Pro Se

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Court Imposes Sanctions On State For Failing To Comply With Discovery Order

Arthur Blake filed a claim against the State of New York, alleging that while riding in a DOCCS van, he was injured as a result of a state employee's negligence. He then served a discovery request on the defendant. The request was for information about witnesses, documents, medical reports and authorizations.

A month later, counsel for the defendant informed Mr. Blake that a response would be furnished when work on the request was completed. After an additional two months had passed, Mr. Blake moved to compel production, which the defendant opposed. In its response, the defendant objected to a portion of the request for medical reports and stated that it would produce the claimant's medical records when he paid for them. Based on this production, the defendant argued that the motion was moot.

The court's decision on the motion to compel discovery is published in Blake v. State of New York, Claim No. 118705, (Ct. of Clms. Albany Co. Feb. 16, 2011). In the decision, the court notes that the State had failed to give any explanation for its failure to communicate with the claimant after its initial letter, its failure to request an extension, its subsequent failure to timely object or answer the discovery demand and its continuing failure to answer the demand. The court also notes that the defendant nowhere acknowledged that these failures had caused delays in discovery, made necessary the claimant's motion to compel, caused expense to the claimant and unnecessarily consumed the claimant's and the court's time.

The court found that the motion was not moot and ordered the defendant to provide the claimant with the names of the other inmates on the bus and the driver's name and to state whether the driver was still employed by the State. In addition, because the defendant had not objected in a timely manner to the production of the names and addresses of all of the individuals on the bus, the defendant was required to provide this information to the claimant. Finally, the court ordered the defendants to provide the claimant with his medical records without charge.

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A MESSAGE FROM THE EXECUTIVE DIRECTOR

Karen L. Murtagh

PLS Creates a Pro Bono Partnership Project

Samantha Howell

As most of you know, PLS' funding was cut this year, leaving us with fewer resources and forcing us to reduce our staff. To compensate for some of our lost resources, and to leverage the resources we do have, we were fortunate to receive a generous donation from an anonymous donor and a grant from The New York Bar Association. These allowed us to start a Pro Bono Partnership Project. In July, Samantha Howell was hired as PLS' Pro Bono Coordinator. Since then, Ms. Howell has been working tirelessly to develop a comprehensive pro bono program to ensure that legal services beyond what the reduced PLS can offer are available to inmates in New York State prisons.

Through the Pro Bono Partnership Project, attorneys work on prisoners' rights cases on a pro bono basis, meaning they will work on cases at no cost to the person whom they are representing. Certain cases, chosen by PLS staff, will be investigated and referred to the Pro Bono Coordinator. If, Ms. Howell, finds these cases to be appropriate for a pro bono referral, she will look for outside counsel. Volunteer attorneys will receive training materials and support from PLS staff when handling a case. For example, PLS recently hosted a two-day training seminar which addressed a variety of topics, including Article 78 proceedings, medical/mental health care issues and sentencing calculations. These trainings were recorded and are available for attorneys who accept cases through PLS. Pro bono attorneys can also receive CLE credits for the time they spend working on cases.

Ms. Howell has recruited attorneys throughout New York State to best facilitate the representation of prisoners in the variety of cases about which prisoners contact PLS. She is also looking to expand our panel so that we can accept more cases through our program. Attorneys can volunteer by contacting Samantha Howell, Pro Bono Coordinator, Prisoners' Legal Services, 41 State Street, Suite M112, Albany, New York, 12207.

Ms. Howell has also formed partnerships with Albany Law School's Pro Bono Society and the Syracuse University Law School's Pro Bono Advisory Council. PLS is working with both programs to involve law students in research projects and assisting our pro bono attorneys, as well as expanding the services available through our Pro Bono Program.

To improve collaboration between organizations, Ms. Howell created a resource referral spreadsheet that lists civil legal services and referral agencies throughout New York State and details the services offered, if any, to prisoners. This guide was provided to over 100 bar associations, legal service providers and law school clinics, and should improve the referrals that incarcerated persons receive.

PLS formally "kicked-off" the new program on October 26, 2011, at the Spectrum 8 Theater in Albany, New York. On that night, we hosted a screening of the film *Crime After Crime – The Battle to Free Debbie Peagler*, a documentary about a woman's fight for justice following her conviction for the murder of her abusive husband. Two pro bono attorneys accepted Ms. Peagler's case and worked with her for several years before her case was resolved. The perseverance of these two attorneys and the results that they obtained demonstrate the value of pro bono work as well as the importance of working with incarcerated persons.

