

# Pro Se

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## FEDERAL COURT FINDS SEVERAL SOMTA PROVISIONS TO BE UNCONSTITUTIONAL

The Sex Offender Management and Treatment Act (SOMTA or Act), Article 10 of the Mental Hygiene Law (MHL), permits the State of New York, under certain circumstances, to civilly confine or supervise sex offenders after their sentences have expired or they are otherwise released from prison. The Act sets forth a detailed set of procedures pursuant to which it will be determined whether detained sex offenders may be civilly confined or managed. At several stages during this process, the Act permits the confinement of individuals whose sentences have expired, pending completion of their reviews. Recently, in Mental Hygiene Legal Services v. Cuomo, 2011 WL 1344522 (S.D.N.Y. Mar. 29, 2011), the federal district court for the Southern District of New York held several of the Act's provisions to violate the constitutional rights of individuals who were subject to the Act.

### The Sex Offender Management and Treatment Act

SOMTA defines a sex offender as a person who stands convicted of a sex offense as defined in Mental Hygiene Law (MHL) §10.03(p) and who is currently serving a sentence for or under parole supervision for such offense or a related

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.

Civil Management may take the form of indefinite civil commitment or a regimen of strict and intensive outpatient treatment and supervision. SOMTA has a three step procedure for determining whether a detained sex offender should be civilly confined or managed.

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**A MESSAGE FROM THE EXECUTIVE DIRECTOR**  
**Karen L. Murtagh**

**Prison Closures and Marriage Equality – On Balance, A Win For Prisoners**

This past legislative session was a historic one on a number of accounts, two of which will impact many of our readers. True to his words in his first State of the State address, Governor Cuomo succeeded in securing the planned closing of seven prisons across New York State. The list of prisons to be closed includes four minimum-security facilities for men: Buffalo Work Release in Erie County, Camp Georgetown in Madison County, Summit Shock in Schoharie County and Fulton Work Release in the Bronx; and three medium-security prisons: Arthur Kill on Staten Island, Mid-Orange in Orange County and the Oneida Correctional Facility in Oneida County.

The closures themselves make sense, as this past decade has seen a significant drop in the state prison population from a high of over 72,000 to approximately 56,000 today. The choice of the facilities to be closed, however, leaves something to be desired. Closing minimum and medium security prisons forces the remaining prison population into maximum security prisons; prisons which, by their very nature, are harsher and more focused on security and punishment rather than programming, rehabilitation and reentry. In addition, the location of the closures (many in or close to urban areas) flies in the face of DOCCS' and the State's purported efforts to bring prisoners closer to home, an effort that encourages prisoner stability and family contact, both of which translate into better chances for successful reentry.

Obviously, many factors had to be considered in making the decision as to which facilities to close, but the main considerations should have been the needs of DOCCS and the needs of the prisoners. In a perfect world, politics would not have played a role in deciding which prisons to close – but sadly – based upon the decisions that were made, it appears as if politics played a major role. Thus, while I applaud the Governor, the Legislature and Commissioner Fischer for their efforts to make our prison system more efficient and cost-effective by closing unnecessary prisons, the process that was used to decide which prisons to close, is not as commendable.

The second historic event that occurred this legislative session was the passage of the marriage equality bill. Finally, same-sex couples will enjoy the same rights as heterosexual couples in New York State. To its credit, DOCCS has been out in front on this issue, publishing proposed regulatory changes in the April 20, 2011 State Register to amend the Temporary Release Program and Short Term Temporary Release Program to add language recognizing same-sex marriages in certain circumstances. In that proposed regulation, DOCCS redefined "spouse" as "including a person who is the same sex as the inmate if the same sex marriage or civil union was performed in an outside jurisdiction that authorizes such marriages or unions." In addition, DOCCS' Directive 4210 on Marriages During Confinement, is gender-neutral and thus, as of July 24, 2011, prisoners should be allowed to take advantage of the marriage equality legislation providing there are no other outstanding legal impediments.

On balance, prisoners and their loved ones benefitted from this year's legislative session. Although the planned prison closures do not seem to fit with the stated criminal justice goal of promoting successful reintegration, the closures themselves are a step in the right direction. And as far as encouraging prisoner stability and family ties goes, New York State should be commended for the passage of the marriage equality bill and DOCCS should receive major kudos for its progressive stance on the issue.

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### ***Step 1: Case Review Panel***

A civil management proceeding begins when DOCCS or OMH asks the SOMTA case review panel (CRP or “the Panel”) to review the case of a detained sex offender who is approaching his or her release date. The Panel reviews the inmate’s records, and conducts a psychiatric exam. The CRP determines whether the inmate suffers from a mental abnormality and is, therefore, either a dangerous sex offender requiring confinement or a sex offender requiring strict and intensive supervision. If the Panel decides that the inmate is a sex offender requiring civil management of either type, the Panel notifies the inmate and the Attorney General (AG) of its finding.

Mental Hygiene Law §10.06(f) provides that if it appears that the inmate may be released prior to the time that the CRP makes a determination, and the AG determines that the protection of public safety requires, the AG may file a securing petition to prevent the inmate’s release from custody while the review is ongoing.

### ***Step 2: Probable Cause Hearing***

If the AG agrees with the Panel’s decision, the statute requires that the AG start a legal proceeding by filing a sex offender civil management petition. In this proceeding, the State of New York is the petitioner, and the inmate is the respondent. The court must hold a probable cause hearing within 30 days of the filing of the petition.

The judge is the fact finder at the hearing. The issue at the hearing is whether there is probable cause to believe that the respondent is a sex offender requiring civil management. At this hearing, the **burden of proof** (which party has the responsibility of submitting evidence) is on the State.

If the respondent is at liberty when the civil management petition is filed, or if he or she becomes eligible for release prior to the probable cause hearing, the court must order the individual’s

return to confinement or impose a stay on his or her release, pending completion of the probable cause hearing. MHL §10.06(h).

If the court finds that the evidence submitted by the State of New York establishes probable cause that the subject of the petition is a sex offender requiring civil management, which ultimately may require either confinement or supervision, SOMTA mandates that the individual be committed to a secure treatment facility pending resolution of a commitment trial. MHL §10.06(k).

