11 months being added to his current sentence.

Petitioner then filed a habeas corpus proceeding.

The court concluded that the local jail was partly right: Because the period from the date the parole warrant was filed to the date the petitioner was restored to parole had been credited to the 1995 sentence, the court decided, it could not also be credited to the current sentence. “Jail time credit and parole jail time credit can be viewed as mutually exclusive,” held the court, and “[p]eriods of time credited against one sentence cannot be credited against the other.” (The court did not consider whether the Sparago case applied to these facts.)

The court also concluded, however, that the local jail had been partly wrong: Since the Division of Parole had credited petitioner's 1995 sentence only with the time he had served after the parole violation warrant was lodged, the two months he served prior to that date on the new charges were still available to be credited to the new sentence.

NEWS AND BRIEFS

DOCS To Propose Harsher Visitation Sanctions

The Department of Correctional Services will propose significantly harsher sanctions for visit-related misbehavior in new regulations to be published in the Spring, according to sources within the Department. The new sanctions are part of a multi-year effort by DOCS to re-write and streamline its visitation regulations.

The proposed regulations will increase the sanctions available for various types of visit-related misconduct currently punishable by a visitation suspension of limited duration by a sanction “up to” permanent revocation of visitation.

Under current regulations, for example, the visitation violation of “unacceptable physical conduct (intercourse or sodomy)” is punishable by “up to” one year’s suspension of visitation. Under the proposed regulations, the same violation will be punishable by “up to” permanent revocation of all visitation rights. Likewise, assault on staff or other visitors and virtually all contraband-related offenses, currently punishable by limited suspensions, will be punishable by “up to” permanent revocation.

The harsher sanctions are consistent with Commissioner Fischer’s statement, in a recent issue of DOCS Today, that DOCS “needs tougher consequences for those who abuse visitation privileges.” “Who enters our prisons, how they behave and who should be denied entry based on their behavior is critical to all of us,” wrote the Commissioner.

New Law Permits An Application to Vacate Certain Prostitution Offenses

On August 15, 2010, Governor

Paterson signed into law Bill S4429, which amends the Criminal Procedure Law with respect to victims of sex trafficking who were convicted of prostitution offenses. The new law enables male and female victims of sex trafficking who are convicted of prostitution related offenses to apply to the court to have the conviction vacated. Specifically, the bill adds a provision to §440.10 of the Criminal Procedure Law, to allow a defendant to bring a motion to vacate a conviction where the arresting charge was Penal Law §240.37 (loitering for the purpose of engaging in a prostitution offense) or Penal Law §230.00 (prostitution), and the defendant's participation in the offense was a result of having been a victim of trafficking as defined under state or federal law.

Penal Law §230.34 defines “sex trafficking” as intentionally advancing or profiting from prostitution and lists a number of means by which the sex trafficker might coerce someone to engage in prostitution activity. The section notes that such coercion may be achieved, among other ways, through using force against, drugging, lying to, withholding the immigration documents of, or requiring that prostitution be performed to repay the debt of the person who engages in prostitution.

If you were convicted of an offense under §§240.37 or 230.00, and you believe that you received that charge while under the coercion of another person, you may be eligible to have the conviction reversed.

The Rumor Mill

Prisoners’ Legal Services has received a large number of requests from inmates for information regarding a rumor that determinate (“flat”) sentencing and/or post-release supervision will be repealed effective September 1, 2011. According to some versions of the rumor, any person serving a determinate sentence as of that date will have their sentence converted into an indeterminate sentence.

The rumor is false, but it is understandable how it arose. When former Governor George Pataki first proposed

determinate sentences, in 1995, he met with resistance from the Democratically controlled State Assembly. The proposal was eventually passed as a two year “pilot project” scheduled to expire in 1997. It has been renewed in two year increments every other year since then. Thus, all statutes that reference determinate sentences state that they will expire on September 1st of the next odd-numbered year, to be replaced by an identically worded statute without the reference to determinate sentences. However, there is no reason to believe that determinate sentencing will not be renewed again in 2011. (Indeed, far from retreating from determinate sentencing, the Legislature has made more and more offenses subject to it since 1995, including all drug offenses and sex offenses.) Moreover, even were determinate sentencing to expire, its expiration would not affect determinate sentences imposed prior to the expiration date.