News and Briefs

Eligibility for Class B Felony Re-Sentencing Clarified

Since the 2009 enactment of C.P.L. §440.46, which provides for the re-sentencing of individuals in the custody of DOCCS who are serving an indeterminate sentence for a class B felony drug offense, many applicants have had their re-sentencing motions denied because they were parole violators – that is, they had been released to parole and then sent back to prison following a parole violation. David Paulin and Jesus Pratts were two such individuals. They were both convicted of class B felony drug offenses and sentenced to indeterminate prison terms, paroled, violated, and returned to prison. Once back in prison, they both applied for re-sentencing as authorized by CPL §440.46, but were denied because they were parole violators. They appealed, and as we explained in the last edition of *Pro Se*, the Court of Appeals reversed these denials and, in People v. Paulin, 929 N.Y.S.2d 36 (2011), made it clear that there is nothing in CPL §440.46 that renders parole violators ineligible for re-sentencing.

Some people have also been denied re-sentencing due to the fact that they were in prison at the time they filed their re-sentencing application, but were released before a decision was made. Nydia Santiago found herself in this exact situation. She was sentenced to an indeterminate sentence for a 2003 class B felony drug offense. In 2009 she applied for re-sentencing under CPL §440.46 but was released to parole before her application was decided. The lower court denied her application stating that because she was no longer in custody, she was not eligible for re-sentencing. In People v. Santiago, 928 N.Y.S.2d 665 (2011), which was decided the same day as People v. Paulin, the Court of Appeals reversed the denial, ruling that, "a prisoner who applied before being paroled is not barred from obtaining resentencing after release."

What do these two decisions mean for someone who is currently in prison serving an indeterminate sentence for a class B felony drug offense? Even if you have been released to parole and returned to prison following a parole violation, you may still be eligible for resentencing. Additionally, if you have applied for resentencing, but had your application denied because you are a parole violator, you are eligible and should consider re-applying. Finally, if you are near your release date, you should consider applying; even if you are released before the re-sentencing application is decided, you will be eligible for re-sentencing.

It is important to remember that if you cannot afford an attorney for your re-sentencing application, one will be appointed for you. Rather than submit a re-sentencing application on your own, we encourage you to send a letter to the court which sentenced you to the class B felony drug offense requesting that an attorney be assigned to you. This attorney can then file the re-sentencing application on your behalf. A copy of the letter must be sent to the District Attorney's Office of the same county. Two form letters follow this article. Letter "A" is for individuals who have never applied for resentencing authorized by CPL § 440.46. Letter "B" is for individuals who have already applied for resentencing, but were denied on the basis that they were parole violators.

This article and the following letters were written by Jeffrey G. Leibo, Esq., Senior Project Manager, Justice Strategies, Center for Community Alternatives, Syracuse, New York 13202.

LETTER A

(Date)

(*Name of Judge)*
(Court Address)

Hon. (*Judge's Full Name*) :

I am writing to request assignment of counsel for a resentencing application. I am currently serving an indeterminate prison sentence following a conviction for a class B felony drug conviction. I wish to apply for resentencing as authorized by New York CPL § 440.46. Although I am a parole violator, the Court of Appeals decision in People v. Paulin, 929 N.Y.S.2d 36 (2011), clarified that parole violators are eligible for resentencing under CPL § 440.46. In accordance with CPL § 440.46(4) and §§ 717(1) & 722(4) of the County Law, I respectfully request that counsel be assigned to prepare and file a motion for resentencing on my behalf.

Please consider this letter to be my initial application for resentencing to be supplemented by the more complete motion my assigned attorney will file.