### ***Step 3: Trial***

Within sixty days of the probable cause decision, a jury trial must begin to decide whether the inmate is a sex offender who suffers from a mental abnormality, and, for individuals who were convicted of designated felonies, whether the designated felony at issue was “sexually motivated.” Mental abnormality is defined as a condition, disease or disorder that affects the emotional, cognitive or volitional capacity of a person in a manner that predisposes him or her to engage in the commission of conduct constituting a sex offense and that results in that person having serious difficulty in controlling such conduct. If so, the court must decide whether the individual is a dangerous sex offender requiring confinement or a sex offender requiring strict and intensive supervision. MHL §10.07(a), (d) and (f). At the trial, the State must prove its case “by clear and convincing evidence,” including the issue of whether a designated felony was sexually motivated. MHL §10.07(c).

### **Mental Hygiene Legal Services v. Cuomo**

Mental Hygiene Legal Services (MHLS) v. Cuomo was filed in 2007. The lawsuit challenges several provisions of the Act, including the use of securing orders to confine individuals whose sentences will expire before the review process is complete and the use of the “clear and convincing evidence,” standard – as opposed to “proof beyond a reasonable doubt,” – that a designated felony was sexually motivated. (The lawsuit also challenged several provisions of Article 10 that control the civil management of individuals who were charged with,

but not convicted of, sex offenses and who therefore did not go to prison. The challenges to provisions relating only to individuals who were not convicted but whose charges were disposed of in other manners are not discussed in this article.

In November 2007, in response to preliminary motions, Judge Lynch enjoined (stopped) the enforcement of MHL §10.06(k), the provision allowing detention, following a probable cause hearing at which the State proved that the subject of the hearing had a mental abnormality but at which an individualized finding of dangerousness was not required. To achieve this result, the plaintiff had to show that there was a substantial likelihood of success on the merits of this claim. Judge Lynch found that the plaintiff had not shown a substantial likelihood of success on its claim that the issuance of a securing order prior to a determination of probable cause was unconstitutional.

## Resolution of Dispositive Motions

The most recent order was the result of motions for summary judgment filed by MHLS and the State. Rule 56(a) of the Federal Rules of Civil Procedure provides that summary judgment will be granted where there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Where the plaintiff is seeking facial invalidation of a statute, the court in MHLS v. Cuomo wrote, “the plaintiff bears a heavy burden of demonstrating that there is no set of circumstances in which the challenged legislation could be applied constitutionally.”

## Court Finds Two Provisions Unconstitutional

Here, the court ruled, the plaintiff had made the necessary showing as to MHL §10.06(k), the provision that requires detention of all individuals for whom a probable cause finding has been made (a decision that there is probable cause to believe that an individual requires civil management), in the absence of an individualized finding that no condition or combination of conditions of supervision could allow an individual to be at liberty pending adjudication.

The court noted that not all sex offenders who have “mental abnormalities” (as defined by the Act) require detention under SOMTA. A sex offender with a mental abnormality meets that definition of a “sex offender requiring civil management,” but the term civil management encompasses both individuals who require civil confinement and those who require only supervision. Nonetheless, Section 10.06(k), in the absence of a judicial finding of dangerousness, provides for the automatic detention of all individuals subject to Article 10 proceedings. For this reason, the court found that Section 10.06(k) is unconstitutional on its face and granted summary judgment in the plaintiff’s favor.

The court reached the same result with respect to Section 10.07(c), the provision authorizing the fact finder at a civil commitment trial to make a retroactive determination by clear and convincing evidence that certain non-sex crimes were committed with a sexual motivation. To determine whether this provisions constituted a deprivation of liberty without due process, as required by Mathews v. Eldridge, 424 U.S. 319 (1979), the court looked at 1) the private interest that is affected by the official action; 2) the risk of an erroneous deprivation of such interest through the procedures used and the probable value of additional or substitute procedural safeguards; and 3) the government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

The court found that the individual interests at stake were of the highest level: physical liberty and the stigma of being branded a sex offender. Further, even after release from confinement, Article 10 sex offenders are subjected to a regimen of strict and intensive supervision and treatment. Thus, the consequences of erroneous application of the label are severe.

In addition, the court noted that for offenders who commit crimes after the enactment of Article 10, the NYS legislature had determined the “beyond a reasonable doubt” standard is appropriate for determining whether commission of certain felonies was sexually motivated. Given that for offenders who commit sexually motivated felonies after the

enactment of Article 10, sexual motivation is an element of these crimes that must be proven beyond a reasonable doubt, it cannot be said that a finding of sexual motivation is not an element of the criminal offense or that requiring such a finding will hamper accomplishment of the purpose for enacting Article 10. Thus, because of the individual interests at stake, the risks of erroneous adjudication that are a part of a lower standard of proof, and the State's minimal interest in the lower standard, the court found that Section 10.07(c) is facially unconstitutional in requiring that the finding of sexual motivation be made only by clear and convincing evidence.

### **Court Finds Two Challenged Provisions Are Constitutional**

The court reached a different conclusion with respect to MHL 10.06(f), the provision authorizing the AG to procure a securing order where the CRP review process (Step 1, described above) is not completed prior to the sex offender's release date. The court considered whether this provision was facially unconstitutional. This requires the plaintiff to show that there is no set of circumstances in which the challenged legislation could be applied constitutionally. Here, the court acknowledged that the provision lacked the due process protections of notice and the opportunity to be heard. Nonetheless, the court found that because there were situations in which this provision could be, and in fact had been, administered in a constitutional manner – such as where a potentially dangerous sex offender is unexpectedly scheduled for imminent release and the detention is brief – an emergency could justify a short period of detention pending a decision as to whether a detained sex offender was in need of civil management. Thus, because the defendants showed that there were circumstances that had required the use of this provision, and that in each of those situations, the statute's application had been constitutional, the court found that MHL §10.06(f) was constitutional.

Finally, Mental Hygiene Legal Services challenged the constitutionality of MHL §10.05(e), the provision that allows the CRP, during the CRP review process (Step 1), to request a detained sex offender to submit to a psychiatric exam but does

not require that he or she have counsel at the exam. The plaintiff argued that § 10.05(e) violates the due process rights of those subject to the Act because the notice for the exam does not advise recipients adequately of the purpose and possible consequences of the exam and that the examination constitutes a “critical stage” of the commitment process that triggers the right to counsel.