STATE CASES

Son of Sam Law

Matter of New York State Crime Victims Board v. Sookoo, 909 N.Y.S.2d 823 (3d Dep’t 2010)

New York’s Son of Sam Law, Executive Law §632-a, states, in part, that whenever an inmate who is serving a sentence for a “specified crime” – generally violent felonies and other felonies against which a merit time allowance cannot be earned – receives funds in her or her inmate account which total more than \$10,000 – excluding “earned income” – DOCS must notify the Crime Victims Board. The Crime Victims Board must then notify the victim or victims of the crime or crimes for which the inmate is incarcerated. The victim, in turn, may bring a civil suit against the inmate for injuries or loss suffered as a result of the crime within a specified time after being

notified. The Board may also seek provisional remedies against the inmate, including a preliminary injunction, to freeze the inmate’s inmate account and prevent any of the funds from being spent pending resolution of the victim’s lawsuit.

This is precisely what happened in Matter of New York State Crime Victims Board v. Sookoo. Respondent, an inmate, was serving a term of 20 years to life imposed in 2001. When, in 2009, his inmate account exceeded \$10,000, DOCS notified the Crime Victims Board, which in turn notified the mother of the victim of the respondent’s offense. She then notified the Board that she intended to bring a lawsuit against the respondent for damages. The Board then applied for a preliminary injunction to prevent the respondent from spending the funds in his account before the suit could be resolved. The lower court granted the Board’s request.

Respondent appealed. He argued that approximately \$2,500 in his inmate account had been drawn from a pension and therefore constituted “earned income” under the statute and was exempt from the notification requirement. The court pointed out, however, that even if the money constituted “earned income,” and should not, therefore, have been reported to the Board, that has no bearing on what funds of the inmate might be subject to recovery by a crime victim in a lawsuit once the lawsuit has been brought and, therefore, no relation to what monies may be subject to a preliminary injunction action brought by the Board on behalf of a crime victim.

PAROLE

Parole Board Reversed When It Relied Solely on Seriousness Of Offense

Matter of Huntley v. Evans, 910 N.Y.S.2d 112 (2d Dep’t 2010)

Petitioner was convicted of murder in

the second degree and sentenced to an indeterminate term of imprisonment of 17 years to life. The Parole Board denied his second application for parole, stating as follows: “[Y]ou appear before this panel with the serious instant offense of murder 2 wherein you shot a male victim twice in the chest with a hunting rifle causing his death. This panel is disturbed by the extreme violence associated with this terrible crime.”

After exhausting his administrative appeals, petitioner challenged the denial in an Article 78 proceeding. The court reversed the Board and ordered a *de novo* (new) hearing.

The court noted that Executive Law §259-i requires the Board to consider a number of factors in determining whether an inmate should be released to parole, including his or her institutional record. Although the various factors need not be given equal weight, nor is the Board required to articulate specifically how each factor was considered in its determination, nevertheless, “where the Parole Board denies release to parole solely on the basis of the seriousness of the offense, in the absence of any aggravating circumstance, it acts irrationally.”

Here, the court found, the Parole Board cited only the seriousness of the petitioner's crime. It failed to mention any of the other statutory factors, including his many institutional achievements. These included training of animals for use by law enforcement, the physically challenged, and veterans; a good disciplinary record; and the positive recommendations made by his sentencing court. Under the circumstances, the court found, “the Parole Board's determination demonstrated that it failed to weigh the statutory factors, and a new parole hearing is warranted.”

Termination of Parole For Drug Offenders Held Not Retroactive

Executive Law §259-j (3-a), enacted as part of the Rockefeller Drug Law Reform Act of 2004, requires termination of indeterminate drug sentences after a period of unrevoked parole. For a person serving an indeterminate sentence for a Class A drug felony, the statute requires the Division of Parole to terminate the sentence after three years of unrevoked parole. Indeterminate sentences for all other drug felonies must be terminated after two years of unrevoked parole. The effective date of this section of the Drug Law Reform Act is February 12, 2005. The Second Department recently addressed whether the law can be applied retroactively to periods of unrevoked parole completed prior to February 12, 2005.

In our Spring 2010 issue of *Pro Se*, we reported on the case People ex rel. Murphy v. Ewald, Sup Ct, Suffolk County, March 4, 2010, Pines, J. The petitioner in that case completed over three years of unrevoked parole on a Class A drug felony, but his parole was revoked and he was incarcerated again before February 12, 2005. Because the revocation of his parole occurred prior to the effective date of the statute, the Division of Parole would not terminate his life sentence. The petitioner commenced an Article 70 proceeding for a writ of habeas corpus, and the Supreme Court of Suffolk County held that he met the requirements of Executive Law §259-j (3-a), and was entitled to release and termination of his sentence, even though his period of unrevoked parole had occurred before the effective date of the statute. Following the Supreme Court's opinion, it appeared there was room to argue for retroactive application of the statute.

