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Urinalysis Directive Revised to Accommodate Inmates Who Suffer From Shy Bladder Disorder

In a recent issue of *Pro Se*, we discussed how “shy bladder” – a condition that prevents individuals from urinating in front of other people – impacts on the ability of some inmates to comply with the procedure that DOCS uses to test inmates for drug use. This procedure, which requires that inmates urinate into specimen bottles while being observed by corrections officers, presented a sometimes insurmountable hurdle for shy bladder sufferers. As a result, for many years, prisoners who suffered from shy bladder syndrome were disciplined for *refusing* to provide urine samples when in fact, they were too nervous to urinate in front of other people. Although shy bladder disorder is a common anxiety disorder recognized by modern psychiatry, it was not until recently that DOCS developed an alternative procedure to its urinalysis testing protocol to accommodate prisoners who suffer from this disorder.

On December 21, 2010, DOCS published a revised Urinalysis Testing Directive, which adds an alternative procedure to accommodate inmates who suffer from shy bladder disorder. These inmates will now be allowed to produce samples in a private room instead of having to do so while being observed. A strip frisk will be required before using the private room. Just as with non-shy bladder sufferers, an inmate with shy bladder will be given three cups of water and

three hours within which to produce the urine sample. Although it is not a perfect solution, it is certainly an improvement.

The Directive provides that the new procedure “shall be employed when there is *reasonable belief* that the inmate is unable to provide a urine specimen due to an alleged inability to urinate in front of others.” The Directive goes on to say that *reasonable belief* can be based upon medical and mental health records, disciplinary history, and an inmate’s behavior/demeanor at the time of the request for the urine sample. It is the responsibility of the inmates who suffer from shy bladder to demonstrate that due to a medical or mental

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WE KNOW WHAT WE NEED TO DO – WHY DON'T WE DO IT?

A Message From the Executive Director – Karen L. Murtagh

With all the talk about the budget deficit and our current economic crisis, you would think that we would finally pay attention to what we know works when it comes to criminal justice policies – if for no other reason than to promote sound fiscal policies. Of course, to agree on “what works” we have to agree on both our goal and the most efficacious methods for achieving that goal. For the most part, I think that we can all agree that the primary goal of the criminal justice system in New York is public safety. As a criminal justice major in college and subsequently as a lawyer, I was taught that the way in which we have pursued the goal of public safety has evolved over time. For instance, rehabilitation and reintegration were not always considered necessary components in achieving public safety. In fact, there was a time when society believed that “criminals” were “born that way” and public safety could only be achieved through punishment and deterrence; thus the focus on incarceration.

But as time passed we grew in our understanding of the physiology of the brain, the effects of socio-economic factors and the importance of education. We learned that people engage in criminal activity for all sorts of reasons and that most people can be rehabilitated. We also learned that the goal of public safety is better served if we focus on rehabilitation and reintegration. And yet, you only have to look at the statistics on incarceration and recidivism rates to see that the United States is one of the least effective countries in the Western world when it comes to implementing policies and strategies that promote public safety.

Take for example incarceration rates. The United States has the highest documented incarceration rate in the world. As of June 2009, the Bureau of Justice Statistics reported that the incarceration rate in the U.S. was 748 inmates per 100,000, or approximately 1 out of every 136 adults! The U.S. has less than 5% of the world's population but approximately 25% of the world's prison population. None of our closest competitors– Russia, Belarus and Bermuda, with incarceration rates of approximately 532 prisoners per 100,000 – is even a close second. More disturbing is the comparison of our incarceration rate to the rates of a number of other countries – New Zealand: 186, per 100,000; England and Wales: 148 per 100,000; Australia: 126 per 100,000; The Netherlands: 93 per 100,000; and Norway: 66 per 100,000.

While the incarceration rate in the United State is the highest in the world, we also have a very high crime rate. Given our high crime rate, if a high rate of incarceration helped us to achieve our goal of public safety, it might make sense to continue down the path of incarcerating people at the current rate. But the sad news is that our rate of incarceration does not translate into public safety. Corrections experts agree that recidivism rates are the most accurate measure of whether a particular correctional system is successful. Thus, unless a high rate of incarceration correlates with a low recidivism rate, it cannot be said to promote public safety. According to the Bureau of Justice Statistics, the recidivism rate in the U.S. is 67.5 percent. Compare this rate to the rates in other countries and you will find that the U.S. tops the charts once again. Japan's national recidivism rate is 39%; Sweden's is 35%; and Canada's is 35% for men and 20% for women.

When we look to other countries to study why their recidivism rates are so low, we find that not only are their incarceration rates lower but their approach to incarceration is also quite different from the approach taken by the U.S. Take, for example, Norway's Halden Prison. Dubbed ‘the most humane prison in the world,’ the recidivism rate for individuals released from Halden is only 20%. At Halden Prison, the focus of the correctional strategy is based on respect for human rights. I will write more about Halden approach to corrections in the next issue of *Pro Se*, but for now, the point is that we do not have to look too far to see what works.

So why do we continue to pursue public safety using techniques that we know do not work? Why don't we focus more of our time, energy and resources on adopting the practices that have led other countries to have lower rates of incarceration and recidivism? Hasn't the time come for us to focus on criminal justice strategies that both enhance public safety and are fiscally sound?

. . . *Urinalysis Directive - continued from Page 1*

health condition, they are unable to produce a urine sample while being watched. To meet this responsibility, we advise shy bladder sufferers to create a record of their condition by discussing the problem with their medical providers, the Office of Mental Health, or both.