The court held that a psychiatric exam conducted prior to the time that a decision has been made to bring a civil management proceeding is not a critical stage of the proceeding and thus the right to counsel does not attach. Further, the court found that the alleged insufficiency of the notice that accompanies the request that the individual allow the exam – e.g. it is difficult to understand and fails to advise the inmate that the examiner may testify against him or her at the commitment trial – should be challenged as unconstitutional “as applied” rather than as “facially” unconstitutional.

### **State Not Liable For Consequences of Illegally Imposed PRS**

In 1998, New York State legislators passed a law requiring that when a court imposes a determinate sentence, the defendant must also serve a period of post release supervision. Nonetheless, for almost a decade after this law went into effect, courts frequently, if not routinely, failed to impose post release supervision when they imposed determinate sentences. Consequently, when the individuals subject to these sentences were released, the Department of Correctional Services added the maximum permissible period of post release supervision to the sentence of each inmate. The Department's conduct in this process became known as the administrative imposition of post release supervision.

For several years, state courts rejected challenges to the administrative imposition of post release supervision (PRS). See for example, Deal v. Goord, 778 N.Y.S.2d 319 (3d Dep't 2004); People v. Crump, 753 N.Y.S.2d 793 (4<sup>th</sup> Dep't 2003). In 2006, however, in a federal court challenge to the administrative imposition of PRS, the court found that the administrative imposition of PRS by DOCS

violated the plaintiff's right to procedural due process of law. See, Earley v. Murray, 451 F.3d 71 (2d Cir. 2006). After this ruling, in part, because decisions of the federal Courts of Appeals are not binding precedent on the state courts and because, when given the opportunity to do so, the New York State Court of Appeals had not found the administrative imposition of PRS to be unconstitutional, see People v. Catu, 792 N.Y.S.2d 887 (2005) (holding, however, that not informing a defendant that in addition to the incarceratory term that he agreed to serve in exchange for pleading guilty, he would have to serve a period of PRS, violated the court's constitutional obligation to inform the defendant of the direct consequences of his plea), many state courts continued to rule that DOCS had the authority to administratively impose PRS; DOCS continued to administratively impose PRS; and the Division of Parole continued to supervise individuals on administratively imposed PRS and to subject them to sanctions as a result of violations of administratively imposed PRS.

Five years after its decision in Catu, and two years after the federal court's decision in Earley, the New York State Court of Appeals also reached the conclusion that DOCS lacked the authority to impose PRS. See, People v. Sparber, 10 N.Y.3d 457 (2008), and Matter of Garner v. DOCS, 10 N.Y.3d 358 (2008). Unlike the federal court's decision in Earley, however, the Garner and Sparber decisions were based on statutory – not constitutional – considerations and did not rule out the possibility of re-sentencing people whose determinate sentences had not originally included a period of PRS. Shortly after these decisions, the N.Y.S. Legislature passed legislation, now known as Correction Law 601-d, authorizing courts to resentence individuals who had determinate sentences which did not include PRS. DOCS, the Division of Parole and the Office of Court Administration then developed a plan for returning such individuals to court for re-sentencing. Under the plan, a large number of people were returned to their sentencing courts and in many cases, the courts imposed periods of post release supervision. Among the people upon whom a period of PRS was imposed were people who had been released on the conditional release or maximum expiration dates of their determinate sentences.

Many people who had already completely served the incarceratory portions of their determinate sentences when they were resentenced to add PRS challenged the courts' authority to resentence them, arguing that it violated the due process and/or double jeopardy clauses of the federal constitution to resentence someone who had finished serving the sentence that had actually been imposed. In 2010, the issue of whether there was a time after which the sentencing court could no longer impose a period of PRS if one had not originally been imposed reached the Court of Appeals. In People v. Williams, 14 N.Y.3d 198 (2010), the Court concluded that when an individual has completed the appeal process and has served the term of the determinate sentence, the sentencing court loses jurisdiction to correct the sentencing error. At that point, the Court wrote, it would be a violation of the double jeopardy clause of the Fifth Amendment to allow a court to correct an illegal sentence.

Naturally enough, at various points in this legal journey, people who had served time in prison for violations of illegally imposed PRS began to consider whether they had either a federal constitutional claim for damages or a state claim for damages based on wrongful confinement or false imprisonment. To date, the decisions on these claims have been disappointing to the people who were under parole supervision and/or confined for longer than the sentences which were imposed on them, in many cases for longer than the sentences which were promised to them in exchange for pleading guilty.

### **Federal Court Rulings On Liability for the Administrative Imposition of PRS**

The federal courts have uniformly dismissed, on the basis of qualified immunity, the constitutional claims for damages filed by individuals who were confined as a result of "violations" of illegally imposed PRS. The qualified immunity defense protects state actors like prison officials who violate the constitutional rights of individuals where the conduct at issue did not violate clearly established constitutional rights of which a reasonable person would have known. The first cases that came before the federal courts

alleged that the plaintiffs' *due process* rights had been violated by the non-judicial imposition of PRS. In Scott v. Fischer, 616 F.3d 100, 107 (2d Cir. 2010), the Court found that before its decision in Earley, a reasonable DOCS official would not have known that it was a violation of the plaintiff's right to due process of law to administratively impose PRS.

Before the Earley decision (June 2006), the court reasoned, the New York State courts had routinely upheld the administrative imposition of PRS. Thus, the Scott court wrote, it was not unreasonable prior to Earley for a DOCS official not to have known that it was a violation of the constitution to administratively impose PRS. Further, although the Supreme Court decision in Hill v. United States ex rel. Wampler, 56 S.Ct. 760 (1936), did state that "the only sentence known to law is the sentence or judgment entered upon the records of the court," the factual context that gave rise to the Wampler decision was sufficiently distinct from the facts of Plaintiff Scott's case that a reasonable DOCS official could not have been expected to know that it precluded the administrative imposition of a period of PRS that was a statutorily mandated part of the plaintiff's sentence.