The Division of Parole appealed the Suffolk County Supreme Court's decision, and on October 12, 2010, the Second Department issued a decision reversing the lower court's finding in People ex rel. Murphy v. Ewald, 2010 NY Slip Op 07374. The Second Department held that a period of

parole revoked before the effective date of Executive Law §259-j (3-a) does not make a person eligible for termination of an indeterminate drug sentence. The court relied on the Third Department's previous decision in Matter of Ciccarelli v. New York State Div. of Parole, 827 N.Y.S.2d 726 (3d Dep't 2006), which had held that a person who had completed seven years of parole that was revoked before February 12, 2005 could not require the Division of Parole to terminate his drug felony sentence.

The consequence of the reversal of People ex rel. Murphy v. Ewald is that there are now no cases supporting retroactive application of Executive Law §259-j (3-a). In order to be granted termination of an indeterminate drug sentence, the Division of Parole is requiring that at least some part of the unrevoked period of parole fall after February 12, 2005.

Sex Offender Registration Act **(SORA)**

New York's Sex Offender Registration Act, or "SORA," requires that anyone convicted of a sex offense, or who was on parole, probation or incarcerated for a sex offense, on or after January 21, 1996, register as a sex offender with the New York State Division of Criminal Justice Services (DCJS). The statute also requires that the sentencing court, after a hearing, classify sex offenders into one of three "risk levels," reflecting the likelihood that he or she will re-offend: Level 1 (low), Level 2 (moderate), and Level 3 (high). The amount of information that a sex offender must provide to DCJS when he or she registers, the length of the registration period, the frequency with which he or she must re-register, and the amount of information about the offender that may be made publically available, all depend upon the offender's risk level.

SORA also creates a "Board of Examiners of Sex Offenders," which is given responsibility for making recommendations about offenders' risk levels to the sentencing courts. The Board typically makes its

recommendations by consulting a "Risk Assessment Instrument," or "RAI," which assigns points to the various factors that go into determining the risk level. These factors include, but are not limited to, whether force or weapons were used in the underlying offense, whether alcohol or drugs were involved, the victim's age, the number of victims, whether the victim was assaulted or injured and the offender's relationship to the victim. Upward and downward assessments from the risk assessment scores may also be granted according to various factors.

Several recent Appellate Division decisions illustrate the process in action.

In People v. Johnson, 909 N.Y.S.2d 716 (1st Dep't 2010), the defendant pled guilty to rape. He was initially classified a risk level 2 sex offender by the Board of Examiners of Sex Offenders in accordance with the RAI. Following a hearing, however, the sentencing court granted the District Attorney's request for an upward departure and classified defendant as a risk level 3. Upon appeal, the Appellate Division reversed, on the ground that the court's findings in support of the upward departure were "insufficiently detailed to permit intelligent appellate review." After a new hearing, at which the defendant submitted additional evidence, the County Court granted defendant's request for a *downward* departure and classified defendant as a risk level 1 sex offender. The District Attorney's office then appealed.

The Appellate Division noted that a downward departure from the risk assessment score is "only warranted where there are mitigating factors in the case which are taken account of by the Board's risk assessment guidelines." In this case, the defendant argued that he deserved a downward modification because he accepted responsibility for his offense and had been successfully discharged from a sex offender treatment program. The District Attorney countered that those circumstances were already encompassed by the risk assessment instrument.

The court found that the additional documentation received from the defendant

at his second hearing, including letters from personnel involved in his outpatient treatment program, established that he had developed a sound relapse prevention plan, had also continued to participate in the outpatient program's group discussions and volunteered to help other offenders. Additionally, the court found, the defendant had voluntarily continued his drug and alcohol treatment, resulting in an extended period of sobriety. Furthermore, the court noted, a risk assessment conducted by personnel at the outpatient program placed defendant at a very low risk of re-offending.

Finally, the defendant himself spoke at length at the hearing regarding his rehabilitative efforts and his work with various programs aimed at assisting other offenders. Under the circumstances, the court concluded, the County Court's grant of a downward departure was appropriate.