Going forward, when someone who suffers from shy bladder is asked to produce a urine sample as part of the DOCS drug testing program, he or she should calmly explain his/her condition, state that it is documented in his or her medical and/or mental health history, and request a private room. If the urinalysis testing officer does not understand or grant the request, the inmate should ask that the officer speak to the Watch Commander. If these efforts are unavailing and Tier III charges result, at the hearing the inmate should explain the efforts that he or she made to take advantage of the alternative procedure and produce evidence that he or she suffers from shy bladder.

Most of the advice given in our earlier *Pro Se* article on this topic remains relevant and useful. The article contained an exhaustive description on how an inmate might document a shy bladder issue, as well as advice on defending against disciplinary charges. It also explained how someone with a severe case of shy bladder may go about requesting a catheter for urinalysis, should the private room not resolve the problem. A copy of this article, published in *Pro Se*, Vol. 20, Issue 3, can be obtained from the facility law library or from your regional PLS office.

News and Briefs

Whether Less Than 25 Grams of Marijuana is Dangerous Contraband Depends on the Contents of the Indictment

In *People v. Finley*, 862 N.Y.S.2d 1 (2008), the Court of Appeals held that in the absence of aggravating circumstances, possession of 25 grams or less of marijuana did not constitute dangerous contraband as is required to support a conviction of promoting prison contraband in the first degree. In *People v. Reeves*, 911 N.Y.S.2d 236 (3d Dep't 2010), defendant Reeves, who in 2007 had pled guilty to promoting prison contraband in the first degree based on possession of 25 grams of marijuana, moved to vacate his conviction. Even though he had waived his right to appeal, the Third Department held that if the indictment to which the defendant pled guilty was "jurisdictionally defective" because it failed to allege that the defendant committed acts constituting every element of the crime charged, the conviction must be vacated. In defendant Reeves's case, the court found that the indictment tracked the statutory language of Penal Law §205.25(2) [promoting prison contraband in the first degree], and stated that the amount of marijuana possessed by the defendant was 25 grams. Because of the amount of marijuana, the court found that the indictment did not satisfy the dangerous element of the crime. The court looked at the grand jury minutes and concluded that the defect was not remedied because although there was some testimony about past problems caused by marijuana possession in prison, it was unclear whether the problems were caused by possession of 25 grams or less of marijuana or by possession of larger amounts of marijuana. The imprecise testimony did not, the court found, establish the aggravating circumstances which

must be shown when possession of 25 grams or less is alleged. Because of the jurisdictionally deficient indictment, the court vacated the judgment of conviction.

Disciplinary Hearings

HO's Handling of Witness Refusal Forms Leads to Reversal and Expungement

In a case requiring the court to analyze the sufficiency of the witness refusal forms that were presented to the hearing officer, the court concluded that the manner in which the forms were filled out required that the hearing officer interview either the witnesses or the officer who filled out the forms. Having failed to do so, the court in Matter of Jamison v. Fischer, 913 N.Y.S. 2d 350 (3d Dep't 2010), concluded, the hearing must be reversed and expunged. The respondent had argued that the hearing officer's error warranted only a remittal for a new hearing.

In most cases where a witness is reported to have refused to testify, under Matter of Alvarez v. Goord, 813 N.Y.S.2d 564 (3d Dep't 2006), unless the witness had previously said that he would testify, a hearing officer is not obligated to personally interview the witness to determine the reason for the change. In Jamison, while the inmate witnesses had not previously agreed to testify, the witness refusal forms were missing critical information about the refusal and at the hearing, the hearing officer falsely summarized the content of the forms. While the hearing officer informed the petitioner that his inmate witnesses had refused to testify because they had not seen anything, on four of the five forms, no reason for refusing to testify was noted and on the fifth, the reason given was that the witness did not want to testify. The hearing officer did not examine the officer who presented the forms as to the circumstances of the refusals, nor did the hearing officer himself question the witnesses as to their reasons for refusing to testify.

Later in the hearing, an officer submitted two additional forms. The hearing officer told the petitioner that while no reason was noted on either form, both witnesses had signed the witness refusal forms. In fact, one of the forms was blank and the other, while signed by the witness, gave as the reason for the refusal, "I'm not in my cell."

By holding that under these circumstances, the hearing should be reversed and the charges expunged, the court equated the hearing officer's conduct to that of a hearing officer who denies a witness without a stated good faith reason or who fails to make any effort to obtain a requested witness's testimony.

The petitioner in Matter of Jamison v. Fischer was represented by the Criminal Defense Clinic at CUNY Law School under the supervision of Professor Donna Lee.

Court Rules That Inartful Questioning Is An Improper Basis for Exclusion From Hearing

When the petitioner in Matter of Cornwall v. Fischer, 911 N.Y.S.2d 239 (3d Dep't 2010), was questioning the officer who had accused him of violating the rules of inmate discipline, the hearing officer directed that he stop making statements and ask questions. The petitioner had difficulty complying with this direction, whereupon the hearing officer excluded him from the hearing. The Supreme Court ruled that the hearing officer's conduct did not wrongfully deprive the petitioner of his right to be present at the hearing. The Appellate Division disagreed.

Noting that the right to be present at a prison disciplinary hearing is a fundamental right, the court found that the hearing officer had neither given the petitioner the required warning that if he did not follow the hearing officer's instructions, he would be excluded from the hearing, nor did he have a sufficient factual basis for concluding that the petitioner's conduct was a basis for excluding him. Rather, the court stated, while the behavior – an inability to form questions rather than make statements – was irritating, it did not rise to the level of disruption that justified exclusion from the hearing.