The Scott court went on to consider whether the Earley decision clearly established (for the purpose of defeating the qualified immunity defense) the unconstitutionality of administratively imposed PRS. The court found that because after the Earley decision, two Departments of the N.Y. State Appellate Division continued to find the practice constitutional (see Garner v. N.Y. State Dep't of Correctional Services, 831 N.Y.S.2d 923 (3d Dep't 2007) and People v. Thomas, 826 N.Y.S.2d 36 (1<sup>st</sup> Dep't 2006) ), it was "open to question" whether Earley itself sufficed clearly to establish the unconstitutionality of administratively imposed PRS. However, because the defendants' imposed PRS on the plaintiff before the Earley case was decided, the Court held that it only had to decide whether the law was clearly established at that time. Having held that it was not, the court granted summary judgment to the defendants on qualified immunity grounds.

Most recently, in King v. Cuomo, 2011 WL 13944 (S.D.N.Y. Jan. 4, 2011), a court found that because of the contradictory rulings in the state courts as to the whether the procedures put into place by Correction Law §601-d were unconstitutional, the administrative imposition of PRS did not violate clearly established constitutional rights of which a reasonable person would have known until the New York State Court of Appeals decided People v. Williams in February 2010. Based on the King decision, prison officials would only be financially responsible for injuries resulting from administratively imposed PRS where the administrative imposition occurred after February 23, 2010, the date that People v. Williams was decided. The decision in King has been appealed to the Second Circuit.

### **State Court Rulings on Liability for the Administrative Imposition of PRS**

The plaintiffs who sought damages from the New York State Court of Claims for the administrative imposition of PRS fared no better than did the plaintiffs in the federal court actions. In Donald v. State, Orellanes v. State, Eanes v. State and Ortiz v. State, the New York State Court of Appeals ruled that the claims were without merit. See Donald v. State, 2011 WL 24471551 (June 23, 2011). In one of the cases – Orellanes – the determining fact was that DOCS had required the plaintiff to serve PRS because the sentence and commitment order showed, erroneously, as it turned out, that the court had imposed PRS. In that case, the Court ruled that it was the court which had erred by failing to impose PRS and that any claim against the state based on the judge's error would be barred by judicial immunity.

In the remaining three cases, the plaintiffs sued for false imprisonment (also known as wrongful confinement). The Court focused on plaintiffs' failure to plead the essential elements of that claim. Claimant Ortiz, the Court found, had failed to allege, and apparently had no grounds to allege, that DOCS' error had caused him to be imprisoned or confined. Claimants Donald and Eanes pled wrongful confinement, but failed to allege that the

confinement was not privileged. “A detention otherwise unlawful,” the Court wrote, “is privileged where the confinement was by arrest under a valid process issued by a court having jurisdiction.” Neither Claimant Donald nor Claimant Eanes alleged any defect in the process by which he or she was arrested for violating PRS, or in the jurisdiction of the court that issued that process. Thus, Claimants Donald and Eanes were unable to show that the confinement was not privileged.

Finally, the Court stated that the claims of Claimants Donald, Eanes and Ortiz might be read to assert that the State is liable for DOCS’s alleged negligence in subjecting them to unauthorized terms of PRS. To establish this, each claimant would have to show that DOCS owed him or her a duty, a breach of the duty and injury resulting from the breach. With respect to the negligence cause of action, the Court found that the claims were barred because the State is immune from liability for the discretionary acts of its officials.

A governmental action is discretionary where it involves the exercise of reasoned judgment. DOCS’s actions in recording PRS terms as a part of the claimants’ sentences were discretionary, the Court held. In each case, DOCS was presented with a prisoner sentenced to a determinate prison term, for whom PRS was mandated. DOCS made the reasoned judgment, the Court found, that it should interpret the sentences as including PRS, though the sentences rendered by the court did not mention PRS. The Court noted that it had found in Matter of Garner v. Dep’t of Correctional Services, that DOCS’s judgment was mistaken. Here the Court held that such a mistake in judgment involved a matter of discretion that did not give rise to liability, unlike a ministerial error – like mis-transcribing an

entry or confusing the files of two different prisoners – a mistake which does not flow from a discretionary act. Where DOCS exercises – albeit mistakenly – the discretion given to the agency by law (to interpret directions it receives from the court system), its acts, the courts have held, cannot be a basis for state liability.

## **Conclusion**

The recent New York State Court of Appeals decision in Donald v. State rules out claims for damages against the State relating to the administrative imposition of PRS. In Scott v. Fischer, the Second Circuit Court of Appeals found that DOCS officials are qualifiedly immune from constitutional claims for damages relating to the administrative imposition of PRS where the PRS was imposed prior to the Court’s decision in Earley v. Murray. In King v. Cuomo, a federal district court ruled that DOCS officials are qualifiedly immune from such damages claims where DOCS imposed PRS prior to the decision in People v. Williams. It remains to be seen whether the Second Circuit will agree with the decision in King v. Cuomo that not until February 2010, when People v. Williams was decided, are DOCS officials liable for administratively imposing PRS.

## News and Briefs

### The SHU Exclusion Law

The SHU Exclusion Law protects people with serious mental illness in New York State prisons from being placed in solitary confinement. As of July 1, 2011, the State must comply with the law.

#### What does the law require?

Prisoners with **serious mental illness** must be diverted or removed from segregated confinement (disciplinary confinement in a Special Housing Unit (SHU) or separate keeplock housing unit) to a **residential mental health treatment unit** (RMHTU), where such confinement could potentially be for more than 30 days, except in exceptional circumstances.

#### How does it work?

When a person is placed in segregated confinement, there must be a suicide prevention screening and an initial assessment to determine whether the person has a serious mental illness.

- *When should the assessment be done?*

It depends on the mental health classification of the prison. If it is a prison with full-time mental health staff (Level 1 or 2 facility), then a mental health clinician must do the assessment within one business day of placement in segregated confinement. If it is a prison with part-time mental health staff (Level 3 or 4 facility), the assessment must occur within 14 days of placement.