In People v. Stewart, 908 N.Y.S.2d 767 (3d Dep't 2010), the sentencing court granted the District Attorney's request for an *upward* departure from the Board's initial recommendation. The Appellate Division affirmed the decision, holding that an upward departure from a presumptive risk classification is justified when an aggravating factor exists that is not otherwise adequately taken into account by the risk assessment guidelines. Here, the RAI assessed the defendant 20 points for a continuing course of sexual misconduct. However, the court found, this did not adequately reflect the aggravating factors of the length and nature of defendant's abuse towards his seven-year-old victim, where the case summary and presentence investigation report establish that he had repeated contact with the victim...causing contusions and pain, and the conduct continued for well over a year.

In People v. Miller, 908 N.Y.S.2d 513 (4th Dep't 2010), the defendant argued that the sentencing court had erred by assessing 10 points against him on the RAI for his failure to take responsibility for his offense, since he had pleaded guilty to the offense. The court found, however, that, in the pre-sentence report, the defendant had

denied culpability for the offense and stated that he had pleaded guilty only to avoid the risk of losing at trial. These statements, the court held, constituted "clear and convincing evidence" of his failure to accept responsibility for the crime, and justified the 10 point upward adjustment of his risk assessment score.

SENTENCE COMPUTATION

People v. Ruddy ___ N.Y.S.2d ___ (3d Dep't 2010)

The defendant in this case pled guilty to burglary in the third degree and was sentenced to time served plus five years of probation. The terms of his plea agreement required his compliance with conditions imposed by the Saratoga County Drug Treatment Court, which included inpatient drug treatment. If he was unable to meet the conditions of his plea he would be re-sentenced to a prison term. After failing to complete the drug treatment program, he was re-sentenced to a term of 2 - 4 years with credit for "time served." The credit, however, did not include the time he had spent in the drug treatment program. He appealed, arguing that he should receive credit against his sentence for the time spent in the treatment program.

The court rejected his appeal. "The case law makes clear," wrote the court, "that a defendant is not entitled to a jail time credit for time spent on probation." Further, the court held, "time spent in an inpatient rehabilitation program for the purpose of receiving treatment is not the functional equivalent of being 'in custody' and, hence, is not properly included when computing a credit for time served."

Practice pointer: Jail time is governed by Penal Law §70.30(3) which defines jail time as time spent "in custody" prior to the commencement of a sentence, on the charges that resulted in the sentence.

Courts have not looked fondly on efforts to define time spent “in custody” as anything other than time spent in a local jail or correctional facility. For example, in Titmas v. Hogue, 799 N.Y.S.2d 626 (3d Dep’t 2005), the court held that time spent in a secure physical rehabilitation center prior to sentencing did not constitute “jail time” to be credited to the sentence, even though the petitioner had agreed to it as a condition of his plea bargain. The court held that the petitioner was on bail during that time and therefore could not be considered to have been “in custody.”

Matter of Burton v. Annucci, 76 A.D.3d 1150 (3d Dep’t 2010)

Petitioner was sentenced in 1999 as a second violent felony offender to an aggregate prison term of 12½ to 25 years. At the time of his sentence, he also owed four years, four months and two days on a prior undischarged prison term. The commitment order of his new sentence was silent as to how it should run relative to the time owed on the prior term. DOCS calculated the sentences as running consecutively. Petitioner challenged the calculation in an Article 78 proceeding.

The court dismissed petitioner’s challenge. It noted that the Court of Appeals, in People ex rel. Gill v. Greene, 12 N.Y.3d 1 (2009), had recently concluded that Penal Law §70.25(2-a) requires that whenever a defendant is sentenced as a predicate felony offender, as petitioner was, the sentence must run consecutively to any time owed on a prior sentence, even if the sentencing court did not specify that the sentences were to run consecutively.

Petitioner – who had filed the case before Gill was decided – had conceded this point in papers before the court. He argued, however, that even if his maximum expiration date had been correctly calculated under Gill, his conditional release date was still erroneous. According to the petitioner, the conditional release date should be based solely upon the maximum term imposed on his 1999 sentences, without adding the time

owed to the prior sentence.

The court disagreed. It noted that Correction Law §803(2)(b) states that an inmate serving two or more indeterminate sentences that run consecutively may receive a good time allowance not to exceed one third of the “aggregate maximum term.” In calculating petitioner’s tentative conditional release date, therefore, DOCS added the maximum term owed on the 1999 sentences (25 years) to the time owed on the prior undischarged term (four years, four months and two days), resulting in an aggregate maximum term of 29 years, four months and two days. Petitioner could earn up to one third of the aggregate term in good time, meaning he would have to serve two thirds of the aggregate term before becoming eligible for conditional release.