Because a fundamental right was at stake, the court ordered that the hearing be reversed and the charges expunged from the petitioner's institutional record.

Improper Use of Phone During Family Reunion Visit Leads to Several Disciplinary Charges

While on a family reunion visit, the petitioner in Matter of Bailey v Smith, 910 N.Y.S.2d 923 (3d Dep't 2010), discovered that the camera that he had been given had no film and used the emergency phone to notify correction staff of this fact and that the camera was not working. He was charged with misusing the emergency phone system, among other charges. After petitioner filed his Article 78 petition, the Attorney General agreed that the determination that petitioner had misused the emergency phone was not supported by substantial evidence. The court ordered the hearing reversed and the charge expunged.

Substantial Evidence Did Not Support Charge That Inmate Threatened Officer

When the petitioner in Matter of Phillips v. Fischer, 913 N.Y.S.2d 416 (3d Dep't 2010), was delayed by an officer's decision to complete a task before he responded to petitioner's request, the petitioner stated that any idiot could do the job and that the officer should be taken out back and shot. The officer charged the petitioner with harassment and threats. Petitioner was found guilty and challenged the determination in an Article 78 proceeding. The court found that while there was substantial evidence to support the charge of harassment, because the petitioner's "totally inappropriate" comment could not have been perceived as an actual threat, the determination of guilt as to that charge was not supported by substantial evidence. The court ordered the determination of guilt reversed and the charge expunged from the petitioner's record and remitted the hearing for redetermination of the penalty.

Request For Reconsideration Does Not Toll Statute of Limitations

In Matter of Spencer v. NYS DOCS, 909 N.Y.S.2d 687 (3d Dep't 2010), the Third Department considered whether the Albany County Supreme Court's decision that the action was time barred had resulted in an improper dismissal of the petitioner's Article 78 petition. This case arose out of a disciplinary hearing that was held in 1994. In 2006 and 2009, after the petitioner wrote to the Director of Special Housing and Inmate Disciplinary Programs requesting that the disciplinary determination be reversed, the Director denied the request. After the Director refused to reconsider the decision in 2009, the petitioner filed this Article 78 petition seeking reversal of the hearing. The respondent moved to dismiss the petition as time-barred. He argued that more than four months had passed between the petitioner's receipt of the Director of Disciplinary Program's affirmation of the hearing decision and the filing of the petition. The lower court ruled that because an Article 78 must be filed within four months of the final agency decision, the action was time barred. The Appellate Court agreed, finding that the four month limitation period was not extended by the petitioner's submission of requests for reconsideration.

Contamination of Urine Sample is Not Substantial Evidence of Interfering with an Employee; Petitioner Not Entitled to OMH Testimony

According to the misbehavior report, when the petitioner in Matter of Quinones v. Fischer, 78 A.D.3d 1407 (3d Dep't 2011), was asked for a urine sample, a correction officer observed him place "powder" into the sample, and after being ordered to stop, saw the petitioner flush the sample down toilet. The officer charged him with failing to comply with urinalysis testing guidelines, refusing a direct order and interfering with an officer. At the disciplinary hearing, the hearing officer refused petitioner's request for an

OMH witness to testify that he suffered from shy bladder. The hearing officer found the petitioner guilty of the charges.

When the Third Department reviewed the hearing, it found that the determination of that the petitioner had interfered with an employee was not supported by substantial evidence and ordered that charge dismissed. The court also held that although the petitioner was charged with violating urinalysis procedures, he was not entitled to call an OMH clinician as a witness. While such witnesses have relevant testimony as to the issue of whether inmate may not be able to urinate in front of other people, their testimony would not be relevant to the charge that petitioner violated urinalysis procedures by tampering with the sample.

Regulation Permits Officer Who Approved Contraband Watch To Serve As Hearing Officer

Following a family reunion visit, an officer asked the petitioner in Matter of Perkins v. Fischer, 911 N.Y.S.2d 226 (3d Dep't 2010), to provide a urine sample. According to the officer's misbehavior report, after stepping out of the room to secure the sample, he returned to find a feces covered condom on the floor near the petitioner. Petitioner was placed on contraband watch. When the contents of the condom tested positive for marijuana, he was charged with possession of drugs.

At the hearing, petitioner argued that because the hearing officer was the individual who had authorized the contraband watch, he was involved in the incident and was thus ineligible under the regulation to serve as the hearing officer. The hearing officer denied that he had authorized the watch. The court ruled that even if he had authorized the watch, this would not disqualify him from serving as the hearing officer at petitioner's hearing as authorizing the watch was not the equivalent of investigating the incident.

Annotated List of Names Is Not Substantial Evidence of Possession of Gang Related Materials

When an officer found what he believed to be a gang roster list – a list of inmate names on which various symbols preceded the names on the list – the petitioner in Matter of France v. Bezio, 911 N.Y.S.2d 244 (3d Dep't 2010), was charged with possession of gang related materials. At the hearing, the officer who found the document testified that he was trained in identifying gang-related material but admitted that he did not know the meaning of the symbols that appeared next to the names on the list and could not explain how he knew the symbols were gang-related. The only basis for his conclusion that the document was a gang roster list was that he knew that some of the inmates whose names were preceded by a symbol were in the Latin Kings organization. The officer could not confirm that all of the inmates whose names were preceded by symbols were in the Latin Kings. The court held that in the absence of substantial evidence that the document contained gang related information, the determination of guilt must be annulled and all references thereto expunged from petitioner's records.

