

# Pro Se

Vol. 21, No. 2 2011

Published by Prisoners' Legal Services of New York

## THANK YOU FOR YOUR SUPPORT!

More often than not, it is our readers who write letters thanking Prisoners' Legal Services for publishing *Pro Se*. Today, it is our turn to thank you, and our other loyal supporters in New York State and across the country, for your efforts to save PLS. Without your support, it is likely that we would have had to close our doors. Instead, as a result of your heartfelt, thoughtful and persuasive letters to legislators, the governor and editors of newspapers across the state, Prisoners' Legal Services was included in the State budget for the first time since 1998. Although the amount of funds allocated to Prisoners' Legal Services is quite small, it will allow us the time to reinvent ourselves so that we can continue to provide individuals in the custody of the New York State Department of Correctional Services with high quality legal services and to be a voice for justice, fairness, dignity and humanity in the prisons of New York.

Due to the need to inform our readers and client base of the adjustments to the PLS case acceptance guidelines that are necessitated by our funding constraints, this issue's article by the Executive Director of PLS details these changes. A future issue will have the promised article on Norway's Halden Prison.

## News and Briefs

### Budget Merges DOCS and the Division of Parole

In an effort to streamline the operations of the Division of Parole and the Department of Correctional Services, the legislature adopted Governor Cuomo's proposal that the Commissioner of a newly created Department of Corrections and Community Supervision be given the authority to impose conditions of parole, such as setting curfews and placing individuals in drug treatment programs. The Governor stated that this would better coordinate programming for offenders and save \$271,000,000. This plan was  
... article continued on Page 3

### Also Inside . . .

**DLRA Resentencing Cases . . . . Pages 5 – 7**

**Court Agrees DOCS/DOP  
Conduct Unconstitutional . . . . . Page 10**

**Failure to Advise Sex Offenders  
Of Collateral Consequences Not  
Fatal to Plea . . . . . Page 8**

*Subscribe to Pro Se, see page 13 for details.*

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

As many of you know, after stagnant funding for eight years and no funding in the 2010-2011 fiscal year, PLS received a 2011-2012 funding allocation in the New York State budget. We are overjoyed to be in the budget for the first time since 1998. The significance of this cannot be overestimated. At the same time, however, due to the State's dire financial condition, the amount that we received was a 75% reduction from our 2009-2010 funding. We have already reduced our staff by 66%, and have reassessed how we will respond to requests for assistance and the cases we will be able to accept while we are in the process of redesigning how, with limited funding, we can provide legal services to prisoners in a meaningful manner.

Most of our readers are familiar with the types of cases PLS has historically accepted and the guidelines we use to choose to accept cases within our priorities. For instance, historically, PLS has accepted disciplinary cases where the prisoner received at least 18 months in solitary confinement or an 18 month recommended loss of good time. Similarly, PLS has accepted jail and sentencing time cases if the time being sought was more than 90 days. Although these guidelines helped us to manage the thousands of requests for assistance that we receive annually, they did not necessarily help us identify those cases that raised the most significant legal issues.

Because the PLS staff has been reduced by 2/3, we will not be able to accept as many cases as we were able to accept in the past. For this reason, it is critical that we develop a process to identify and focus on the most egregious cases.

**To maximize the likelihood that we will be able to identify the cases where there is serious harm, we are asking you to work with us. When you write to us, tell us why your case is important and what violations of the law you think occurred. In your initial letter to us, we need you to give us as much information as possible about your problem.**

For instance, if you write to us about a disciplinary hearing issue, tell us what procedural and/or substantive errors occurred at your hearing and why you think the hearing disposition should be modified or reversed. If you write to us about a jail time, parole jail time or sentencing computation issue, tell us from what county you are seeking additional time, what period of time – referencing a start date and an end date – you think you are owed, and whether you might have been serving another sentence during that time. If you write to us about an excessive use of force, provide us with the details of the incident including the date and time, the names of officers involved, the motive, the extent of your injuries and any resulting disciplinary action. If you write about a medical or mental health care issue, tell us the care that you have received, what additional care you need, and why that care is necessary. In any of these cases, send any documents you have that support your claims.

In the past, our priorities have been challenges to Tier III disciplinary hearings; jail time, parole jail time and sentencing cases; excessive use of force claims; serious medical and mental health claims; and First Amendment claims. We are not able to broaden our priorities at this point, and will primarily consider requests for assistance that fall within these guidelines.

**For the past 35 years, PLS was committed to responding to every letter that we received. Unfortunately, because of our lack of staff and resources, we are no longer able to do so. We will respond to letters where we are accepting your case for investigation, are sending you form materials that you requested or that are relevant to your request for assistance or are able to provide you with counsel and advice.**

**PLEASE BE ADVISED THAT, because of our limited staff, PLS will be relying on your initial letter to decide whether to open your case. If there is insufficient information in your initial letter to warrant further investigation, you may not receive a reply from us.**

... *Budget Merges DOCS/DOP continued from Page 1*

included in the latest budget that was passed by the legislature. As a result, the Department of Correctional Services and the Division of Parole will be merged. In the new Department of Corrections and Community Supervision, parole will remain a separate entity within the agency and parole boards will continue to make parole release and parole revocation decisions.

The Governor's proposal that the number of parole commissioners be reduced from 19 to 13 was not adopted. Parole Boards are made up of parole commissioners. However, as the number of parole hearings has dropped by 43% since 1999, the Governor thought that it was time to reduce the number of commissioners available to conduct hearings. The Governor's bid to reduce the number of commissioners failed.