TRANSFERS

Matter of Gecetchkori v. Annucci, 908 N.Y.S.2d 755 (3d Dep’t 2010)

The Convention on the Transfer of Sentenced Persons is an International Treaty which permits the transfer of a foreign national serving a sentence for a criminal offense in one country to be transferred to his or her home country. The United States is a signatory to the treaty, but it has advised other signatories that it will not consent to a transfer of a state prisoner “unless the competent state authorities first give their consent.”

New York State law requires the Commissioner of DOCS to “promulgate rules and regulations setting forth the procedures by which an inmate may apply to be considered for transfer to a foreign nation.” It also states, however, that “[t]he commissioner or his designee shall retain “sole and absolute authority to approve or disapprove an inmate’s application for transfer” and that “[n]othing herein shall be construed to confer upon an inmate a right to be a transferred to a foreign nation.”

Correction Law §71(1-b).

Petitioner Gecethkori is a Georgian national serving a prison sentence in New York of 23 years to life. He sought approval from DOCS for a transfer under the Convention to the Republic of Georgia. DOCS denied his application. It cited the seriousness of his crime, his lack of family ties in Georgia and the failure of Georgian authorities to indicate whether they could administer an indeterminate life sentence. Petitioner then submitted new information to address those concerns, but DOCS again denied his application. Petitioner then filed an Article 78 proceeding challenging DOCS' decision.

The court upheld DOCS. The court noted that an inmate does not have a right under the Convention to be transferred to a foreign nation and that DOCS "retain[s] sole and absolute authority to approve or disapprove an inmate's application for transfer." Under state law, the court continued, "prison officials enjoy broad discretion in determining whether to permit a transfer - be it intrastate, interstate or international." Correction Law §71, the court noted, does not contain detailed guidelines about how DOCS should exercise its discretion or the factors that should be considered in granting or denying a transfer request. That does not render the law invalid, however, and, in this case, the court found, DOCS did not abuse its discretion in denying the petitioner's request.

The court also noted that after DOCS had made its decision, Georgian officials indicated that they were willing to accept petitioner, although his sentence would have to be adapted in an unspecified manner to comport with Georgian law. Since that information was not before DOCS when it made its decision, the court did not consider it in determining whether DOCS had abused its discretion. It noted, however, that "nothing prevents petitioner from noting the Georgian government's position should he reapply for a transfer, which he will shortly be entitled to do."

VISITATION

Matter of Carter v. Rock, 908 N.Y.S.2d 754 (3d Dep't 2010)

Petitioner's wife's visitation privileges were suspended following her arrest for allegedly smuggling drugs into a correctional facility. When the resulting criminal charges were later dismissed, petitioner, an inmate, requested that his wife's visitation privileges be restored. DOCS denied that request. Petitioner then commenced an Article 78 proceeding challenging the suspension.

The court dismissed petitioner's claim. It found, first, that petitioner did not have "standing" to challenge the suspension of the visitation privileges of his wife. "Standing" is a legal concept which refers to the right of a person to file a lawsuit. In general, courts have held that inmates do not have "standing" to challenge the loss of visitation privileges of other persons, even their spouses. Such challenges must be brought by the person directly affected - in this case, the inmate's wife.

Second, the court held that, to the extent that petitioner was also seeking review of respondent's denial of his request for restoration of his own visitation privileges, his petition failed to state a cause of action, because it lacked sufficient " 'factual allegations of an evidentiary nature or other competent evidence tending to establish his ... entitlement to the requested relief.' "

PROPERTY

Docs' Directive Interpreted as Prohibiting CD's and CD Players

In Matter of Davis v Fischer, 907 N.Y.S.2d 718 (3d Dep't 2010), an inmate challenged DOCS' refusal to allow him to purchase and possess compact discs and a CD player, pursuant to DOCS' Directive No. 4911, which permits inmates to possess only cassette tapes and players.

The court dismissed the challenge, holding: "[C]orrection facility officials must be accorded wide latitude in their efforts to insure the safety and security of correctional facilities under their supervision and, in that regard have ... the obligation, to control what property is permitted to be introduced into these facilities." Here, the court held, where it is undisputed that compact discs and CD players are not among those items permitted to be possessed by inmates by the DOCS' Directive, "we find that CORC's determination denying petitioner's grievance was based upon a rational interpretation of the directive and, therefore, has not been proven to be arbitrary and capricious."