Court Finds No Evidence Supports Determination That Inmate Used Job to Steal Money

When an inmate (unidentified) falsified payroll records to inflate the number of hours petitioner and other inmates had worked, and thereby give them a pay increase, he did so, he testified, at the direction of the civilian supervisor. When petitioner, who was one of the beneficiaries of the scheme, was found guilty of stealing, he filed an Article 78 challenge to the hearing claiming that the finding of guilt was not supported by substantial evidence. The court, in Matter of Loret v. Bezio, 79 A.D.3d 1561 (3d Dep't 2010), ruled that in the absence of evidence showing that petitioner had knowledge

of the payroll alterations or that he conspired with the inmate who had altered the payroll, the determination that petitioner stole the money was not supported by substantial evidence.

Parole

Appeals Court Has Authority to Dictate When a Parolee Can Associate With His Wife

In 1999, Robert Boehm was convicted of having sexually abused a woman to whom, in 2008, he was married. While there was a history of domestic violence between the two, during a subsequent period of incarceration, Mr. Boehm's wife visited him in prison and participated in the family reunion program. When Mr. Boehm was released to parole supervision in 2008, as a condition of his release, he was not permitted to associate or communicate with his wife without his parole officer's permission.

Mr. Boehm challenged this condition in an Article 78 petition and when his petition was dismissed, he appealed to the Appellate Division. In Matter of Boehm v. Evans, 914 N.Y.S.2d 318 (3d Dep't 2010), the Appellate Division ruled in the Division of Parole's favor. The court began by noting that the following principles apply to the imposition of special conditions:

1. The decision to impose a special condition upon the release of an inmate is discretionary in nature and beyond the review of the courts so long as made in accordance with law;
2. The Board of Parole has a compelling interest in supervising parolees; and
3. The Board of Parole has the discretion to impose conditions restricting contact between spouses.

While the petitioner did not dispute the validity of these principles, he argued that the special

condition imposed on him was unlawful and arbitrary and capricious in the following respects:

1. The condition restricts the couple's fundamental right to maintain a marital relationship;
2. The condition is not narrowly tailored to the state's interests in supervising the petitioner and protecting his wife; and
3. The condition serves no legitimate penological interest.

The court rejected the petitioner's argument, finding that under the rule of law announced by the United States Supreme Court in Turner v. Safely, 482 U.S. 78 (1987), the restriction of an inmate's fundamental rights is valid if it is reasonably related to legitimate penological interests.

Reasonableness is determined, the court went on, by considering among other things whether there is a valid rational connection between the regulation and the legitimate governmental interest put forward to justify it and whether there are obvious easy alternatives that accommodate, in this case, the right to marry while imposing a de minimis burden on the pursuit of security objections.

Citing New York State caselaw, including Matter of Ariola v. NYS Division of Parole, 880 N.Y.S.2d 367 (3d Dep't 2009) and Matter of Ciccarelli v. NYS Division of Parole, 784 N.Y.S.2d 173 (3d Dep't 2004), the court noted that a special condition is not arbitrary and capricious if it is rationally related to the inmate's criminal history, past conduct and future chances of recidivism. In this case, the court found that in addition to having been charged with rape in the first degree, convicted of sexual abuse in the first degree against his wife, and having a history of domestic violence perpetrated against his wife, the petitioner had 20 disciplinary infractions while in prison, a long history of substance abuse and orders of protection issued in favor of his parents. Under these circumstances, the court concluded that the

special condition – in essence a five year ban on unsupervised contact with his wife – is reasonably related to legitimate penological objective and rationally related to petitioner’s history and potential for recidivism. The court rejected petitioner’s suggested alternatives, finding that they would impose more than a de minimis cost on the state. Finally, finding the case factually similar to that decided by the First Department in Matter of Williams v. NYS Division of Parole, 899 N.Y.S.2d 146 (1st Dep’t 2010), the court held, as did the court in Williams, that even if a heightened level of scrutiny is warranted because a fundamental right is being burdened, here there was a direct relationship between petitioner’s criminal history

and the challenged condition which does not impose a complete impediment to petitioner’s fundamental right to family life.

Mr. Boehm is represented by Prisoners’ Legal Services of New York. His lawyer has filed for permission for leave to appeal in the Court of Appeals.

Denial of Parole Upheld in Spite Of Missing Sentencing Minutes

In Matter of Santiago v. NYS Division of Parole, 911 N.Y.S.2d 436 (2d Dep’t 2010), the Second Department considered the issue of whether the absence of sentencing minutes at a parole release hearing resulted in a decision making process that was so flawed as to require a re-hearing. Under the circumstances presented in Petitioner Santiago’s case, the court reversed the lower court’s determination that the proceeding was fatally flawed.

One of the factors that the Parole Board is required to consider at a parole release hearing is the inmate’s sentencing minutes. In Petitioner Santiago’s case, the minutes were not included in the record of the hearing. The lower court found that the Board’s failure to locate and consider the minutes deprived the petitioner of due process. It ordered the Board of Parole to conduct a re-hearing.

The Appellate Division concluded that the lower court’s ruling was unwarranted because 1) the petitioner had failed to raise this issue in his administrative appeal and 2) the Board of Parole had made sufficient efforts to locate the 1985 sentencing minutes and 3) there was no evidence to indicate that the sentencing court made any recommendation as to parole.