Sincerely,

(Your Signature)
(Your Name Printed)

CC: *(Name of District Attorney's Office)*
(Address of District Attorney's Office)

LETTER B

(Date)

(*Name of Judge)*
(Court Address)

Hon. (*Judge's Full Name*) :

I am writing to request assignment of counsel for a Motion to Renew in regards to my previous application for resentencing under New York CPL § 440.46. I am currently serving an indeterminate prison sentence following a conviction for a class B felony drug conviction. I was previously denied resentencing by this Court because I was a parole violator. Based on the recent Court of Appeals decision in People v. Paulin, 929 N.Y.S.2d 36 (2011), a parole violator is eligible for resentencing under CPL § 440.46. In accordance with CPL § 440.46(4) and §§ 717(1) & 722(4) of the County Law, I respectfully request that counsel be assigned to prepare and file a Motion to Renew on my behalf.

Please consider this letter to be my initial Motion to Renew to be supplemented by the more complete motion my assigned attorney will file.

Sincerely,

(Your Signature)
(Your Name Printed)

CC: *(Name of District Attorney's Office)*
(Address of District Attorney's Office)

Legislature Amends Parole Release Statute

The 2011 amendments to the Executive Law significantly revised two sections of the law which control the Parole Board's consideration of whether an inmate should be released to parole supervision. Amended §259-c(4) provides that the Parole Board "shall establish written procedures for its use in making parole decisions as required by law. Such written procedures shall incorporate risks and needs principles to measure the rehabilitation of persons appearing before the board, the likelihood of success of such persons upon release and assist members of the state board of parole in determining which inmates may be released to parole supervision."

Prior to this amendment, this section of the Executive Law directed the Board of Parole to a set of guidelines that assessed the seriousness of the crime and the individual's prior criminal history. Thus, the Board's consideration was primarily focused on factors that never changed. Now, the law requires that the Board have written procedures that measure rehabilitation and the likelihood of success upon release.

This amendment of the law has the potential to greatly change the landscape for inmates going before the parole board. We look forward to the issuance of the revised parole release guidelines as they will be the first indication of how the new parole release consideration process will be different from the former process.

Most Opt for Civil Confinement Rather Than Go to Trial

Under the Sex Offender Management and Treatment Act (SOMTA), sex offenders whom the Attorney General has determined to need civil management have the right to a trial before being committed to a psychiatric facility for treatment. Data shows that of the 196 sex offenders civilly confined as of June 30, 2011, nearly 40% consented to confinement. Of those offenders who do go to trial, 20% are successful. No study has been done to determine why such a high percentage of people decide not to take their cases to trial.

State Court Decisions

Disciplinary Court Reverses Charge of Possession of UCC Documents

In Matter of Fuentes v. Fischer, Index No. 2010-2014 (Supreme Court, Chemung Co. Feb. 11, 2011), petitioner Fuentes challenged the hearing officer's determination that he was guilty of possessing UCC documents. The charge resulted from a request by petitioner that the Wyoming County Clerk send him copies of documents from a prior Article 78 challenge to a Tier III hearing involving a UCC charge. When the clerk informed him that there was a $20.00 fee, petitioner Fuentes submitted a disbursement request to DOCS. The disbursement form detailed the UCC documents being requested. Petitioner Fuentes also made a written request to the Superintendent for permission to possess the documents requested from Wyoming County.

When the documents that had been mailed to petitioner Fuentes by the Wyoming County Clerk reached the prison where petitioner Fuentes resided, they were confiscated. Upon receiving notice that the documents had been confiscated, petitioner Fuentes made a second request to the Superintendent that he be allowed to possess the documents. Petitioner Fuentes was then charged with violating Rule 113.30, attempting to possess UCC documents, specifically, the documents mailed to petitioner by the Wyoming County Clerk.

At the hearing, petitioner's letters requesting permission to possess the documents were put in the record as were the Wyoming County documents. Petitioner pointed out that the rule prohibits possession of UCC documents but not attempted possession. Nonetheless, the hearing officer found petitioner guilty of possession of unauthorized UCC material and imposed a sanction of 12 months SHU.

In this proceeding, the petitioner challenged the determination of guilt, arguing that he had never possessed the documents. In their defense, the respondents argued that there was no meaningful distinction between cases where the inmates were charged with possession of unauthorized items discovered in outgoing mail and this case, where the unauthorized materials were discovered in in-coming mail. The court characterized the issue before it as: whether or not the petitioner can be charged with possession of prohibited UCC materials based on his attempt to receive them while his request for permission was still pending.