In Matter of Green v. Fischer 908 N.Y.S.2d 757 (3d Dep't 2010) an inmate challenged the October 2008 change in policy, reflected in DOCS Directive No. 4913, which limits the amount of inmate personal property to that which will fit in four standard fabric "draft bags." The inmate argued that this limit would impede inmates' right of access to the courts by arbitrarily limiting the amount of legal material they could keep.

The court rejected the challenge, calling the inmate's assertions about access to the courts "conclusory" (*i.e.*, unsupported by any evidence). It also held that the property bag limits were not otherwise arbitrary or capricious and noted that DOCS had issued a memorandum in which it

justified the limits as necessary to address fire and safety hazards, sanitation and hygiene issues and the escalating cost of storage areas, among other things. On these grounds, the court concluded that DOCS' policy was "rational."

Practice pointer: DOCS' Directive 4913 states that an inmate with excess legal material may possess "one additional draft bag of legal material upon demonstrating that such material pertains to active legal cases by providing court names and case number."

DISCIPLINARY CASES

Courts Address "Witness Denial" Claims, With Mixed Results

Inmates facing a disciplinary proceeding at which good time may be lost have a conditional right to call witnesses on their behalf, provided that the witness has relevant testimony, would not be redundant and would not otherwise jeopardize institutional security. The right is derived from the fundamental constitutional right to due process of law. In New York, it is also codified in DOCS' regulations at 7 N.Y.C.R.R. §254.5.

Courts addressed a number of cases in the past several months in which inmates claimed that a disciplinary Hearing Officer had improperly denied a requested witness, with mixed results.

In Matter of Tafari v. Selsky, 907 N.Y.S.2d 704 (3d Dep't 2010), the petitioner was charged with various disciplinary infractions after a search of his cell produced several items that he was not permitted to possess. After being found guilty of the charges in a Tier III proceeding, he commenced an Article 78 proceeding, contending only that he was impermissibly denied a witness who could have provided relevant testimony.

The court agreed. The basis for one of the charges against the petitioner was a personal photograph with an inscription on the back that was alleged to have been gang-related. Petitioner asked to call the inmate, who had allegedly written the inscription on the photo and given it to him, as a witness. The Hearing Officer denied petitioner's request on the grounds that the proposed witness would be irrelevant. The Hearing Officer reasoned that the witness had no training in the recognition of gang-related material. The court found, however, that if the inmate had in fact inscribed the photograph, he plainly had information relevant to the charges. He might, for instance, have been able to offer a non-gang-related explanation for the inscription. "As such," the court found, "the Hearing Officer erred in denying petitioner's witness." Nevertheless, the court concluded, "because the Hearing Officer put forth a good faith reason for the denial, the proper remedy is to remit the matter" to DOCS for a re-hearing, rather than to expunge the proceeding from the petitioner's records.

In Matter of Tafari v. Selsky, 907 N.Y.S.2d 886 (3d Dep't 2010), by contrast, the same inmate was charged with threats, harassment and stalking based upon two letters he allegedly wrote to a female facility employee. After being found guilty of the charges in a disciplinary hearing, he again filed an Article 78 proceeding alleging, again, that he had been improperly denied a witness. In this case, however, the court found "no merit" to the claim. "The record demonstrates, rather, that the hearing was adjourned twice in an attempt to find the civilian witness, but the Inspector General was unable to locate him at either address provided by petitioner." Under these circumstances, the court found, the Hearing Officer made "reasonable efforts...to locate petitioner's witness and, thus, [the petitioner's] due process rights were not violated."

In Matter of Santiago v. Fischer, 908 N.Y.S.2d 139 (3d Dept 2010), the petitioner allegedly became involved in an altercation with correction officers during a search of his

cell. As a result, he was charged with assaulting staff, refusing a direct order, engaging in violent conduct, causing a disturbance and interfering with staff. During the ensuing Tier III disciplinary hearing, two correction officers involved in the incident testified, but the Hearing Officer denied petitioner's request for a third correction officer to testify on the grounds that it would be redundant. The court ruled that this was error. The petitioner had requested the testimony of the third officer on the ground that his written report of the incident was contrary to the version of events related by the two correction officers at the hearing. "Inasmuch as the stated reason for calling the third officer was to rebut the testimony of the other two officers," the court held, "the Hearing Officer erred in denying petitioner's witness on the ground that his testimony would be redundant." However, the court found, as it did in Tafari v. Selsky, above, that "because the Hearing Officer put forth a good faith reason for the denial, petitioner's constitutional rights were not violated; instead, it amounted to a violation of petitioner's regulatory right to call witnesses and, therefore, the proper remedy is to remit the matter for a new hearing."