## Prison Closures

In recognition that the State is maintaining prison beds in excess of its need for them, the State legislature enacted legislation to eliminate over 3,700 adult prison beds. In addition, the legislature modified the amount of notice required when making decisions to close prisons. Originally, the statute required 12 months notice; now prisons can be closed with only 60 days notice.

Instead of convening a task force to **mete out** (distribute) the duties of picking prisons to close, as the Governor had originally proposed, the authority to do so will rest with the Governor. The Governor is required to consult with the legislature about his choices, however, at this point it is not clear how that consultation will take place.

## Counting Prisoners

A lawsuit challenging the manner in which prisoners are "counted" for the purpose of establishing state political districts has been filed by six state senators and several private citizens. Up until last year, for the purposes of political representation, prisoners were considered to be in

the districts that the prisons in which they resided were located. Last year, as a part of the New York State budget, the legislature passed a law requiring that prisoners be considered to be in the districts in which they resided prior to their convictions.

The lawsuit, captioned Little v. NYS Legislative Task Force on Demographic Research and Reapportionment, alleges that the change in the method for determining where prisoners reside is unconstitutional. The plaintiffs argue that if prisoners are not counted as part of the districts where the prisons to which they assigned are located, these communities will lose political influence but will still be required to provide services, such as fire and police, to facilities that house prisoners who are not, technically speaking, residents.

The new law will be defended by Attorney General Eric Schneiderman who, at the time that the law was passed was one of the legislators who lobbied for its passage.

## Disciplinary Hearings

### Right to Be Present

The Third Department recently addressed the issue of under what circumstances an inmate's right to be present at a Tier III hearing is violated. The decision in Matter of Ifill v. Fischer, 913 N.Y.S.2d 789 (3<sup>rd</sup> Dept. 2010), arose in the context of an inmate's refusal to attend a hearing after he had attended the initial session. Relying on its prior ruling in Matter of Tafari v. Selsky, 836 N.Y.S.2d 306 (2007), the court found that because there was no evidence in the record to show that the petitioner had been advised that if he did not attend, the hearing would be held in his absence, the petitioner had not knowingly and voluntarily waived his right to be present at the hearing.

A waiver of a fundamental right must be knowing and intelligent. The right to be present at a prison disciplinary hearing is a fundamental right. When a fundamental right at a prison

disciplinary hearing is violated, the remedy is reversal and expungement. In this case, the court ordered the hearing reversed and expunged.

## **Neither Constitution Nor Regulations Require That a Witness Be Physically Present**

In Matter of Piper v. Bezio, 916 N.Y.S.2d 319 (3d Dep't 2011), where the court considered whether an inmate's right to call witnesses is violated when the witness testifies via speaker phone, the court once again concluded that the practice did not violate either the regulations or the Constitution. In reaching this result, the court cited its decisions in Matter of Davis v. Prack, 872 N.Y.S.2d 565 (3d Dep't 2009) and Matter of Chavis v. Goord, 845 N.Y.S.2d 866 (3d Dep't 2007).

### **Sentencing**

## **Court Orders DOCS to Compute Local Sentence In the Manner That the Court Imposed It**

It is not unusual for an individual who is on parole to be convicted of a misdemeanor offense. When this happens, the law gives the court the authority to impose the sentence for the misdemeanor to run concurrently or consecutively to the felony sentence that the defendant was serving at the time of the commission of the new offense. See P.L. §70.25, providing that when a person who is subject to an undischarged sentence of imprisonment imposed at a previous time by a court of this state is sentenced to an additional term of imprisonment, the sentence imposed shall run concurrently or consecutively to the undischarged term in such manner as the court directs.

In Matter of Campbell v. Fischer, No. 510791, App.Div'n, (3d Dep't Mar. 31, 2011), the petitioner was serving a determinate sentence of five years when he absconded from a work release program. He was later arrested and pled guilty to driving while intoxicated, reckless driving, and

fleeing a police officer in a motor vehicle in the third degree in exchange for a promise of a sentence of 4 months to run concurrently with his unexpired prison sentence.

Petitioner brought this Article 78 proceeding when he returned to prison and DOCS refused to credit his felony sentence with the time that he had spent in the county jail.

In support of its position, DOCS argued that PL §70.30(7), which provides that time spent in a local jail will only be credited against the term of the undischarged sentence where:

- 1) the incarceration was due to an arrest based upon the failure to return;
- 2) the incarceration arose from an arrest on another charge which culminated in a dismissal or an acquittal; or
- 3) the custody arose from an arrest on another charge which culminated in a conviction, but in such case, if a sentence of imprisonment was imposed, the credit allowed shall be limited to the portion of the time spent in custody that exceeds the period, term or maximum term of imprisonment imposed for such conviction.

The Third Department, reversing the ruling of the lower court, ruled that because the sentencing court was authorized by P.L. §70.25 to impose the misdemeanor sentence to run concurrently to the undischarged felony sentence, DOCS was required to give the petitioner credit for the time that he served in local custody. The court stated that although PL §70.30(7) prohibits such a credit, the court resolved the conflict in favor of requiring that DOCS credit the time "by adopting the Fourth Department's reasoning in Matter of Midgely v. Smith, 407 N.Y.S.2d 283 (4<sup>th</sup> Dep't 1978)." To do otherwise, the court commented, "would restrict the sentencing court's conceded authority to impose a concurrent sentence pursuant to PL §70.25(1) and negate a plea bargain approved by the court.