The Appellate Division rejected the respondent’s argument that the petition should be dismissed as moot because between the time that the Board had issued the decision and when the court ordered the rehearing, the Board had conducted another hearing. The Second Department found that because there was no reason to presume that the missing minutes

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would resurface and because Mr. Santiago would probably continue to seek early release from prison, the appeal should be decided rather than dismissed as moot.

Court of Claims

When Must a Claimant State a Specific Amount of Damages

Section 11 of the Court of Claims Law (part of the Judiciary Law) sets forth what a claimant must state in his or her claim. Included in the requirements is, with certain exceptions, the total sum claimed:

The claim shall state the time when and place where the claim arose, the nature of the claim, the items of damage or injuries claimed to have been sustained and, **except for in an action to recover damages for personal injury, medical, dental or podiatric malpractice or wrongful death**, the total sum claimed.

Two claimants recently requested that they be allowed to amend their claims for damages in their Court of Claims actions and received different decisions. In Lozada v. State of New York, 2010-041-054, the claimant is seeking damages for a period of wrongful confinement, a type of false imprisonment. Mr. Lozada's claim alleges that as result of the failure to credit him with the parole jail time to which he was entitled, he was confined for 140 days beyond the 24 month time assessment imposed at his parole revocation hearing. When he moved to file an amended claim to increase the total sum of damages claimed, the court denied his motion. The court noted that Section 11 does not require the claimant to allege the total sum claimed as damages where a cause of action for personal injury has been alleged. Finding that a claim for false imprisonment is a personal injury claim, the court held that it was unnecessary for Mr. Lozada to state the total sum claimed as damages

and therefore unnecessary for him to amend his claim.

In Jane Doe v. State of New York, 2010-042-532, on a similar motion to increase the damages sought in the claim, the court reached the opposite result. In this case, the claimant was sexually abused by an employee at the Tryon Residential Center. At the time that she made her motion to amend her damages claim, the court had granted her summary judgment motion on the issue of liability. The claim for damages had already been increased once and the claimant asked that it be increased from \$2,000,000 to \$650,000,000. Here the court found that while Section 11 eliminates the requirement that certain claims set forth a "total sum claimed" as a jurisdictional requirement, it does not bar the use of an **ad damnum** clause (a clause that states the amount of money that is claimed as damages for the alleged wrong committed). As the defendant had failed to show any prejudice that would result from amending the clause, the court granted the motion.

Sentencing

SOMTA: Confined Or Under Supervision For a Sex Offense Or a Related Offense

In State v. Rashid, 2010 WL 4720854 (Ct. App. Nov. 23, 2010), the Court of Appeals held that in order to pursue civil management under the Sex Offender Management and Treatment Act (SOMTA), Article 10 of the Mental Hygiene Law, the Attorney General must file the required petition before the respondent has been released from state custody or supervision. In addition, the Court clarified that Article 10, contains its own provision for determining which individuals who are subject to multiple sentences will be eligible for Article 10 treatment. For this reason, the Court decided, P.L. §70.30 does not control whether individuals subject to multiple sentences are eligible for Article 10 treatment. The facts that led to this decision were as follows.

In 1988, Mr. Rashid was arrested on several charges including robbery, rape and sodomy and received a maximum sentence of 16 years. While on parole supervision from this sentence, he was convicted of several charges, including felony robbery and misdemeanor weapons possession, and was sentenced to 2 to 4 years. The indictment was satisfied by a plea of guilty to weapons possession charge included a charge of sexual abuse. While on parole supervision, in 2008, Mr. Rashid was sentenced to a 1 year definite sentence which he served at Rikers Island. When he finished serving his definite sentence, he owed 5 days on his felony sentence. The day after his felony sentence expired, the Attorney General filed a petition seeking sex offender civil management pursuant to Article 10 of the Mental Hygiene Law.

An Article 10 civil management proceeding is designed to reduce the risks posed by and to address the treatment needs of sex offenders who suffer from mental abnormalities that predispose them to commit repeated sex crimes. Article 10 provides that whenever an individual who may be a detained sex offender is nearing a release date, DOCS or OMH must notify the Attorney General and the Commissioner of Mental Health. The Division of Parole has the authority to report that a parolee who may be a sex offender is nearing completion of his period of supervision, but is not required to do so. If the OMH staff determines that an individual about whom it was notified needs treatment and supervision, the case is referred to the Attorney General with a recommendation that the State file an Article 10 proceeding seeking a ruling that the respondent is a sex offender who is in need of civil management.

SOMTA defines a sex offender as a person who stands convicted of a sex offense as defined by MHL § 10.03(p) and who is currently serving a sentence for, or under parole supervision for such offense **or a related offense**. MHL § 10.03(p) states that a “sex offense” includes felonies in P.L. Article 130 and any felony attempt or conspiracy to commit those crimes, **as well as “a designated felony . . . if sexually motivated and committed prior to the effective date of [Article 10].”** The list of **designated felonies** includes a broad range of

felony crimes including assault, kidnapping, burglary, robbery, and arson. **“Related offenses”** include any offenses that are prosecuted as part of the same criminal action or proceeding, or which are part of the same criminal transaction, or which are the bases of the orders of commitment received by DOCS in connection with an inmate’s current term of incarceration.

On September 29, 2008, the Division of Parole, citing the 1992 sodomy conviction, notified OMH that Mr. Rashid was a detained sex offender and that his sentence would expire on November 4. The case was referred to the Attorney General with a recommendation that an Article 10 proceeding be initiated.