In Matter of Brown v. Fischer, 908 N.Y.S.2d 270 (3d Dept 2010), the petitioner was charged with violating visiting procedures and engaging in a sexual act after an incident in which a correction officer, watching the visiting area through a video monitor, allegedly witnessed petitioner's visitor masturbating him. At his disciplinary hearing, the Hearing Officer determined that the videotape of the incident was insufficient to substantiate the correction officer's charges and, furthermore, contradicted the officer's testimony that petitioner was removed from the room immediately following the incident. He nevertheless denied petitioner's request for the testimony of the correction officers who responded to the call in the visiting room. He found the petitioner guilty based solely on the first correction officer's testimony. He determined, without further inquiry, that the other officers were not present during the

incident and that “[w]e know what they saw.”

The court reversed. Since the determination of guilt rested entirely on the testimony of the first correction officer, it was possible that the other officers had information that contradicted that officer’s version of events. The Hearing Officer had no reasonable basis for refusing to call them as witnesses. Therefore, the court found, the denial of petitioner’s request “constituted a violation of his constitutional right to call witnesses, requiring an annulment of the determination and expungement” rather than a rehearing.

Hearing Officer Found Qualified to Compare Handwriting Samples

Matter of Davis v. Fischer, 907 N.Y.S.2d 718 (3d Dep’t 2010)

After a female commissary employee received two letters which the court in this case characterized as being “of a personal nature,” petitioner, an inmate, was charged in a misbehavior report with harassing an employee, stalking, smuggling, lying and soliciting sex. He was found guilty of the charges in a Tier III disciplinary hearing on the ground that samples of his handwriting appeared similar to the hearing officer to the handwriting in the two letters. On his administrative appeal, DOCS officials reduced the penalties but refused to reverse the charges. He then submitted an Article 78 proceeding.

After he submitted his Article 78 proceeding the Attorney General conceded that there was insufficient evidence to sustain the charge that petitioner had solicited sex and, consequently, the court annulled that portion of the determination and remanded the proceeding to DOCS to re-assess the penalties in light of its decision. The court upheld the remainder of the charges, however. It found that the misbehavior report, the hearing testimony, the offending letters and the samples of petitioner’s

handwriting provided “substantial evidence” to support the Hearing Officer’s determination of guilt. The court further found that “the Hearing Officer made an independent assessment of the letters and the handwriting samples and, as the trier of fact, was qualified to do so.”

Practice pointer: In Woodard v. Prack, 881 N.Y.S.2d 338 (3d Dep’t 2009), discontinued, 14 N.Y.3d 837 (2010), PLS represented an inmate before the state Court of Appeals, and argued that the hearing officer’s comparison of writing samples did not constitute substantial evidence. DOCS then administratively reversed the hearing, and as a result, the case was moot and the Court of Appeals never issued a decision. Since the Court of Appeals has not ruled on this issue, the Third Department’s decisions holding that a hearing officer’s comparison of handwriting samples can be substantial evidence remain good law.

Hearing Officer Had Adequate Basis For Assessing Confidential Information

Matter of Sterling v. Bezio, 907 N.Y.S.2d 755 (3d Dep’t 2010)

After an inmate was slashed with a razor in the prison yard, a confidential informant identified petitioner as a participant in the gang-related incident and, consequently, he was charged with multiple disciplinary infractions. After the petitioner was escorted to the special housing unit, a search of his cell revealed a razor with the blade missing and he was served a second misbehavior report charging him with possession of an altered item. Petitioner was subsequently found guilty in a Tier III hearing of violent conduct, assault on an inmate, possession of a weapon, threats, gang activity and possession of an altered item. That determination was affirmed on administrative appeal, prompting petitioner to commence an Article 78 proceeding.

The court upheld the determination. It cited “the detailed misbehavior reports, the

hearing and confidential testimony of the correction officers who investigated the incident and searched petitioner's cell and the confidential memorandum....” Although the hearing officer never spoke with the confidential informants, the court found that “he was able to independently assess the reliability of the confidential information through his questioning of the correction officer who obtained the information from two confidential informants.”