The court rejected the respondents' argument, commenting that there is a "wide divergence" between presuming possession of unauthorized items discovered in outgoing mail and imputing possession of items in an inmate's incoming mail. The court found it especially illogical to impute unauthorized possession to petitioner as he had sought permission both prior to the arrival of the Wyoming County documents as well as upon their arrival at the facility. The court found that the petitioner's intent was to only possess the documents with the Superintendent's permission and that the determination that the petitioner had violated the rules was both arbitrary and capricious, especially in light of the hearing officer's acknowledgement that the petitioner had never possessed the documents. The court ordered reversal of the hearing and expungement of the charges from petitioner's institutional records.

Inmate's Right to Call Witnesses Violated by Hearing Officer's Failure to Determine Reason for Refusal to Testify

In Matter of Barnes v. Prack, Index No. 383-11 (Sup. Court, Albany Co. Jul. 17, 2011), the petitioner alleged that the hearing officer had violated his right to call witnesses. In this case, the petitioner's witness agreed to testify, but when he arrived at the hearing, attempted to kick the petitioner. The witness was escorted from the hearing, but petitioner maintained that he wanted the witness's testimony. The hearing officer sent an officer to get the witness. The officer returned saying that the witness refused, would not give a reason, and would not sign the witness refusal form.

Citing the applicable law, Matter of Hill v. Selsky, 795 N.Y.S.2d 794 (3d Dep't 2005), the court noted that when an inmate witness who has previously agreed to testify later refuses to do so without giving a reason, the hearing officer is required to *personally* **ascertain** (find out) the reason for the witness's unwillingness to testify. Here, the court wrote, where the hearing officer failed to do so, Matter of Alvarez v. Goord, 813 N.Y.S.2d 564 (3d Dep't 2006), dictates that the failure to make a

personal inquiry is tantamount to a constitutional violation of the petitioner's right to call witnesses and requires expungement.

Parole

Inmate Granted Parole After Judge Twice Urged Review of Denial

In June 2010, a Sullivan County Justice of the Supreme Court ruled that in contravention of the Executive Law, the Board of Parole, in denying Craig Winchell parole, had failed to issue a "detailed and non conclusory" written determination of the factors and reasons for the denial. See, Matter of Winchell v. Evans, 27 Misc.3d 1232(A) (Sup. Ct. Sullivan Co. June 9, 2010), reported in ***Pro Se***, Vol. 20, No. 4. The justice remanded the matter to the Board of Parole for a new hearing. In September 2010, the Board of Parole again denied Mr. Winchell's application for release to parole supervision and Mr. Winchell again challenged the determination.

In his determination of Mr. Winchell's second Article 78 challenge to the Board's denial, the court noted that Mr. Winchell, who had served 29 years of a 16 to Life sentence for a homicide committed when he was 16 years old, had been a model inmate. See Matter of Winchell v. Evans, Index No. 325-2011, (Sup. Ct. Sullivan Co. Jul. 19, 2011). He had earned an associate's degree, numerous certificates of achievement, and the privilege of working outside. He had several job offers and a wife and two children. Nonetheless, the Parole Board found that while his rehabilitative efforts were compelling, it found the senseless and violent nature of his crime more compelling. The court found that in denying parole on this basis, the Board had abused its discretion and violated Mr. Winchell's rights to due process of law. In reaching this result, the court stated: "One is left with the impression that the state's position is that because of the man's past crimes, there would, in essence never be a time that he would be suitable for release, even though the lengthy confinement and punishment are not in accord with cases of similar seriousness.

Parole Boards have wide discretion as to how much weight they give to each of the statutory factors, the Court wrote, but they cannot base their decision exclusively on the seriousness of the crime and must explain their denials in detail. The court ordered that a new hearing be conducted before a different panel.

This summer, after Mr. Winchell's 11th parole hearing, the Board of Parole granted his release. On September 19, 2011, Craig Winchell went home.

Sentencing

Challenge to Exclusion of 2nd Violent Felony Offenders From Provisions of Resentencing Law Fails

Criminal Procedure Law §440.46 authorizes sentencing courts to resentence to determinate terms Class B felony drug offenders who were originally sentenced to indeterminate sentences. The law excludes from its remedial scope Class B felony drug offenders who have previously been sentenced as second violent felony offenders. In People v. Cerza, 925 N.Y.S.2d 133 (2d Dep't 2011), the defendant challenged this exclusion, arguing

that the exclusion violated the equal protection clauses of the New York State and federal constitutions. The court rejected this argument, writing that to survive constitutional scrutiny, the statue need only be supported by a rational basis. Here the court found that the disparate treatment of Class B drug offenders who were previously adjudicated second violent felony offenders is rationally related to a legitimate state purpose: the state's interest in preventing those who repeatedly violated New York's criminal laws from benefiting from the **ameliorative** (remedial) effect of the Drug Law Reform Act.