---

*The petitioner in Matter of Campbell v. Fischer was represented by Prisoners' Legal Services.*

## 2009 DLRA: Second Department Disagrees With First Department

The 2005 DLRA provides individuals serving indeterminate sentences who had been convicted of A-II felony drug offenses *and who are more than 3 years from parole eligibility*, the opportunity to apply to be resentenced to determinate terms. In People v. Mills, 872 N.Y.S.2d 705 (2008), the Court of Appeals rejected a defendant's argument that having been re-incarcerated following a parole violation, an individual who is serving a sentence for the commission of an A-II felony drug offense is eligible for re-sentencing under the 2005 DLRA because at that point he or she is again more than 3 years from parole eligibility. In reaching this result, the Court stated, "Once a defendant has been released to parole supervision for a class A-II drug felony conviction, he or she no longer qualifies for 2005 DLRA relief for that particular conviction." Such a defendant is no longer more than three years away from parole eligibility.

The 2009 DLRA provides similar relief to individuals who are serving indeterminate sentences for the commission of class B felony drug convictions. However, the statute does not limit its coverage to those individuals who are more than 3 years from parole eligibility. Nonetheless, in People v. Pratts, 904 N.Y.S.2d 380 (1<sup>st</sup> Dep't 2010), the First Department held that an individual who was serving a sentence for a class B felony offense and had been returned to prison following a parole violation was not eligible for resentencing under the 2009 DLRA. The court noted that had the defendant successfully served two years of parole supervision, he could have been relieved of his entire sentence including parole, pursuant to Executive Law §259-j(3-a). Acknowledging without discussing the differences between the two statutes, the First Department stated that "there is no reason to believe that the legislature intended parole violations to trigger resentencing opportunities," and ruled that otherwise eligible individuals who were parole violators were not eligible for resentencing under 2009 DLRA. People v. Pratts, is currently before the Court of Appeals.

In People v. Phillips, 2010 WL 924035 (2d Dep't Nov. 11, 2010), the Second Department rejected the First Department's analysis of the 2009 DLRA. As noted by the Second Department, "[i]n the Drug Law Reform Act of 2009 (hereinafter 2009 DLRA), the Legislature provided that '[a]ny person in the custody of the Department of Correctional Services convicted of a class B felony offense defined in article two hundred twenty of the Penal Law which was committed prior to [January 13, 2005], who is serving an indeterminate sentence with a maximum term of more than three years, may ... apply to be resentenced' (CPL 440.46)." The Court stated that "[w]hile a person's status as a parole violator might be relevant in determining whether 'substantial justice dictates that the application should be denied' on the merits, nothing in Criminal Procedure Law §440.46 supports a conclusion that such status renders a person ineligible to apply for resentencing in the first instance." The Second Department did not accept the First Department's premise that commentary in People v. Mills, interpreting a statute that expressly excluded persons who were within three years of parole eligibility from its coverage should be used to justify the exclusion of individuals from the coverage of another statute that did not have the exclusionary language.

The Second Department **remitted** [sent back] the motion back to the county court for further proceedings.

## 2009 DLRA Exclusion Offense: Sentence Authorized For an A-I Felony

The defendant in People v. Gregory, 914 N.Y.S.2d 655 (2d Dep't 2011), sought resentencing under the 2009 DLRA. In 2001, he was convicted of criminal possession of a controlled substance in the third degree – a class B felony – criminal possession of a weapon in the third degree, and criminal possession of a controlled substance in the seventh degree, and was sentenced as a discretionary persistent felony offender to two concurrent indeterminate terms of 15 years to life. The People opposed the motion, arguing that the defendant was not eligible for

resentencing because of the term of his sentence. Criminal Procedure Law §440.46 extends to certain eligible individuals in DOCS custody who were convicted of class B felony drug offenses the opportunity to seek resentencing to a determinate term. However, the law excludes from eligibility for this relief “any person who is serving a sentence on a conviction for . . . an exclusion offense.” CPL §440.46(5). Relevant to this resentencing application, CPL §440.46(5) includes in its definition of exclusion offenses, “any other offense for which a merit allowance is not available pursuant to Correction Law §803(1)(d)(ii). Among the people who are not eligible for a merit allowance are those who are serving an indeterminate sentence authorized for an A-I felony offense. CL §803(1)(d)(ii). Penal Law §70.00(2) and (3)(a)(ii) authorize a sentence of 15 years to life for an A-I felony. Because the defendant was serving a sentence of 15 years to life with regard to his conviction for criminal possession of a weapon in the third degree, the court found that he was not eligible for a merit time allowance and therefore did not fall within the class of inmates eligible for resentencing pursuant to the 2009 DLRA.

### **2009 DLRA Exclusion Offense: Conviction Within the Preceding 10 Years**

In *People v. Green*, 2010 WL 5373922 (Sup. Ct. Richmond Co. Dec. 15, 2010), the defendant filed a motion to be resentenced under the 2009 DLRA. Under certain circumstances, the 2009 DLRA permits defendants convicted of Class B drug felonies who are serving indeterminate sentences to apply for resentencing to determinate terms. See Criminal Procedure Law §440.46. The law excludes from its coverage anyone who is serving a sentence on a conviction for or has a predicate felony conviction for “an exclusion offense.” Exclusion offenses are defined as:

(a) a crime for which the person was previously convicted within the preceding ten years, excluding any time during which the offender was incarcerated for any reason between the time of the commission of the previous

felony and the time of the commission of the present felony, which was: (i) a violent felony offense as defined in §70.02 of the penal law; or (ii) any other offense for which a merit time allowance is not available . . . ; or (b) a second violent felony offense pursuant to section 70.04 of the penal law or a persistent violent felony offense pursuant to section 70.08 of the penal law for which the person has been previously adjudicated.