- *What happens if the person has a serious mental illness?*

There is an administrative process to determine whether the person should be removed from segregated confinement or whether exceptional circumstances exist allowing the Department of Corrections to hold the person in segregated confinement. This process must be completed within 14 days of the initial assessment. If the determination is that the person should be removed from segregated confinement, the removal must happen within 72 hours. If there are exceptional circumstances, then the person with serious mental illness does not have to be removed from segregated confinement to an RMHTU.

- *What are exceptional circumstances that permit a prisoner with serious mental illness to be kept in segregated confinement?*

When removal would pose a substantial risk to the safety of the prisoner or others or a substantial threat to the security of the facility even if additional restrictions were placed on the prisoner in an RMHTU; OR

When the assessing clinician determines that placement in segregated confinement is in the prisoner's best interest based on his/her mental condition and that removing the prisoner to an RMHTU would be detrimental to his/her mental condition.

### **What is a residential mental health treatment unit (RMHTU)?**

Housing for prisoners with serious mental illness that is operated jointly by the Department of Corrections and Office of Mental Health and is therapeutic in nature. The units cannot be operated as disciplinary housing units. Residential Mental Health Units, Behavioral Health Units, Intermediate Care Programs, and Intensive Intermediate Care Programs qualify as RMHTUs.

In RMHTUs, prisoners must receive:

- Therapy and programming in a setting appropriate to the person's clinical needs while maintaining the safety and security of the prison
- At least four hours a day of structured out-of-cell therapeutic programming and/or mental health treatment
- Property, services, and privileges similar to prisoners in general population although additional restrictions may be imposed to maintain security and order on the unit

While in the RMHTU, the person's disciplinary sentence will continue to run. The disciplinary sentence must be periodically reviewed to determine whether it should be reduced (a time cut) and whether the person should be transferred to a less restrictive setting.

In these units, prisoners must not

- Receive a restricted diet as a disciplinary sanction
- Be issued misbehavior reports for refusing treatment or medication, but may be subject to the disciplinary process for refusing to go to the location where treatment is provided or medication is dispensed
- Be sanctioned with segregated confinement for misconduct on the unit or removed from the unit and placed in segregated confinement, except when the prisoner's conduct poses a significant and unreasonable risk to the safety of prisoners or staff, or to the security of the facility

A person's access to out-of-cell therapeutic programming can be restricted in an RMHTU in exceptional circumstances when such access presents an unacceptable risk to the safety of prisoners or staff.

### **What is serious mental illness according to the SHU Exclusion Law?**

A prisoner is considered to have a serious mental illness if he or she is:

- Diagnosed with any of the following Axis I disorders:
  - Schizophrenia
  - Delusional Disorder
  - Schizophreniform Disorder
  - Schizoaffective Disorder
  - Brief Psychotic Disorder
  - Substance-Induced Psychotic Disorder (excluding intoxication & withdrawal)
  - Psychotic Disorder NOS
  - Major Depressive Disorders
  - Bipolar Disorder I and II

- Actively suicidal, or has engaged in a recent, serious suicide attempt.
- Diagnosed with a mental condition that is frequently characterized by breaks with reality, or perceptions of reality, that lead to significant functional impairment involving acts of self-harm or other behavior that have a seriously adverse effect on life or on mental or physical health.
- Diagnosed with an organic brain syndrome that results in significant functional impairment involving acts of self-harm or other behavior that have a seriously adverse effect on life or on mental or physical health.
- Diagnosed with a severe personality disorder that is manifested by frequent episodes of psychosis or depression, and results in a significant functional impairment involving acts of self-harm or other behavior that have a seriously adverse effect on life or on mental or physical health.
- Determined to have substantially deteriorated mentally or emotionally while confined in segregated confinement and is experiencing significant functional impairment indicating a diagnosis of serious mental illness and involving acts of self-harm or other behavior that have a seriously adverse effect on life or on mental or physical health.

**What happens to people with serious mental illness who, due to exceptional circumstances, are not removed from segregated confinement?**

While in segregated confinement, prisoners with serious mental illness:

- Must be offered out-of-cell treatment and programming for a minimum of two hours each day, five days a week. *However*, this heightened level of care will not be provided when a mental health clinician determines that it is not required, or when doing so would create an unacceptable risk to the safety and security of prisoners or staff.
- Must be reassessed within two weeks of the initial assessment and every two weeks thereafter. At each reassessment, a mental health clinician must make a recommendation regarding removal.
- Must not be placed on a restricted diet unless the restricted diet is necessary for reasons of safety and security.

**Does the law provide any protections for prisoners placed in segregated confinement and not initially assessed as having a serious mental illness?**

Yes, but it depends on the prison. At Level 1 and 2 prisons, the prisoner must be offered an interview with a mental health clinician within 14 days of the initial assessment and an additional interview at least every 30 days after that. At Level 3 and 4 prisons, the prisoner must be offered an interview with a mental health clinician within 30 days of the initial assessment and an additional interview at least every 90 days after that.

**Does the law provide any other benefits to prisoners with mental illness?**

Yes, oversight by an outside agency and training to correction officers about mental illness.

- The Commission on Quality of Care and Advocacy for Persons with Disabilities must monitor and make recommendations regarding the quality of prison mental health care and oversee compliance with the SHU Exclusion Law. The Commission is required to report on the state's progress in complying with the law.
- The Commission must also appoint an advisory committee on psychiatric correctional care to advise the Commission on its oversight responsibilities and make recommendations regarding improvements to prison-based mental health care.

New correction officers and other new corrections staff who will regularly work in programs providing mental health treatment for prisoners must receive eight hours of mental health training. Corrections staff who are transferred into a RMHTU must receive at least eight additional hours of mental health training and eight hours of annual training as long as they work on the unit.