In the petition filed on November 5, the AG stated that the qualifying felony was a “designated felony that was sexually motivated.” However, at the first hearing on the petition, the AG argued that Mr. Rashid was a detained sex offender because, by operation of Penal Law §70.30, at the time that the proceeding commenced, he was subject to state custody or supervision for the 1992 rape and sodomy conviction. In the alternative, the AG argued that the Article 10 qualifying conviction was a sexually motivated designated felony because even though Mr. Rashid only pled guilty to a misdemeanor (the weapons possession charge), that charge was on an indictment with a sexually motivated robbery. The AG took the position that the proceeding had commenced on September 29, 2008, the date upon which the Division of Parole informed the OMH Commissioner and the Attorney General that Mr. Rashid had been identified as a person who is a detained sex offender.

Mr. Rashid filed a motion to dismiss, arguing that he was not a detained sex offender at the time that the petition was filed and therefore that court did not have jurisdiction over him. His first argument was that the petition had been filed on November 5, after his sentence had expired and thus he was no longer detained. His second argument was that for SOMTA purposes, P.L. §70.30 – a law that governs the calculation of sentences – did not control whether in 2008 he was serving his 1992 sentence. The Court of Appeals ruled in Mr. Rashid’s favor on both arguments.

The Court of Appeals neatly disposed of the argument that someone who was not in custody or under parole supervision when the petition was filed could be considered a “detained” sex offender. The court wrote that Article 10 was enacted specifically to cover individuals in DOCS custody or under Parole supervision. Once such individuals are no longer subject to state supervision, the involuntary commitment provisions of Article 9 of the Mental Hygiene Law control whether they can be involuntarily committed for psychiatric treatment.

The Court also rejected the argument that P.L. §70.30’s rules for the merger of concurrent sentences and the aggregation of consecutive sentences should be used to determine whether an individual is serving a sentence for a SOMTA qualifying offense. The Court of Appeals had used that section – which by **aggregating** (adding together) all consecutive sentences, results in an inmate having one sentence that is composed of all sentences to which the inmate was subject at the time that he committed the most recent offense – when it determined whether the Sex Offender Registration Act (SORA) applied to an individual whose sentence for a sex crime would have expired but for its aggregation with a subsequently imposed assault crime (non-sexual). In that case, People v. Buss, 872 N.Y.S.2d 413 (2008), the Court of Appeals held that the defendant, whose 1982 sentence for a sexual offense would have expired – had it not been for its aggregation with a 1987 sentence for a non-sexual offense – before the SORA law was adopted, was subject to the sex offender registration requirement because, under the aggregating provisions of P.L. §70.30, he was still serving the 1983 sentence when he was released in 2003.

The Court said that applying P.L. §70.30 to determine whether an individual was serving a sentence for the conviction of a sex offense was “consistent with SORA’s aims” of “protect[ing] the public from the danger of recidivism posed by sex offenders.” However, the Court found, the rationale that applied to sex offender registration did not apply to the SOMTA. In addition, unlike SORA, which did not provide any guidance as to how multiple

sentences would be treated, SOMTA, in its definition of a detained sex offender, expressly states which offenders who were subject to multiple terms of incarceration would be eligible to Article 10 commitments: those offenders who are serving a sentence or are subject to parole supervision for a sex offense or a related offense.

The law further states that “related offenses” include (1) offenses prosecuted as part of the same criminal action or proceeding as a sex offense, (2) offenses which are part of the same criminal transaction as a sex offense, and (3) offenses which are the bases of the orders of commitment received by the department of correctional services in connection with an inmate’s current term of incarceration.” MHL §10.03(1). The Court noted that (1) and (2) apply to inmates in DOCS custody or on parole but that (3) applies only to inmates in DOCS custody, and that the definition of related offenses in subdivision (3) was more expansive than the definition in the other two subdivisions. Based on this observation, the court concluded that the Legislature intended to give DOCS greater latitude in referring inmates for civil confinement than it gave to the Division of Parole. DOCS could refer individuals in its custody based on any of the commitments that were delivered with the inmate when he or she entered DOCS custody. The Division of Parole however, could refer inmates on the basis of related offenses only if those offenses were prosecuted in the same action or proceeding as a sex offense or on the basis of offenses which were part of the same criminal transaction as the sex offense. The Court held that the Legislature had enacted in Article 10 a comprehensive and complex scheme that defines which offenses count for Article 10 purposes and found that superimposing P.L. §70.30 analysis onto Article 10 for the purpose of making eligibility determinations would distort the statutory scheme.

Finally, the Court found that with respect to respondent Rashid, at the time that the Article 10 proceeding was commenced, he had not been under parole supervision or in DOCS custody for a sex offense or a related offense. Rather he was

in local custody serving a sentence for petit larceny and thus was not subject to Article 10.

The case which led to this decision was factually complex. While the courts addressed several arguments that were not directly related to the facts upon which this case was ultimately decided, space does not permit a fuller recitation of the facts here. Only those facts which were necessary to understand the basis for the Court's disposition of the appeal are discussed in this article.

Civil Management: Court Approves Transfer From Community Supervision to Confinement

When the respondent in State of NY v. Motzer, 913 NYS2d 473 (4th Dep't 2010), was released to parole supervision, he consented to a finding that he was a sex offender who suffers from a mental abnormality requiring strict and intensive supervision and treatment (SIST) pursuant to Mental Hygiene Law (MHL) §10.11. Shortly after his release, the respondent was arrested for violating certain SIST conditions and the Supreme Court found him to be a dangerous sex offender requiring supervision. On appeal, the court reviewed whether this finding was supported by clear and convincing evidence. The evidence supporting this finding was the testimony of the respondent's parole officer and a psychologist who had evaluated the respondent.