Defendant Green had been sentenced as a discretionary persistent felony offender. The People opposed the motion for resentencing, arguing that the defendant’s 1979 conviction for robbery in the 2<sup>nd</sup> degree – a violent felony offense – was an exclusion offense.

The court rejected the People’s argument, finding that the law limits the “look back” period for a violent felony “for which the [movant] was previously *convicted within the preceding 10 years.*” The People argued that the 10 years should run from the date of commission of the drug felony with respect to which the defendant was seeking to be resentenced. The defendant argued that the 10 years should run from the date upon which the resentencing application was filed.

In resolving this issue, the court first noted that the statute itself did not specify a starting date from which the 10 years should be measured. Nonetheless, the court found that the language used in the statute was materially different from another “look back period” set forth in the Penal Law provisions relating to determining whether a defendant is a predicate felon, e.g., PL §70.06, which provides that for determining whether someone is a second felony offender, the 10 year look back period runs *from the date of the commission of the crime for which the defendant is being sentenced.* Whereas, the 2009 DLRA limits the look back period for an exclusion offense to *a violent felony conviction occurring within the last 10 years.* Based on this distinction in statutory language, the court found that the proper starting point for measuring the 10 year period was from the date upon which the application for resentencing was filed, and not, as the People

argued, the date upon which the drug felony with respect to which the defendant was seeking resentencing was committed. The court noted that using this interpretation allows a defendant who might have been ineligible for relief on the effective date of CPL §440.46 to become eligible after serving a greater percentage of his or her original sentence.

Based on this analysis, the court found that Defendant Green was eligible for resentencing and then considered whether resentencing was appropriate. The statute provides that in determining whether to allow the resentencing, the court “may consider any facts or circumstances relevant to the imposition of a new sentence which are submitted by such person or the people and may, in addition, consider the [applicant’s] institutional record.” Based upon its review of the relevant factors, the court is required, “unless substantial justice dictates that the application should be denied,” to inform the defendant of the determinate sentence it would impose.

Here, the court found that the defendant had been involved in the criminal justice system since 1976, when at the age of 14, he vandalized a school. Following this, at age 15 the defendant was a look out in an armed robbery during which a woman was killed, and subsequently was involved in a series of robberies in which women victims were injured. After being paroled from those convictions, the defendant was convicted of an attempted robbery and when next he was paroled, was convicted of selling crack to an undercover officer, following which he was sentenced as a persistent felony offender (non-violent).

An examination of the defendant’s institutional record showed that to his credit, during his 22 years in prison, he had completed a number of vocational and educational programs. He had also committed 38 Tier II and 7 Tier III disciplinary infractions and served over 400 days in SHU and 670 in keeplock. The court found that a number of the disciplinary infractions involved defiant, threatening and abusive conduct, some of which was of a sexual nature. Based on this, the

court concluded that the defendant has a pronounced inability to control his conduct even in a highly structured setting and that substantial justice required that his motion to be resentenced be denied.

## Parole

### **Board of Parole Must Consider Factors Beyond the Circumstances of the Underlying Crime**

Once again, an appellate court rules that where the New York State Board of Parole denies parole referencing the circumstances of an applicant’s underlying crimes without mentioning the other factors which the Board is required to consider, the case must be remanded for a new hearing. In Matter of Gelsomino v. NYS Board of Parole, 2011 WL 1087935 (2d Dep’t Mar. 22, 2011), the petitioner challenged the Board’s decision to deny his application for parole. When it denied parole, the Board referred only to the circumstances of the underlying crime; it failed to mention any of the other statutory factors such as, the applicant’s institutional record, performance in a temporary release program, release plans, deportation order, statement made to the Board by the crime victim or his/her representative (See Exec. Law §259-i(2)(ii)). In this case, there apparently were no aggravating circumstances, yet the Board denied parole, citing only the seriousness of the crime. The Board did not mention any of the other statutory factors, including in this case, the petitioner’s excellent disciplinary record, his record of achievements while incarcerated, and the positive statements made by the judge at sentencing. Accordingly, the Appellate Division found that the Board had acted irrationally and remanded the case for a new hearing before the Board of Parole.

---

*The law firm which represented Mr. Gelsomino was Franzblau Dratch, P.C. of New York, NY and Livingston, NJ.*

## Grievances

### Court Orders IGP to Reconsider Grievance

In Matter of Eastwood v. Fischer, 915 N.Y.S.2d 765, the petitioner alleged that DOCS employees in the package room had wrongfully refused to deliver a package containing cigarette tubes. He grieved the decision, and when the Central Office Review Committee denied his grievance, he filed an Article 78 petition. The court noted that prison officials should be accorded wide latitude in decisions relating to prison security, particularly with regard to decisions about what property can be introduced into a prison. Nonetheless, the court wrote, “such decisions must be rationally based to be entitled to deference [from the court].” In analyzing the rationality of DOCS’s decision, the court noted that cigarette tubes are commercially pre-rolled cigarettes without tobacco and that DOCS Directive 4911 allows inmates to possess cigarettes, cigarette papers, cigarette rollers, and loose tobacco. The permissible items, the court reasoned, were similar to the tubes that the petitioner was not allowed to have. Thus, without an explanation of why certain tobacco related items were permitted while the tubes were not, the court could not say that DOCS’ conduct was rational. For this reason, the court granted the petition and **remitted** (sent back) the case to DOCS for further proceedings.