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*This fact sheet on the SHU Exclusion Law was written by the Urban Justice Center and MHASC (Mental Health Alternatives to Solitary Confinement).*

## State Court Decisions

### Disciplinary

#### **Record Did Not Support Charge of Filing a Lien**

Underlying the Tier III hearing determination challenged in Matter of George v. Bezio, 2011 WL 2473736 (3d Dep't June 23, 2011), were charges that the petitioner possessed unauthorized UCC materials, personal information belonging to other inmates, and documents relating to the filing or recording of liens. The petitioner, having been found guilty of all charges, filed an Article 78 challenge. Because petitioner admitted that he possessed the UCC materials knowing that possession violated the inmate rules, the court ruled that there was substantial evidence to support the charge of possession. The court found that where petitioner presented no evidence beyond his own testimony that he had permission as a law clerk to possess the inmate information which was found in his cell, the issue presented a credibility question

for the hearing officer which the hearing officer resolved by finding the petitioner not credible. However, with respect to the charge of possessing documents relating to the filing or recording of liens, the court reached a different conclusion. The court noted that although the hearing officer had viewed documents at the hearing – including apparently two liens containing the names of prisoners other than the petitioner – these documents were not included in the record field by the respondent. Thus, the court found, there was nothing in the record to substantiate the charge that petitioner had filed or recorded a document that purported to create a lien. Due to the lack of evidence, the court annulled the determination that petitioner was guilty of filing or recording lien documents.

#### **Evidence Did Not Support Charge of Penal Law Violation Where Offenses Were Committed Prior to DOCS Custody**

Based on a plea of guilty to criminal contempt and stalking which were made in the Clinton County Court, a DOCS hearing officer found Mark Gantt guilty at a Tier III hearing of having

committed a penal law offense and violating facility correspondence rules. When Mr. Gantt challenged the determination of guilt in an Article 78 petition, the attorney general agreed that the charge of penal law offense was not supported by substantial evidence because the date of the crime to which Mr. Gantt pled guilty was July 6, 2007, before Mr. Gantt was committed to DOCS custody. Matter of Gantt v. Fischer, 2011 WL 2473394 (3d Dep't 2011). Neither, the court ruled, was the charge of violating facility correspondence rules supported by substantial evidence. At the hearing, the only evidence regarding the charge that petitioner violated the facility correspondence rules was the testimony of an investigator who wrote the misbehavior report that the report was written in response to petitioner's recent conviction. That conviction, the court noted, was based on petitioner's admission that he had written letters in 2005, prior to coming into DOCS custody. Although the investigator testified that the Clinton County District Attorney's office had informed him that the petitioner had mailed letters from state correctional facilities between September 2008 and November 2009, the investigator admitted that he had never seen these letters and there was no evidence of the identities of the recipients of the letters or that there were any orders of protection prohibiting petitioner from contacting the intended recipients in the administrative record. In the absence of evidence of this nature, the court found, the determination that petitioner had violated the inmate correspondence rules was not supported by substantial evidence. The court therefore ordered the hearing annulled and directed the expungement of all references to this matter from petitioner's institutional records.

## **Off the Record Conversation Leads To Expungement of Hearing**

Inmates have a regulatory right to have their prison disciplinary hearings electronically recorded. See 7 NYCRR §253.6(b). In Matter of Adeline v. LaClair, Index No. 2010-1536 (Sup. Ct. Franklin Co. May 25, 2011), the court had the opportunity to consider the application of this regulation to petitioner Adeline's Tier II hearing.

Petitioner received a misbehavior report charging him with loss of state property and inmate movement violation. The charges arose when petitioner returned from a trip to the medical area without the medical pass that he had been given. The author of the misbehavior report stated that when asked about the location of the pass, petitioner replied that he must have lost it. At his hearing, the charge of property loss was dismissed. Petitioner testified that he gave the pass to the infirmary officer who, when petitioner prepared to leave the infirmary, claimed that petitioner had not given the pass to him and instructed petitioner to return to his housing unit without the pass. Petitioner testified that he told the housing unit officer that he would return to the infirmary to get the pass if it turned up there, and conceded that he might have mislaid the pass in the infirmary. The pass was eventually returned to petitioner's housing unit.

The infirmary officer testified that he does not take passes from the inmates but that the inmates keep their passes and give them to the housing unit officer when they return from the infirmary. No testimony was elicited from the officer as to whether he knew that petitioner did not have the pass when he left the infirmary and whether he had instructed petitioner to return to the housing unit without the pass.

At some time before the hearing officer made his disposition, and at a time that petitioner was not present, the hearing officer contacted the housing unit officer by telephone and asked him "facts about the incident and [petitioner's] pass." The hearing officer stated that the call was made to verify that the pass was returned – information which related only to the charge that was dismissed – and therefore was not testimony on the charge that petitioner was challenging. As all of the testimony relating to the charge of movement violation was recorded, the hearing officer argued, there was no violation of the regulation requiring that he record the entire hearing.

The court concluded that the hearing officer had improperly failed to record his conversation with the housing unit officer and that the call should have taken place in petitioner's presence. Failing to record the call, the court held, deprived the court of

the ability to determine exactly what was said during the conversation. If the circumstances surrounding the return of the pass to the housing unit were discussed, the court wrote, the conversation might arguably have been relevant to the movement violation charge as well. For this reason, the court found that the off-the-record conversation was a regulatory violation requiring reversal of the hearing.

The court then considered how to determine whether to expunge the charges or to order a re-hearing. Citing Matter of Monko v. Selsky, 667 N.Y.S.2d 480 (3d Dep't 1998), the court set forth three situations where expungement is appropriate:

1. Where the determination is not supported by substantial evidence;
2. Where there has been a violation of one of the inmate's fundamental due process rights, as set forth in Wolff v. McDonnell, (418 U.S. 593); or
3. Where other equitable considerations dictate expungement of the record rather than remittal for a rehearing.

The court found that the determination was supported by substantial evidence and that there has not been a finding that one of petitioner's fundamental due process rights was violated. The court concluded, however, that based on consideration of equitable principals – specifically that the charges were not particularly serious and that the petitioner had long ago finished serving the penalty – the appropriate remedy was expungement.

## Sentencing

### **2009 DLRA Relief is Available to Re-incarcerated Parole Violators**

The 2009 Drug Law Reform Act (DLRA) allows for the resentencing of *incarcerated* individuals convicted of certain B level drug offenses who were originally sentenced to indeterminate sentences. Unlike the 2005 DLRA, which gave the same type of relief to A-II felony drug offenders, the benefits of the 2009 DLRA are not statutorily limited to individuals who are more than three years from parole eligibility, i.e., have not yet been released to parole supervision. Nonetheless, when individuals who had been released to parole and had then been re-incarcerated moved for resentencing pursuant to the 2009 DLRA, the People, relying on language from the Court of Appeals decision in People v. Mills, 872 N.Y.S.2d 705 (2008), argued that an individual who had been re-incarcerated after release to parole supervision is not eligible for resentencing. In a brief but succinct opinion, the Court of Appeals in People v. Paulin, 2011 WL 2534137 (Ct. App. June 28, 2011), held that prisoners who had been paroled and then are re-incarcerated for violating parole, are not barred from seeking relief under the 2009 DLRA.