Miscellaneous

State Court Judge Examines SOMTA Provision Found to be Unconstitutional by Federal Court

In the last issue of ***Pro Se***, we wrote about the federal district court decision in Mental Hygiene Legal Services (MHLS) v. Cuomo, 2011 WL 1344522 (S.D.N.Y. Mar. 29, 2011). In MHLS v. Cuomo, the court held, **inter alia** [among other holdings], that the section of the Sex Offender Management and Treatment Act (SOMTA) authorizing – in the absence of a finding dangerousness – pretrial confinement of all detained sex offenders who have mental abnormalities was unconstitutional. See Mental Hygiene Law § 10.06(k).

Under the statute, the objectionable pre-trial confinement occurred after a judicial finding that there was probable cause to believe that the individual requires civil management. The basis of imposing pre-trial civil confinement is the factual conclusion is that the subject of the proceeding is a "detained sex offender" (as defined by SOMTA) who suffers from a "mental abnormality" (also defined by the SOMTA). However, the statute does not require that in addition to these findings, the court find that the individual is dangerous. As pointed out by the court in MHLS v. Cuomo, civil management can take the form of either intensive supervision on the street or confinement to a psychiatric facility. And, as the federal court found, in the absence of a finding of dangerousness which would support the need for civil confinement, to subject all detained sex offenders suffering from mental abnormalities to pre-trial confinement, results in the confinement of some individuals who are not dangerous. For this reason, the federal court held, the statue is unconstitutional.

Section 10.06(k) was also found to be constitutionally infirm by a Bronx Supreme Court Justice in State v. Enrique T., 929 N.Y.S.2d 376 (Sup. Ct. Bronx Co. Aug. 4, 2011). In the state case, the court was deciding a petition brought by the state to have Enrique T. civilly managed. At the probable cause hearing, the state put on evidence that Mr. T. had been convicted of one of the enumerated sex offenses and that he had a mental abnormality. Based on this evidence, the state asked the court to order that Mr. T. be confined pending his trial.

The court found that based on the evidence presented, the state had established that there was probable cause to believe that Mr. T. was a detained sex offender requiring civil management. However, the court also found that the State had not put on evidence showing that Mr. T. was dangerous.

United States v. Salerno, 481 U.S. 739 (1987), the court wrote, held that the due process protections of the Fifth and Fourteenth Amendments to the United States Constitution mandate a specific finding of dangerousness in

the pretrial detention context and a finding that lesser conditions of confinement would not suffice. Mental Hygiene Law §10.06(k), the court found, does not provide for such a finding. The statute's pre-trial detention scheme does not have the procedural safeguards necessary to protect the strong liberty interest that is possessed by a respondent in a civil management proceeding. It is the statute's lack of any means to effectuate a finding by the court that a lesser condition of confinement such as supervision, medication and/or community based treatment, would suffice, and its requirement mandating civil confinement after a finding of probable cause that caused the court to hold that this section of the statute was unconstitutional.

Based on the unconstitutionality of §10.06(k), the absence of any other provision constitutionally authorizing the state to confine Mr. T. and the absence in the statute of a provision authorizing the court to release respondent with conditions, the court ruled that it had no choice other than to order Mr. T.'s release pending his civil management trial.

Challenge to Constitutionality of Disciplinary Rule Must Be Raised in the IGP

What steps should an inmate take if he or she thinks that an inmate disciplinary rule is unconstitutional? According to the Third Department's decision in Matter of Samuels v. DOCS Staff, 923 N.Y.S.2d 309 (3d Dep't 2011), such challenges must be brought through the Inmate Grievance Program. In Samuels, the petitioner, who had been found guilty of violating the DOCS rule against possessing UCC documents, challenged this rule as unconstitutional. The court ruled that a challenge to the constitutionality of the Inmate Standards of Behavior must be made to the Inmate Grievance Program. Such challenges, the Court found, citing Matter of Welch v. Coughlin, 856 N.Y.S.2d 732 (3d Dep't 2008), cannot be raised in a disciplinary proceeding where the inmate has been charged with violating the rule.