### Grievance Challenge to Denial of Transfer Fails

In Matter of Rossi v. Fischer, 916 N.Y.S.2d 282 (3d Dep’t 2011), the petitioner challenged the denial of his grievance asking that he be allowed to transfer to a prison closer to his home. His requests to transfer had been denied because the petitioner had refused to voluntarily double bunk. Petitioner then challenged the validity of the regulations permitting double cell housing.

The petition was dismissed by the Supreme Court and on appeal to the Appellate Division, the dismissal was affirmed. The court found that the petitioner had failed to meet his heavy burden of showing that the regulations lacked a rational basis and were unreasonable, arbitrary or capricious. The court contrasted an earlier challenge to a regulatory effort to convert cells intended for one inmate into double cell housing which was found to be irrational because the regulation failed to specify minimum square footage per inmate, see Matter of Law Enforcement Officers Union v. State of NY, 655 N.Y.S.2d 770 (3d Dep’t 1997), with the present regulation, which specifies an objective standard for implementing the conversion. Finally the court found that petitioner had failed to demonstrate that the minimum size requirements imposed by the regulation lacked a rational basis as he was free to refuse to double cell in exchange for losing the opportunity to transfer to a facility where he preferred to be, and one where, the court noted, single cell housing is scarce.

## Miscellaneous

### Failure to Advise Sex Offenders of Collateral Consequences of Guilty Pleas Not Fatal to Plea

In People v. Harnett, 16 N.Y.3d 200 (2011), a divided Court of Appeals ruled 5 to 2 that a plea to a sex offense that brings the defendant within the **purview** (scope) of the civil management provisions of the Sex Offender Management and Treatment Act (SOMTA) is not necessarily invalidated by the court’s failure to advise the defendant when he took the plea that the conviction might result in civil confinement when the sentence expires.

In Harnett, the defendant pled guilty to a sex offense and was sentenced to 7 years. The judge who took the plea did not advise the defendant that because of the offense to which he pled guilty,

he could be subject to civil confinement under the SOMTA. The defendant did not seek to withdraw his plea prior to or after sentencing. Rather, he argued on appeal that his plea was not knowing, voluntary or intelligent because he had not been warned of the possible SOMTA consequences which, whether direct or collateral, were so important that their non-disclosure rendered the plea proceedings fundamentally unfair. Pursuant to SOMTA, “detained sex offenders” – defined by their convictions for certain enumerated sex offenses – are subject to possible lifetime civil confinement when their sentences expire.

Justice Smith, writing for the majority, noted that over a three year period, there were 4,399 individuals whose offenses fell within SOMTA and who were considered for civil management. Of those 4,399, 383 were referred to the Attorney General for civil confinement. Of the 383 who were referred, 123 were found to require civil management. Thus, Justice Smith concluded, civil management, which affected at most 6% of those individuals whose cases fell within SOMTA, could not be considered a direct consequence of the plea. Direct consequences are those which have a “definite, immediate and largely automatic effect on [the] defendant’s punishment.” Consequences which are collateral are peculiar to the individual’s personal circumstances and not within the control of the court system. Possible civil management under SOMTA, the court ruled, was a collateral consequence of the plea. With respect to the validity of plea proceedings, defendants must be advised about direct consequences; only under certain circumstances must a defendant be informed of collateral consequences.

There may be cases, Justice Smith acknowledged, where a defendant can show that he pleaded guilty in ignorance of a consequence that, although collateral for purposes of due process, was of such great importance to him that he would have made a different decision had that consequence been disclosed. Thus, to successfully argue that his plea was invalid, the defendant must show that the prospect of SOMTA confinement was realistic enough that it would have caused him to reject an otherwise acceptable plea bargain. In most cases, Justice Smith wrote, the defendant’s

overwhelming consideration will be whether he will be imprisoned and for how long, a calculus that would not be impacted by the possibility of civil confinement.

Justice Ciparik, in an opinion with which Justice Jones concurred, however, wrote that because civil confinement is “so grave a deprivation of liberty,” a blanket rule should be imposed invalidating pleas of sex offenders where they were not advised of the possibility of civil confinement. In her opinion, a plea to an offense within the scope of SOMTA could not be voluntary and knowing unless the defendant knew of the possibility of civil confinement.

## **Court Gives Formerly Incarcerated Individuals a Second Chance to Apply for Transportation Positions**

Daniel Hasberry and Linda Branch filed applications with the Department of Education (DOE) for bus driver positions. Both responded truthfully to the application’s request for information about felony convictions. Both were denied employment as a result of their felony convictions. In response, the two filed an Article 78 Petition claiming that in processing their applications, the Department of Education had failed to follow its own regulations.

In Matter of Hasberry and Branch v. NYC Dep’t of Education, 912 N.Y.S.2d 190 (1<sup>st</sup> Dep’t 2010), the Appellate Division, First Department, reversing the lower court decision, found that the Department of Education had failed to follow its regulations in the consideration of the two applications before it. The regulations provide that where a background investigation reveals “information of a derogatory nature,” which might lead to the denial of an application, the applicant will be given the opportunity to review the information with DOE staff who are involved in the background check and to place in the file “any written explanations or documents which refute or explain such information.” See, Chancellor’s Regulation C-105. Here, the court found, the DOE did not give the petitioners the chance to see the

information and comment on it before their applications were rejected.

Although the court understood the DOE's concerns about protecting children on school buses, the court ruled that the DOE must follow its own rules and regulations. As the DOE had not done so, the court sent the applications back to the DOE with directions to give the petitioners the chance to review the information that led to the rejection and to submit explanations and documents.