To understand how the People came to make, and two appellate courts to accept, an argument that has no support in the statutory language, it is helpful to first look at the 2005 DLRA and the Court of Appeals caselaw interpreting it. The 2005 DLRA, applicable to drug offenders in prison for the commission of Class A-II felonies, says that such an offender “who is more than twelve months from being an eligible inmate as that term is defined in subdivision 2 of section 851 of the Correction Law” may apply for resentencing. Reading the 2005 DLRA with the Correction Law definition, the Court of Appeals held in Mills that in order to qualify for resentencing under the 2005 DLRA,

the applicant must not be eligible for parole within three years of his or her application for resentencing. One of the defendants discussed in the Mills decision is Jose Then. Mr. Then had been convicted of a Class A-II drug felony, had been released on parole and had committed and been convicted of a new crime. When he applied for resentencing, Mr. Then had returned to prison on his new sentence and was more than 3 years from parole eligibility. In considering whether Mr. Then was eligible for resentencing under the 2005 DLRA, the Court held that the later conviction should be ignored, stating, “in order to be eligible for resentencing, an inmate must be more than three years from parole eligibility for the same class A-II drug felony for which resentencing is sought.” The Court interpreted the statute this way because “it would be ‘illogical, if not perverse’ to put Then in a better position because of his new crime than inmates who had not broken the law.” (The quoted portion is from the Court’s decision in People v. Mills.)

In Paulin, relying on a rule of statutory construction that a statute’s language need not be mechanically applied when to do so would cause an absurd result, the People argued that the 2009 DLRA must be read as inapplicable to parole violators who had been returned to prison after violating parole. Because the statute requires that to be eligible, an individual must be in custody, the People argued that to interpret the statute to allow for resentencing after parole violators are returned to prison, when individuals who are on parole are not eligible for such relief, has the “absurd result” of rewarding parole violators.

The Court of Appeals rejected the People’s argument that allowing returned parole violators to be eligible for relief under the 2009 DLRA was absurd. It found that the purpose of the 2009 DLRA was to grant relief from what the legislature perceived as the inordinately harsh punishment for low-level non-violent drug offenders required by the Rockefeller Drug Laws. By the plain text of the statute, the Court wrote, its benefits are limited to those in DOCS custody and are not available to those on parole. The distinction,

the Court found, was recognition that the burden of inordinately harsh punishment falls most heavily on those who are in prison. Its rationale applies to parole violators as well as other imprisoned offenders.

Thus, the Court found that the Mills holding is irrelevant to the 2009 DLRA. The above quoted language – “it would be ‘illogical, if not perverse’ to put Then in a better position because of his new crime than inmates who had not broken the law” – the Court said, cannot justify what the People asked the Court to do: write into a statute an exception that “simply is not there.”

In a separate decision, People v. Santiago, the Court held that where an otherwise eligible applicant for 2009 DLRA relief files his or her application for resentencing while he or she is incarcerated, a subsequent release to parole while the application is pending does not render the applicant ineligible for relief. The Court found that because the statute requires only that the applicant be incarcerated when the application is filed, and not that he or she be incarcerated when the court rules upon the application, the legislature did not intend that release to parole supervision render an otherwise eligible applicant ineligible.

## **Court Not Required to Tell Defendant of the Consequences of Violating Post Release Supervision**

In People v. Monk, 2011 WL 924042 (2d Dep’t Mar. 15, 2011), the defendant pled guilty to attempted robbery in the first degree with the understanding that he would receive a 10 year determinate sentence and 5 years of post release supervision (PRS). After pleading guilty but before sentencing, the defendant moved to set aside his plea, arguing that the County Court had not informed him that a violation of the conditions of PRS could lead to incarceration beyond the agreed upon prison sentence. The County Court denied the motion, holding that while a defendant must be advised of the PRS component of his sentence, the

consequence of a violation of PRS are merely collateral to the plea and, therefore, need not be included in the court's **allocution** (the court's explanation of the terms of the sentence made at the sentencing proceeding). Following sentencing in accordance with the terms of the plea, the defendant appealed the court's ruling.

The Second Department agreed with the County Court. "Trial courts are required to advise defendants who enter guilty pleas of the direct consequences of their pleas," the court wrote, "but are not required to **iterate** [set forth orally] every collateral consequence of the convictions." A direct consequence is one which has a definite, immediate and largely automatic effect on a defendant's punishment. Collateral consequences are peculiar to the individual and generally relate to the actions of agencies that the court does not control. An example of a collateral consequence is the registration requirement to which individuals who have been convicted of certain sex offenses are subject.

Here the court noted that both the First and Third Departments of the Appellate Divisions have concluded that the consequences of violating the conditions of PRS are collateral and that a court's failure to allocute as to those consequences does not make a plea involuntary, unknowing or unintelligent. The court agreed with the First and Third Departments, noting that while a trial court must, prior to accepting a plea, advise a defendant of the PRS component of his or her sentence, it need not allocute on the ramifications of violating the conditions of PRS as they are mere collateral consequences of the conviction and the failure to explain them to the defendant does not render the plea infirm.

The court stated that this result makes sense because it is the Board of Parole which decides the consequences of violating PRS. That the Board of Parole, as opposed to the court makes this decision renders the consequences, by nature, merely collateral. Because the consequences of violating PRS are within the discretion of the Board of Parole, they are collateral to the judgment of conviction and there is no requirement that a trial

court specifically advise a defendant of the consequences of violating PRS.

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### **Miscellaneous**

#### **DOCS Ordered To Replace Inmate's Eyeglasses**

Petitioner Jessie Barnes filed a grievance seeking the return of his eyeglasses, which, he said, were confiscated by a correction officer during a use of force. The grievance was denied and he was informed that having received glasses in 2010, he was not entitled to replacement glasses at the state's expense until 2012. Petitioner's appeal to the Superintendent resulted in the same response, as did the appeal to the Central Office Review Committee. The issue of responsibility for the loss of the glasses was not addressed in the grievance response or appeal decisions.