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

Son of Sam Law Results in Order Restraining Payment of Judgment

The Son of Sam Law extends the time within which the victim of a violent crime can sue the crime's perpetrator for the injuries he or she caused during commission of the crime. The law's operation is triggered by a violent felony offender's receipt of funds in excess of $10,000.00. Executive Law §632-a(3) states that "any crime victim shall have the right to bring a civil action in a court of competent jurisdiction to recover money damages from a person convicted of a crime of which the crime victim is a victim . . . within three years of the

discovery of any funds of a convicted person." Thus, if an inmate who has been convicted of one of the felonies listed in Executive Law §632-a(1)(e) settles a lawsuit (or otherwise comes into possession of "funds of a convicted person"), the New York State Crime Victims' Office must provide notice to the victims of the crime that they have 3 years from receipt of the notice to bring a suit for damages against the individual who was convicted of the crime in which he or she was the victim. If at any time during this three year period, the victim notifies the Crime Victim's Office that he or she intends to file suit against the inmate who has received funds, the Office is empowered to seek an injunction to prevent the wasting of assets, including an injunction restraining payment of a settlement to an inmate.

In New York State Office of Victim Services v. Murray, Index No. 3530-11 (Sup. Ct. Albany Co. Aug. 23, 2011), the Crime Victim's Office sought a preliminary injunction against Mr. Murray. Mr. Murray, who in 1995 had been convicted of a violent felony offense, had recently received $50,000.00 as a result of the settlement of a lawsuit. In accordance with the above cited provisions of the Executive Law, the Crime Victims' Office had notified the victim of Mr. Murray's crime. The victim responded that she intended to file an action to recover damages from him. In response to this notice, the Office sought an injunction restraining payment of the settlement to Mr. Murray. Mr. Murray opposed the motion.

Before the court will issue an injunction under Ex. Law §632-a, the petitioner must show a likelihood of success on the merits, that irreparable injury will result if the injunction is not granted and that the equities favor injunctive relief. See New York State Crime Victims Board v. Majid, 749 N.Y.S.2d 937 (Sup. Ct. 2002). In Mr. Murray's case, the court found that the petitioner had shown that the victim has a strong likelihood of success in her suit against Mr. Murray because Mr. Murray's conviction is prima facie evidence of the underlying facts in the civil action which the victim intends to file against him. The court also found that the petitioner had demonstrated the likelihood of irreparable injury, that is, that the victim will be irreparably injured if Mr. Murray is allowed to spend the funds in his inmate account before a court can determine whether he is required to pay that money to the victim. Finally the court found that **the equities** (fairness) require that the crime victim be compensated for the injuries caused by Mr. Murray's crime against her. For these reasons, the court granted a preliminary injunction restraining payment to Mr. Murray.

In granting the injunction, the court noted that 10% of the award was exempt from recovery by the victim and that the injunction only applied to 90% of the award.

FOIL Delay Leads to Award of Counsel Fees

Public Officers' Law §89(4)(c)(i) provides that a court may award counsel fees and other litigation costs to a litigant who substantially prevails in an Article 78 challenge to the denial of a Freedom of Information Law (FOIL) request if the court find that the agency had no reasonable basis for denying access to the records sought. In Matter of New York State Defenders Assn [NYSDA] v. New York State Police [NYS Police], 927 N.Y.S.2d 423 (3d Dep't 2011) and Matter of New York Civil Liberties Union [NYCLU v. City of Saratoga Springs [the City], 926 N.Y.S.2d 732 (3d Dep't 2011), the Third Department reversed lower court decisions denying the petitioners attorneys fees and remanded the cases for additional proceedings.

In Matter of NYSDA v. NYS Police, the petitioner (NYSDA) had requested copies of the agency's (NYS Police) policies relating to electronic recording of custodial interviews, interrogations, confessions and statements. Claiming that the policies were exempt from disclosure, the agency denied the request. After exhausting its administrative remedies, NYSDA filed an Article 78 proceeding seeking disclosure of the records and an award of counsel fees and costs. The agency answered by producing the requested documents and moving to dismiss the case as moot. The court dismissed the petition and, finding that the NYS Police had a reasonable basis for withholding the entirety of the records, denied the request for counsel fees.