## Limited Credit Time Allowance

Correction Law §803-b, effective April 7, 2009, established the 6 month limited time credit allowance (LCTA) program for individuals who are ineligible for merit time. In order to receive LCTA, an inmate must have successfully completed one or more significant programmatic accomplishments. Under the statute, a significant program accomplishment includes the receipt of a certification from the state department of labor (DOL) for successful participation in an apprenticeship program. Osvaldo Paugam is serving a 7 year determinate sentence. He had completed a one year DOL apprenticeship as a Counseling Aide I and had been issued a certificate to that effect. He applied for the limited time credit allowance and was approved at the facility level. However, the Central Office denied the LCTA, finding that Mr. Paugam had not met the statutory requirements. Mr. Paugam then filed an Article 78 challenge to the Central Office decision, which, the court in Matter of Paugam v. Fischer, Index No. 5817-10 (Sup. Ct. Albany Co. Jan. 18, 2011), noted could only be granted if Mr. Paugam established that the decision was "arbitrary and capricious, irrational or otherwise in violation of the law."

The respondent defended the denial, arguing that the completion of a 1 year apprenticeship program, as opposed to a 2 to 5 year program, was insufficient to qualify the petitioner for a LCTA. Respondent also pointed out that the program which Mr. Paugam completed was not among the programs listed on a memo distributed to inmates in October 2009.

The court was not persuaded by the respondent's arguments in support of the denial. Most importantly, the court found that the petitioner had satisfied the statutory language in Correction Law §803-b(1)(c), allowing an inmate to meet the requirement of attaining a significant programmatic accomplishment by, among other accomplishments, receiving a certificate from the DOL establishing his or her successful participation in a DOL apprenticeship program. Further, the court found that the very apprenticeship program completed by the petitioner was among the apprenticeship programs listed in the October 2009 memo, and that the memo specifically states that attaining a Human Services apprenticeship certification qualifies as a significant programmatic accomplishment for the purposes of qualifying for LCTA.

Because petitioner had completed and received a certificate from DOL establishing his successful participation in an apprenticeship program, and because that program is one of those listed in respondent's memo as constituting a significant programmatic achievement, the court concluded that the respondent had erred in failing to grant petitioner's application. The court granted the petition, annulled the respondent's determination denying petitioner a 6 month LCTA, and remanded the matter to the respondent for further proceedings consistent with the court's decision.

## Federal Cases

### District Court Agrees That DOCS & DOP Conduct Is Unconstitutional

The plaintiffs in Sudler v. Goord, et al. and Batthany v. Horn, et al., brought a §1983 lawsuit alleging that employees of the Division of Parole and the Department of Correctional Services had violated their constitutional rights by holding them past the expiration of their sentences. Specifically, plaintiffs Sudler and Batthany claimed that the Division of Parole (DOP) employees had violated their 4<sup>th</sup> and 14<sup>th</sup> Amendment rights by failing to ascertain whether the plaintiffs' local

misdemeanor sentences were imposed to run concurrently with the time remaining on their undischarged felony sentences and, by denying them parole jail time credit without determining whether their local sentences were imposed to run concurrently or consecutively, unlawfully transforming those concurrent sentences into consecutive sentences. As a result of the Division's policy, Plaintiff Sudler was held for roughly 6 months beyond his actual maximum expiration date and Plaintiff Batthany was held for roughly a month beyond his maximum expiration date. The plaintiffs sought class certification and moved for summary judgment on their claims.

In *Pro Se*, Volume 20, No. 5, we reported that a magistrate judge had issued a decision holding that to the extent that the Division of Parole's policies permitted its employees, under certain circumstances, to presume rather than actually determine, that local sentences ran consecutively to previously imposed but undischarged felony sentences, its policies for calculating release dates for parole violators was unconstitutional. The magistrate also held that the defendants were protected by qualified immunity from having to pay damages and denied the plaintiffs' motion for class certification.

The plaintiffs filed objections to the magistrate's decision that the defendants were protected by qualified immunity and to his failure to order injunctive relief. The defendants' objected to the finding that their policy was unconstitutional, arguing that because of the finding of qualified immunity, it was unnecessary to reach the constitutional issue; that the DOP policy of requiring returned parole violators to substantiate their claims that they are entitled to additional parole jail time by producing documentation that their local sentences were concurrent to their felony sentences is not unconstitutional; and that returned parole violators have no legal entitlement to jail time served pursuant to concurrent local misdemeanor sentences.

After reviewing the Magistrate Judge's Report in light of the objections filed by the plaintiffs and the defendants, the court adopted the Magistrate's Judge's recommendation. See, Sudler

v. Goord, et al., and Batthany v. Horn, et al., 2011 WL 691239 (S.D.N.Y Feb. 23, 2011).

### Constitutionality of Policy

The court first addressed the issue of whether summary judgment in the plaintiffs' favor was proper. Summary judgment is appropriate where there are no disputed issues of fact – that is, the parties agree on what the facts are, but disagree about the law or the application of the law to the facts. Summary judgment should be granted where, viewing the evidence in the light most favorable to the non-moving party, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. In Sudler and Batthany, the parties agreed on the facts; the only question was whether the policies of the Division of Parole were legal.