The court found that in reaching its conclusion, the Supreme Court was not limited to the facts of the SIST violations; it was permitted to rely on all the relevant facts and circumstances tending to establish that respondent was a dangerous sex offender requiring confinement.

In this case, two expert psychologists testified, one for the State and one for the respondent. The court ruled that the Supreme Court was in the best position to determine which expert's testimony was more credible and which testimony should be given more weight. The court also held that it was permissible for the State's expert to provide opinion evidence based on interviews with respondent's treatment

providers at the psychiatric hospital who did not testify as long as these interviews were the type of material commonly relied on in the profession. Here, the State's expert testified that statements of respondent's treatment providers are commonly relied upon by the profession when conducting psychological exams to determine whether individuals are dangerous sex offenders requiring confinement.

The court also held that it was not erroneous to allow the state's expert to give hearsay testimony regarding her conversations with respondent's treatment providers, commenting that hearsay testimony given by an expert is admissible for the limited purpose of informing the jury of the basis of the expert's opinion and not the truth of the matters related.

Based on these rulings, the court found that the determination was supported by clear and convincing evidence that respondent was a dangerous sex offender requiring confinement.

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Pro Se Practice

Changing Your Name

INTRODUCTION

A person's name is one of the most fundamental pieces of his or her identity. A name can affect how an individual views himself or herself and how s/he is viewed by others. The State of New York recognizes that an individual should have control over his or her name and that this control should include the decision to change names.

The New York "common law" – law that is not in statutes – allows an individual to change his or her name simply by calling him/herself by a new name, using that name in all parts of his/her life and having his/her associates do the same. This is a viable method for effecting a name change in New York State. In addition, New York has a statutory procedure for obtaining a court ordered name change, that is, a name change with a judicial "stamp of approval." Judicial authorization to change a person's name facilitates the transition from the old name to the new. A certified copy of the name change order can be produced in the event that it is necessary to prove the validity of the new name. This memo summarizes the process of obtaining judicial authorization for the use of a new name.

THE NAME CHANGE PROCESS

Article 6 of the New York State Civil Rights Law governs the judicial procedure for name changes in New York State. The process is straightforward and relatively uncomplicated.

The Petition

First, the person desiring the name change must file a **verified** petition for a change of name with either the County Court or the Supreme Court in the county where s/he resides. The petition must be in writing and must include the following information:

1. The applicant's name, age, date and place of birth and current residence;
2. The proposed name; and
3. The grounds for the name change.

The grounds for the petition are the reasons that the petitioner wants to change his/her name. Acceptable grounds include, for example, that the new name will correspond to the petitioner's gender identity, see In re Golden, 867 N.Y.S.2d 767 (3d Dep't 2008), or that the petitioner wants the same name as his same sex partner to reflect their commitment to each other, see In re Daniels, 773 N.Y.S.2d 220 (N.Y. City Civ. Ct. 2003).

A certified copy of the petitioner's birth certificate must be attached to the petition.

The petitioner must also provide the following information:

1. Whether or not s/he has ever been convicted of a crime or adjudicated a bankrupt;
2. Whether or not there are any judgments or liens of record against the petitioner, or actions or proceedings pending to which the petitioner is a party. If so, the petitioner must give descriptive details sufficient to identify the matter referred to;
3. Whether or not the petitioner is responsible for child support obligations and, if so, whether or not the petitioner's child support obligations have been satisfied and are up to date; the amount of child support arrearage that is currently outstanding; and the identity of the court which issued the support order and of the county child support collections unit; and
4. Whether or not the petitioner is responsible for spousal support and, if so, whether these obligations have been satisfied and are up to date; the amount of spousal support arrearage that currently is outstanding; and the identity of the court which issued the support order.

If petitioner has been convicted of a violent felony offense as defined in Penal Law §70.02 or of a felony defined in Article 125 of the Penal Law (Homicide, Abortion and Related Offenses) or any of the following provisions of the Penal Law:

§130.25 rape in the 3rd degree
 §130.30 rape in the 2nd degree
 §130.40 criminal sexual act in the 3rd degree
 §130.45 criminal sexual act in the 2nd degree
 §135.10 unlawful imprisonment in the 1st degree
 §135.25 kidnapping in the 1st degree
 §230.05 patronizing a prostitute in the 2nd degree
 §230.06 patronizing a prostitute in the 1st degree
 §230.30(2) promoting prostitution in the 2nd degree
 §230.32 promoting prostitution in the 1st degree
 §255.25 incest in the 3rd degree
 §255.26 incest in the 2nd degree
 §255.27 incest in the 1st degree
 Article 263 Sexual Performance by a Child

and is currently an inmate in a correctional facility as a result of the conviction of one of the above offenses, the petitioner shall, for each such conviction, specify the offense, the date of the conviction or convictions and the court or courts in which such conviction(s) were entered.

Procedure

Not less than sixty days prior to the date on which the petition is scheduled to be heard, an incarcerated petitioner is required to serve notice on the district attorney in every county in which s/he has ever been convicted of a violent felony offense as defined in §70.02 of the Penal Law or a felony defined in Article 125 of the Penal Law (Homicide, Abortion and Related Offenses) or any of the other provisions of the Penal Law listed in the preceding section of this memo. See N.Y. Civil Rights Law §62(2).