***Practice pointer:** In order to rely on confidential information, a disciplinary Hearing Officer must be able to independently assess the informant(s) credibility and reliability. In some cases, this may require that the Hearing Officer personally interview the informant(s). In many other cases, however, courts have concluded that the Hearing Officer need not personally interview the informant to be able to independently assess his reliability and credibility. Courts frequently reach this conclusion where the informant’s statement is corroborated by other information in the record or where the court finds that the information was “sufficiently detailed and specific” that the Hearing Officer could assess its credibility and reliability without a personal interview.*

COURT OF CLAIMS

State Found Liable For Van/Step Accident

Quackenbush v. State of New York 910 N.Y.S.2d 851, (N.Y.Ct.Cl., 2010) (Patti, J.)

Claimant, a former inmate at Groveland Correctional Facility, was seriously injured after falling while exiting a DOCS van in 1999. On the day of the incident, claimant was one of four inmates who were to be seen at the infirmary located on the main campus of the facility. This required the inmates to be transported by van

from the Annex to the main facility. DOCS regulations require that inmates be handcuffed during transport, with a black box affixed over the cuffs, the cuffs attached to a waist chain, and shackles on their ankles.

When the inmates arrived at the infirmary, three of them, including the claimant, were ordered to exit through the back of the van. In order to allow them to do this, their ankle shackles were removed and a plastic milk crate was placed on the pavement outside the door. The escorting officer assisted the first two exiting inmates to step down but, when the claimant stepped forward, the escort was attending to the other two inmates and failed to assist him. When the claimant – still in handcuffs and a waist shackle – stooped over to fit through the door and then stepped down onto the plastic crate, the crate slid under the van, causing the claimant to fall backward, half in and half out of the van. His back and upper extremities were snapped back and his left elbow hit the bumper. As he lay on the ground, he was told not to move, and eventually he was assisted to his feet and brought into the infirmary. He later sued the state for his injuries.

At the trial of his claim, claimant called Dr. Robert Sugarman, a systems safety expert, to testify. Dr. Sugarman testified that, in his opinion, use of the rear door of the van as an exit was unsafe, especially as there was a front door that permitted the inmates to safely step down and out of the van. Exiting out of the rear door was less safe because it was only four feet in height, and as a result inmates were obliged to stoop to exit rather than stand upright. In addition, he stated, exiting from the rear did not provide a suitable step down for anyone exiting while in restraints. Using the crate as a step was unsafe since it was made of light plastic, and since the top and base were the same size and could therefore easily tip: to be safe, the base should be broader than the top and should be made from heavier material, giving it stability. Furthermore, Dr. Sugarman testified, in this case the van was parked on a slight downward slope. The crate was therefore prone to slip backwards when

someone stepped on it with forward momentum, as it did in this case. He was of the opinion that even on a flat surface, a plastic milk crate of these dimensions and weight was unsafe to use as a step, even with assistance provided to the person exiting through the rear of the van. He concluded that the use of the rear exit, the use of the crate, the downward slope and the lack of assistance were all substantial contributing factors in claimant's fall and injury.

One of the escorting correction officers testified that the only reason the back door was used on that day was due to a time constraint: the inmates had to be at the infirmary for call outs. The C.O. estimated that if they had used the front door for all four of the inmates it would have taken them perhaps five minutes to remove all the restraints. He stated that he did not personally like to use the milk crate since it was not designed to be a step and did not believe it was safe. He added that the use of the Emergency Exit was not his decision.

Although the State is not an insurer of inmates' safety, it has a duty to protect them from reasonably foreseeable risks of harm. It can be held liable for an injury suffered by an inmate if the cause of the injury could have been reasonably foreseen and it failed in its duty to prevent it.

The court in this case found that the State should have reasonably foreseen the likelihood of an accident resulting from the use of the back door and crate to provide an exit from the van to inmates who were shackled at the waist. The use of the crate as a step down from the van, exacerbated by a downward slope, "was an accident waiting to happen," held the court. "[There] was a perfectly safe means of egress from the van through the front door," the court continued. Use of the backdoor was unnecessary and made an eventual fall "inevitable." Under these circumstances, the court concluded, the State "[cannot] succeed in its argument that it has met its duty to protect its inmates...." It found the State liable to the claimant for "failing to provide him with safe egress from the van" and scheduled a separate trial for damages.



Injustice anywhere is a threat
to justice everywhere.
-Martin Luther King, Jr.

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