The defendants argued that it was not necessary or required for the magistrate to determine the constitutionality of the Division of Parole's policy. The United States Supreme Court, in Pearson v. Callahan, 129 S.Ct. 808 (2009) has in fact given the district courts the opportunity to side step the issue of whether a policy or practice is constitutional and has authorized the court to go directly to the second prong: was it objectively reasonable for the defendant to believe that his actions were lawful? In Sudler and Batthany, however, the magistrate judge, and now the district court, held that it is appropriate to address the constitutionality of the Division of Parole's policy. The district court ruled that answering first the question of whether the policy was constitutional was, in this case appropriate, because “this is not a case where it is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right.” In other words, the district court believed the unconstitutionality of the policy was easily ascertained. In addition, the court wrote, its discussion of the constitutional issue serves to clarify official conduct standards for a practice that is implemented on a daily basis that directly implicates the federal “liberty interest” of thousands of individuals incarcerated by DOCS.

Citing Hamdi v. Rumsfeld, 124 S.Ct. 2633 (2004), the court began its analysis of whether the

defendant's policy was unconstitutional by referencing the well known principle that an individual's liberty interest in freedom from physical detention is a fundamental constitutional right and, its corollary, citing Hill v. United States ex rel. Wampler, 56 S.Ct. 760 (1936), that any deprivation of an individual's liberty interest by imprisonment must be legally authorized by judicial mandate. The implications of these principles are two-fold, the court wrote. First, a jailor's authority to confine a prisoner begins and ends with the sentence pronounced by the judge. Second, an inmate has a liberty interest in being released upon the expiration of his maximum term of imprisonment.

Applying this analysis, the district court held that the magistrate correctly found that the plaintiffs have a constitutional right to concurrent jail time when imposed by the sentencing judge. In New York, except under certain enumerated circumstances (such as a finding that an individual who has been convicted of a felony had previously been convicted of a felony), a sentencing judge has the discretionary authority to direct that a newly imposed term of imprisonment shall run either concurrently or consecutively with respect to an undischarged term of imprisonment imposed at a previous time. The court further found that DOCS' and Parole's recognition of this authority was demonstrated by their willingness to compute such a sentence where an inmate produces the confirming paperwork.

The court found that the sentencing judges for the plaintiffs exercised their authority to impose sentences which were concurrent to previously imposed and undischarged felony sentences. In contravention of these sentences, the Division of Parole applied its parole violator policy and ran the plaintiffs' terms consecutively. As a result, DOCS detained the plaintiffs beyond the expiration of their maximum expiration dates and thus violated their liberty interests. Therefore, the court held, plaintiffs' constitutional rights were violated by the Division of Parole's parole violator's policy and by DOCS' enforcement of that policy.

## Qualified Immunity

The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. In making the assessment of whether a right is clearly established, the court is directed to look only to Second Circuit and Supreme Court **precedent** (decisions) existing at the time of the alleged violation. A defendant will be found to be qualifiedly immune where the official's action does not violate clearly established statutory or constitutional rights of which a reasonable person would have known, **or** where it was objectively reasonable for him to believe that his actions were lawful at the time of the challenged act.

With respect to assessing the constitutionality of the parole policy at issue, the district court noted that there were two cases in effect at the times of the violations in these two cases: Wampler, decided in 1936, involved the non-judicial imposition of a sentence that was ordinarily reserved to the discretion of the sentencing judge but that the sentencing judge had not in that case imposed. In Wampler, the Supreme Court ruled that the judgment of the court establishes a defendant's sentence and that sentence may not be increased by an administrator's amendment. The second case, Early v. Murray, 451 F.3d 71 (2d Cir. 2006), involved the imposition of a mandatory term of post release supervision that was explicitly required by a New York State statute. The Second Circuit held that if a sentencing court does not explicitly impose a term of post release supervision on the defendant, it is unconstitutional for DOCS subsequently to impose one, irrespective of whether DOCS is acting pursuant to a statute that makes post release supervision a mandatory part of the sentence of the crime for which the defendant was convicted.

In spite of these two decisions, in Sudler and Batthany, the magistrate judge and the district court judge found that the constitutional right to concurrent jail time when imposed by the sentencing judge was not clearly established at the time that the Division of Parole's parole violator

policy was applied to Plaintiffs Sudler and Batthany. In reaching this result, the court noted that its finding that the parole violator policy was unconstitutional required not only an understanding of Wampler and its **progeny** (the case decisions that came after Wampler and relied on its reasoning) but also the application of that case law to the Supreme Court's jurisprudence on an individual's right to liberty. At the time that the Division of Parole applied its policy to the plaintiffs, the court concluded, a reasonable employee of the Division of Parole would not have known that his or her conduct was unconstitutional, because to know that, the employee would have had to have been capable of engaging in sophisticated legal analysis.

In support of this view, the court pointed out that neither Wampler nor Early considered or otherwise implicated the parole violator policy and that these cases did not involve **analogous** (similar in significant respects) conduct. Further, the court noted, during the 20 years that the policy was in effect, no federal or New York state court had applied Wampler or Early to the policy, let alone specifically considered the constitutionality of that policy where the sentencing judge explicitly ordered that a misdemeanor sentence run concurrently to an undischarged felony parole sentence. Thus, the court concluded, in the absence of a decision such as the one that it was issuing, there is no basis for concluding that a reasonable Division of Parole or DOCS official should have understood that his or her conduct was unlawful. Based on this analysis, the court concluded that the defendants violated a constitutional right which was not clearly established at the time that the violation occurred.

The plaintiffs have filed a notice of appeal.