A similar set of circumstances led to the Article 78 petition in Matter of NYCLU v. Saratoga Springs. There, when NYCLU requested the City's records relating to its use of stun guns and tasers, the City denied the request, claiming that the records were exempt from disclosure, following which NYCLU initiated an Article 78 proceeding seeking disclosure of the requested records and counsel fees. Negotiations to resolve the dispute were unsuccessful whereupon a conference with the court was held, following which the City produced the records, with some redactions. Further court intervention led to a determination that NYCLU was entitled to unredacted records. NYCLU moved for an award of counsel fees and litigation costs in the amount of $10,059.80. The court found that NYCLU had substantially prevailed in the proceeding, that the City had no reasonable basis for initial denial of NYCLU's FOIL request and that the City had failed to reply to the request within the statutory 5 day time limit. Nevertheless, the court denied NYCLU's motion.

On appeal from the lower court ruling in Matter of NYSDA v. NYS Police, the appellate court stated that a court may award counsel fees to a litigant who substantially prevails in a FOIL case if the court finds that the agency had no reasonable basis for denying access to the requested records. A **pertinent** (relevant and significant) consideration in determining whether the agency had a reasonable basis for denying a FOIL request, the court wrote, is whether the agency reasonably claimed the records were exempt from disclosure, but added that under some circumstances, a denial might still be reasonable even if the records are ultimately deemed not to be exempt. And, the court noted, even if the statutory requirements are met, an award of counsel fees is **discretionary** (left to the court's judgment).

The court rejected the NYS Police claim that NYSDA did not substantially prevail because the City ultimately provided the records sought without a court order or consent decree. Under this logic, the court said, an agency could **forestall** (delay) an award of counsel fees simply by releasing the requested documents before asserting a defense. To allow this would contravene the purposes of the fee shifting provision. Thus, the court held, inasmuch as NYSDA had received all of the information that it requested in response to the FOIL litigation, it had substantially prevailed.

Turning to the issue of whether a reasonable basis existed for initially withholding the records, the court first looked at the claimed exemption. Records which are compiled for law enforcement purposes are exempt if their disclosure would reveal "non-routine" criminal investigative techniques. Further, the law requires that the exemptions be **narrowly construed** (that they be applied to disclose as many documents as possible).

In the NYSDA case, the court found that it was not reasonable for the NYS Police to issue a blanket denial of NYSDA's request. "The argument that there was a reasonable basis to believe that the records were exempt from disclosure," the court wrote, "is belied by the virtually immediate release of the requested information upon the commencement of this proceeding." Thus, the court found, the Supreme Court erred in determining that the NYS Police had a reasonable basis for withholding the entirety of the records sought. Having reached a conclusion as to whether NSYDA had satisfied the statutory requirements for an award of attorneys fees which was different from that reached by the Supreme Court, the court **remanded** (sent back) the case to the Supreme Court for a determination of whether, in the court's discretion, an award of counsel fees was appropriate.

In NYCLU v. City of Saratoga, the court reached the same result, finding that the City's change of stance after the filing of the litigation did not defeat a claim for counsel fees and litigation costs. "To conclude otherwise," the court wrote, "would not only subvert the purpose of the statute, but would lead to a result where only a petitioner who fully litigated a matter to a successful conclusion could ever expect an award of counsel fees and a respondent whose position was meritless need never be concerned about the possible imposition of such an award so long as they ultimately settled a matter before the court heard the petition on the merits."

A person who represents him or herself in a legal proceeding cannot take advantage of the attorney fees provision in Public Officers' Law §89(4)(c)(i). Such litigants can however, seek reimbursement of the costs of litigation, such as filing fees.

Federal Court Decisions

Second Circuit Reinstates Sexual Harassment and Abuse Case

In 2008, thirteen women who claimed to have been sexually harassed, abused and/or assaulted by correction officers at Bedford Hills C.F. filed a class action suit against the officers who had harassed or assaulted them and – alleging that the misconduct took place as a result of the failure to train, supervise and discipline the officers – the supervisors of these officers. The named plaintiffs were seeking damages and declaratory and injunctive relief. That is, the plaintiffs were asking that the court award them compensation (money) for their injuries, declare that the practices and policies of the supervisory defendants had resulted in unconstitutional conduct and order the supervisory defendants to change their policies and practices.