The notice to the district attorney must be served in the manner that a motion is served upon an attorney. That is, the petitioner must serve the notice by mail and the petitioner should prepare an affidavit of service to show that the district attorney was served. Such notice must also be served on the court or courts in which the sentence for such felony or felonies was entered.

Entering the Order and Publishing the Change of Name

If the petition is granted and an order is issued authorizing the name change, the petitioner must enter the order and the papers on which it was granted in the county clerk's office of the county in which the petitioner resides or in the office of the clerk of the civil court of the city of New York if the order was issued by that court.

The petitioner must publish a general notice of the name change within 60 days of the entry of the order. The notice must be published in the newspaper designated in the order. The notice should read as follows:

Notice is hereby given that an order entered by the _____ court, _____ county, on the _____ day of _____, bearing Index Number _____, a copy of which may be examined at the office of the clerk, located at _____, in room number _____, grants me the right to assume the name of _____. My present address is _____; the date of my birth is _____; the place of my birth is _____; my present name is _____.

If the petitioner is incarcerated, within 60 days of the entry of the order, the petitioner must also publish the order in a newspaper in every county in which he or she was convicted if that county is different from, or in addition to, the county in which the order is otherwise directed to be entered. The order will designate the newspaper in each county in which the notice must be published.

Lastly, within **90 days** of when the order was issued, the petitioner must file an affidavit of publication with the court that issued the order. This affidavit should set forth the name of every newspaper in which the notice was published.

After these steps have been taken, the applicant's name is legally changed as a matter of public record.

Reasons for Denying the Petition

Case law establishes that “any person, including an alien, should be allowed to change his name in good faith as he desires, provided such change would not violate any statutory provision or overriding public policy.” Matter of Novogorodskaya, 429 N.Y.S.2d 387 (N.Y. City Civ. Ct. 1980). The court has an obligation to ensure that the name change will not be a source of “fraud, evasion or interference with the rights of others”. Matter of Stempler, 441 N.Y.S.2d 800 (Sup. Ct. Nassau County 1981). Thus, a court may deny a name change application where granting the application would a) override public policy; b) be a source of fraud or evasion; or c) violate the rights of others. For example, a court denied a female applicant’s petition to adopt the last name of an already married man. The court reasoned that the proposed change would allow the applicant to hold herself out as the man’s wife, and this risk of fraud and misrepresentation was fatal to her petition. In re Linda Ann A., 126 Misc. 43 (N.Y. Sup. Ct. 1984).

A court will also deny a proposed name change if it would mislead or confuse the public. For example, a petitioner was denied permission to change his name to Chief Piankhi Akinbaloye. The court ruled that, because the word “chief” carries an air of authority and leadership, it would tend to confuse members of the community that came in contact with the applicant. As a result, the court held that the public’s right to be free from confusion trumped the petitioner’s right to change his name through the court system. In re Thompson, 82 Misc.2d 460 (N.Y. Civ. Ct. 1975).

In considering applications made by incarcerated individuals, the courts have been most concerned about potential record keeping problems caused by a name change. Generally, the appellate courts have decided the issue in the petitioner’s favor. For example, in reviewing a lower court denial of an inmate’s application for a name change, the court in Matter of Austin, 743 N.Y.S.2d 333 (3rd Dep’t 2002), held that “while potential recordkeeping problems were cited as a basis to deny the petition, the letters to petitioner from the Department of Correctional Services do not indicate that his application was opposed. Instead, the letters inform petitioner

that his request for a name change will only be recognized when he produces an appropriate judicial order. Therefore, given the absence of a ‘demonstrable reason not to do so’ we find that the petition should be granted.” See also, Matter of Waters, 695 N.Y.S.2d 428 (3d Dep’t 1999); Matter of Madison, 689 N.Y.S.2d 732 (3rd Dep’t 1999).

The Fourth Department, however, has held to the contrary. In Matter of Holman, 631 N.Y.S.2d 277 (4th Dep’t 1995), the court upheld a lower court denial of an incarcerated individual’s application for a name change. The court found that because the applicant was “a convicted felon who is currently serving a sentence of imprisonment,” allowing him to change his name “would create record-keeping problems for the New York State Department of Correctional Services and other State and Federal agencies required to maintain criminal records.”

And, one lower court denied on public policy grounds, the application of a convicted sex offender to change his name. In Matter of the Application of Gutkaiss, 806 N.Y.S.2d 402 (Sup. Ct. Columbia Co. 2005), the court held that if the petition were granted, “it is possible that those who are familiar with [the petitioner as he was named at the time of his offense and conviction] may not be alerted to his presence unless his name remains the same.” The court went on to say, “People change their appearance; if the court allows the Petitioner to change his name he may, in effect, create a new identity for himself.” The court also found that because the sex offender registry is designed to protect unwary members of the public from convicted sex offenders, to allow sex offenders to change their names undermines the very purpose of the statute. Based on this reasoning, the court held that to protect the rights and interests of the public, it was denying petitioner’s application.

Thus, while courts are generally receptive to applications from incarcerated individuals to change their names, under certain circumstances the courts may deny such applications.

For a copy of this article, along with sample pleadings and forms, and instructions for filling out the forms, write to the PLS regional office that provides services to individuals in the prison in which you are incarcerated and ask for the Name Change memo.

PLS Offices and the Facilities Served

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

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

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

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

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

ITHACA, 114 Prospect Street, Ithaca, NY 14850

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

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

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