---

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

## Denial of Medical Leave of Absence Found to be Discriminatory

The complaint in Spavone v. NYS Dep't of Correctional Services, 2011 WL 253958 (S.D.N.Y. Jan. 21, 2011), alleges that the defendants' denial of plaintiff Spavone's application for a medical leave of absence was an act of disability-based discrimination. According to the plaintiff, the defendants' conduct prevented him from participating in a program for which he was otherwise eligible and which would have enabled him to obtain essential medical care. He claims violations of the Americans with Disabilities Act, the Eighth Amendment and the Fourteenth Amendment. The defendants moved for summary judgment and the court denied the motion, finding that the defendants' conduct was facially discriminatory.

Plaintiff Spavone is 53 years old and is married with 7 children. He has a master's degree in religion and a doctorate in divinity. He is a member of the bricklayers union. He is serving a 10 year sentence and at the time that the complaint was filed, was in DOCS custody. As a result of the horrors he witnessed as a freedom fighter in Nicaragua and as an inadvertent first responder during the attack on the World Trade Center, plaintiff Spavone has been diagnosed by the Office of Mental Health as suffering from several mental disorders, including post traumatic stress disorder.

At the time of sentencing, a report submitted in support of plaintiff Spavone stated that he should get as much psychiatric services and counseling as can be provided by DOCS. In support of his application for medical leave, plaintiff Spavone referenced a fact sheet published by the federal government's National Center for PTSD which states that a prison environment, which requires constant vigilance to avoid injury and attacks by others, can lead to the profound retraumatization of persons with PTSD and to the increase and worsening of PTSD symptoms, to the point that they will act out violently. The fact sheet goes on to say that while PTSD can be managed with treatment and education, it is

unlikely that survivors can receive proper treatment for PTSD in prison.

In support of his application for medical leave, plaintiff Spavone sent a copy of a memo from a psychiatrist and a psychologist who had treated him while he was in DOCS custody. The memo states that because plaintiff Spavone would soon be eligible for medical leave of absence, it authors urge the Program Admissions Officer to allow him to seek and obtain several types of therapies in a community in-patient program. (In the course of the litigation, the authors of the memo have distanced themselves from this memo).

Several months later, a doctor wrote to the DOCS Director of Temporary Release Programs [the Director] and said that OMH would facilitate [the plaintiff's] transition to a residential treatment program if his request for a medical leave of absence is granted. The Director replied that a medical leave of absence permits inmates to leave an institution to undergo surgery or receive medical or dental treatment that is not available in a prison only if the treatment is deemed to be absolutely necessary to the inmate's health and well being. The Director stated that it did not appear that the plaintiff met the statutory definition of medical leave of absence.

Plaintiff's application for a medical leave of absence was denied based on his criminal record of two gun point robberies. In response to his appeal, the Director wrote: ". . . [T]here are no provisions in the Temporary Release Rules and Regulations that allow medical leave of absence for mental health reasons. Therefore your application for a medical leave of absence is denied based on eligibility criteria."

In response to the defendants' motion for summary judgment, the court found that the reasons given for the denial of Plaintiff's application for a medical leave of absence are discriminatory on their face. "A decision denying participation in the [temporary release program] on the ground that the statute, [Correction Law § 851(6)], and the regulations do not mention mental health care as distinguished from medical care," the court wrote, "is to discriminate against inmates

suffering from mental health issues such as PTSD." The court went on to state that mental health treatment is a part of medical health, and that mental health treatment is generally recognized as medical treatment.

The court found that there were disputed issues of material fact: namely whether the mental health treatment that the plaintiff is seeking is absolutely necessary to his health and well being. With respect to this issue, the court found that the defendants' submissions were not dispositive in that while they state that the treatment offered by OMH at DOCS facilities is "effective," they do not state the degree of effectiveness or whether the treatment is truly rehabilitative as opposed to merely sedative. Thus, the court concluded, based on the record in this motion, there is an issue of fact as to whether, under the present regulations, the medical leave of absence program is not available for mental health treatment even if it is absolutely necessary for the health and well being of persons such as plaintiff Spavone.

### **Important Notice Regarding Your *Pro Se* Subscription**

***Pro Se* is not considered legal mail. As such, DOCS will not forward your *Pro Se* newsletters to you if you are transferred. It is important that you let the staff at *Pro Se* know your location each time you are transferred.**

**Due to the cost of postage, we cannot re-mail issues of *Pro Se* to inmates. You may miss issues if you do not inform us of your current location.**

**You can contact *Pro Se* at: *Pro Se*, 114 Prospect Street, Ithaca, New York 14850.**

### **Subscribe to *Pro Se*!**

*Pro Se* is now published six times a year. *Pro Se* accepts individual subscription requests. With a subscription, a copy of *Pro Se* will be delivered, free of charge, directly to you via the facility correspondence program. To subscribe send a subscription request with your name, DIN number, and facility to *Pro Se*, 114 Prospect Street, Ithaca, NY 14850.

### ***Pro Se* Wants to Hear From You!**

*Pro Se* wants your opinion. Send your comments, questions or suggestions about the contents of *Pro Se* to:

*Pro Se*  
114 Prospect Street  
Ithaca, NY 14850

Please **DO NOT** send requests for legal representation to *Pro Se*.

### ***Pro Se* On-Line**

Inmates who have been released, and/or families of inmates, can read *Pro Se* on the PLS website at [www.plsny.org](http://www.plsny.org).

### **Pro Se Staff**

**EDITORS:** BETSY HUTCHINGS, ESQ.,  
KAREN MURTAGH-MONKS, ESQ.

**COPY EDITING AND PRODUCTION:** ALETA ALBERT, PATTI KANE

## **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.