The defendants moved to dismiss the claims, arguing that the claims for declaratory and injunctive relief were moot as to the named plaintiffs who had been released, and that the claims of the remaining named plaintiffs for damages and declaratory and injunctive relief should be dismissed for failure to exhaust their administrative remedies. The defendants argued that the claims for injunctive and declaratory relief brought by the plaintiffs who had been released were moot because these plaintiffs could not benefit from the results of the litigation. Mootness is a doctrine that prevents a court from deciding an issue where the party bringing the case can no longer benefit from its resolution. It may also prevent the plaintiffs to whom the doctrine is applied from serving as named plaintiffs in a class action.

While the defendants did not deny that the plaintiffs who were still in prison would benefit from the resolution of the claims for injunctive and declaratory relief, the claims of these plaintiffs, they argued, should be dismissed either because they had not complied with the Inmate Grievance Program procedures and/or because their grievances did not state that they had been harmed **as a result of the supervisory defendants'** inadequate training, supervision, and discipline of officers and did not seek a change in policy and procedure. In the absence of such claims in the grievances, the defendants argued, it cannot be said that these plaintiffs had exhausted their administrative remedies with respect to their claims of supervisory liability. In the absence of such claims in the grievances, the supervisory defendants had not been put on notice of the problem and it cannot be said that these defendants had the opportunity to investigate and remedy the problem.

The district court agreed with the application of the mootness doctrine urged by the defendants. It dismissed as moot the claims for declaratory and injunctive relief filed by the plaintiffs who had been released from prison and denied the motion for class certification to the extent that it relied on these plaintiffs as class representatives. The court also agreed that the remaining plaintiffs had failed to exhaust their administrative remedies as to their claims for declaratory and injunctive relief and that several plaintiffs had failed to exhaust their administrative remedies with respect to their claims for compensatory damages.

The Second Circuit Appeal

As to the exhaustion claims of the plaintiffs who were still in prison, the court applied the Supreme Court case law on this issue. One of the primary purposes of the Prison Litigation and Reform Act's exhaustion requirement, the court noted, is to give corrections officials the opportunity to address complaints internally before permitting the filing of a federal action. Further, the court noted, the PLRA requires "proper exhaustion." Proper exhaustion requires completion of the administrative review process in accordance with the applicable rules and providing the level of detail necessary in a grievance to comply with the grievance process.

The Second Circuit concluded that only the three plaintiffs who had been released from prison had both raised the claims for declaratory and injunctive relief in their grievances and properly exhausted their administrative remedies. The remaining issue for the court to decide was whether the claims of these plaintiffs had been improperly dismissed as moot.

With respect to mootness, the court agreed that under classic mootness analysis, the claims were moot as to the plaintiffs who had been released from prison. However, the court continued, the U.S. Supreme Court has created a saving doctrine – known as relation back – by means of which certain claims which would otherwise be dismissed as moot are allowed to go forward. The basis for the application of this doctrine is that there are claims which are viable when filed but have an inherently short life before they become moot. An example of such a claim was raised in Gerstein v. Pugh, 420 US 103 (1075), a class action challenging Florida's practice of permitting pre-trial detention in the absence of a probable cause hearing. In that case, the named plaintiffs were all convicted or released before the class motion was decided. Recognizing that this would inevitably occur as to any individual or set of named plaintiffs, and that the underlying claim would thus never be addressed by the court, the Supreme Court held that where there was a live controversy at the time that the case was filed but the claims of the

named plaintiffs would become moot before the court ruled on the class motion, certification of the class may relate back to the date of filing where the issue would otherwise evade review.

Here the court found that the declaratory and injunctive claims for relief brought by the plaintiffs who had been released were, by their nature, capable of repetition but evading review. It therefore found that the claims, which had been properly exhausted, were not moot. The Second Circuit sent the Amador case back to the district court to determine whether the named plaintiffs whose claims had survived the defendants' motion to dismiss meet the other requirements for being class representatives, that is, whether they can fairly and adequately represent the interests of the class.

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