Petitioner also sought the return of his eye glasses by writing Commissioner Fischer and received a response from Deputy Commissioner Lucien LeClair, Jr., authorizing replacement of his eye glasses. He passed this on to a member of the corrections staff for implementation of the authorization, but the glasses were not produced.

After receiving the CORC decision, the petitioner filed an Article 78 challenge to the grievance resolution, seeking an order that DOCS must return or replace his glasses.

In its decision in Matter of Barnes v. Smith, Index No. 2010-1303, (Sup. Ct. Franklin Co., June 22, 2011), the court noted that the respondents' answering papers did not address the allegation that the petitioner's glasses had been confiscated or the allegation that the Deputy Commissioner had approved their replacement. The court therefore ordered DOCS to submit supplemental papers addressing these allegations and after the submission, concluded that, "Petitioner's assertion that his eyeglasses were confiscated . . . by DOCS staff . . . is ultimately not challenged by any first hand statements or documentary evidence to the contrary." Under these facts, the court held, where DOCS offered no direct evidence refuting the petitioner's assertion as to the circumstances surrounding the loss of his eyeglasses, requiring petitioner to pay for replacement glasses, as was decided by CORC, is arbitrary and capricious to the extent that it requires petitioner to go for almost two years without the benefit of prescription eyeglasses. The court therefore ordered that DOCS supply petitioner with replacement eyeglasses without charge.

### **Court Finds That the Passage of 11½ Months Between the Incident and the Indictment Does Not Violate Due Process**

Almost a year passed between the day on which he admitted to a correction officer that he was in possession of a weapon and the date upon which Jamie Perez was indicted for promotion of prison contraband in the first degree. Due to the lengthy passage of time, Mr. Perez moved to

dismiss the indictment, arguing that the delay violated his right to due process of law. In People v. Perez, 2011 WL 2278970 (4<sup>th</sup> Dep't 2011), the court, discussing the issue of when a defendant's right to due process of law is violated by a delay in the indictment process, noted that there is no specific period by which a delay may be evaluated or considered presumptively prejudicial, but a delay of 11½ months alone is insufficient to require dismissal of an indictment. The People explained that the delay was due to staffing problems in the district attorney's office; Mr. Perez did not claim that the delay was caused by bad faith. In addition, the court said, the charges were serious, and, because he was already in prison, the delay led to no further restrictions on the defendant's freedom. Finally, the delay did not prejudice Mr. Perez in any discernable manner. Based on these findings, the court ruled that it would not dismiss the indictment.

### **Court Finds Cell Phone to be Dangerous Contraband**

The Penal Law defines prison contraband as any article or thing which a person confined in a detention facility is prohibited from obtaining or possessing by statute, rule, regulation or order. P.L. §205.00(3). Under New York law, there are two offenses based on possession of contraband in prison. Promoting prison contraband in the second degree is a class A misdemeanor. P.L. §205.20. An inmate is guilty of promoting prison contraband in the second degree when he or she knowingly and unlawfully obtains or possesses any contraband. An inmate is guilty of promoting prison contraband in the first degree when he or she knowingly and unlawfully makes obtains or possesses any dangerous contraband. P.L. §205.25. Dangerous contraband is defined as contraband which is capable of such use as may endanger the safety or security of a detention facility or any person therein. P.L. §205.00(4). Promotion of Prison Contraband in the first degree is a class D felony.

Found in possession of a cell phone, inmate Barry Greene was charged with promoting prison contraband in the first degree. At the close of the People's case, and again after the presentation of the defense case, Mr. Greene's lawyer moved for a

trial order of dismissal. The court reserved decision, and after the jury's verdict, the parties briefed the issue of whether a cell phone constituted dangerous, as opposed to ordinary contraband.

Mr. Greene admitted possessing the cell phone, but argued that because his only actual and intended use of the phone was to communicate with his wife, his possession of the phone was not dangerous.

The People argued that a cell phone is by its very nature dangerous contraband and that it need not be established that the cell phone was actually, or intended to be, used to endanger the correctional facility; to satisfy the element of dangerousness, it is sufficient that the cell phone is capable of such use as may endanger the safety and security of the prison and those therein.

The court looked to the Court of Appeals decision in People v. Finely, 862 N.Y.S.2d 1 (2008) for guidance on determining whether contraband is dangerous or non-dangerous. In Finley, the Court had to decide whether possession of a rolled up pack of toilet paper containing three marijuana joints constituted possession of dangerous contraband. There, the Court rejected a definition of dangerousness that was so broad as to incorporate any item, that when present in a detention facility, could lead to altercations and inmate disobedience. Rather, the Court said, the question should be whether the possession of the item creates the substantial probability that the item will be used in a manner that is likely to cause death or other serious injury, to facilitate an escape, or to bring about other major threats to a detention facility's institutional safety or security. On the other end of a very short spectrum, however, in a second case decided with Finley and under that caption, the Court held that 9 grams of marijuana met the substantial probability standard because possession of that amount of marijuana was large enough to be distributed to other inmates and that when drugs are possessed in distributable amounts, it becomes dangerous contraband because 1) ingestion would alter the mental states of inmates, causing altercations and leading inmates to disobey orders; and 2) altercations could arise from the debtor/creditor relations between the buyers and

sellers and the altercations might also lead to injuries to correction officers.

Asking whether there was a substantial probability that a cell phone might be used in a manner that is likely to cause death or other serious injury or to facilitate an escape or bring about other major threats to a prison's institutional safety or security, the court in Greene looked at the jury's judgment, the fact that in other states it is a crime for inmates to possess cell phones, and at least one other judicial finding that a cell phone was dangerous contraband because it can be used to facilitate an escape. Based on these findings, the court denied the defendant's motion to dismiss.

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**EDITORS: BETSY HUTCHINGS, ESQ.,  
KAREN L. MURTAGH, ESQ.**

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

**Pro Se  
114 Prospect Street  
Ithaca, NY 14850**

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