

Pro Se

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Failure to Apply New Criteria Results in Reversal of Parole Denial

In 2011, the Executive Law § 259-c(4) was amended to require that the Board promulgate new procedures for making parole release decisions. Such new procedures “shall incorporate risk and needs principles to measure the rehabilitation of persons appearing before the board, the likelihood of success of such person upon release and assist members of the state board of parole in determining which inmates may be released to parole supervision.” In July 2010, after serving 25 years for a homicide conviction, Douglas Thwaites saw the parole board for the first time. At the hearing, the board questioned Mr. Thwaites primarily about his crimes, his past criminal history and a deportation order. Mr. Thwaites was denied parole and held for 24 months. The decision stated that in spite of his institutional accomplishments and release plans, the board had concluded that his discretionary release would be incompatible with the welfare of the community and that to hold otherwise would so deprecate the seriousness of his crime as to undermine respect for the law. After exhausting his administrative remedies, Mr. Thwaites challenged the board’s decision in an Article 78.

In Matter of Thwaites v. N.Y.S. Board of Parole, 934 N.Y.S.2d 797 (Sup. Ct. Orange Co. Dec. 21, 2011), the court, in determining whether the Parole Board’s action was lawful, focused on the statutory amendments. The court noted that the

adoption of an explicit requirement that the Parole Board adopt and be guided by procedures that require it to evaluate rehabilitation and the likelihood of success upon release signaled a critical reform and modernization of parole practices. These procedures rationalize parole decision making by placing the focus primarily on who the person appearing before the Board is today and on whether that person can succeed in the community after release, rather than, as under the previous guidelines, on who the person was many years earlier when he or she committed the crime.

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Karen L. Murtagh**

**NYS BAR ASSOCIATION SPONSORS PANEL DISCUSSION ON
SOLITARY CONFINEMENT**

I sit on the Civil Rights Committee of the New York State Bar Association. Every year our committee sponsors a continuing legal education program that focuses on timely, important, complex and controversial issues. This year the Committee chose to address the critically important issue of: *The Increased Use of Solitary Confinement in New York State Prisons: Violation of Human Rights or Necessary Prison Management Tool?* The program was presented on January 26, 2012 in N.Y.C. Among the panelists were David Fathi, Director of American Civil Liberties Union National Prison Project, Jamie Fellner, Senior Advisor to the U.S. Program of Human Rights Watch, Dr. Stuart Grassian, Psychiatrist and Expert in a number of prison cases challenging the use of solitary confinement, Jay Coleman, Life Skills Educator and a formerly incarcerated person and DOCCS' Commissioner Brian Fischer. The speakers addressed a number of issues including: the history of the use of solitary confinement in the U.S. penal system; the expansion of the use of solitary confinement throughout the United States; the use of solitary confinement as a disciplinary and prison management tool and the extent to which solitary confinement actually works to fulfill those purposes; what, if any, other prison management tools could be used in place of solitary confinement; the psychiatric effects of solitary confinement; whether prolonged solitary confinement jeopardizes the physical and mental health of people so confined; the extent to which the New York State or U. S. Constitution protects individuals from being subjected to long term solitary confinement; and the perspective of International Human Rights law.

I advocated for this program because of my history at PLS and my belief that our society has become completely desensitized to the serious repercussions of prolonged solitary confinement. When I began at PLS as a law student in 1983, the prison population was 33,000 and there were 32 adult prisons. A typical box hit, the term used for solitary confinement, was 30 to 60 days, a 90 day hit was given out for relatively serious misbehavior, a 6 month box hit was for very serious misbehavior and a year or more in the box was, for the most part, unheard of. There was no Upstate or Southport or S-blocks – facilities that have since been built solely to house prisoners in solitary confinement.

Eighteen years later – there were approximately 70,000 prisoners and 70 prisons. The average box hit had increased from 2 months to 5 months and 6.7 percent of the prison population was being held in solitary confinement.

Today the prison population has decreased to 55,000 but box hits have continued to increase with 18 months to 2 year box hits being far from uncommon. Four thousand, one hundred and eighty inmates – 7.6% of the prison population – are currently being held in solitary confinement.

I have been a prisoners' rights advocate for 30 years. Although I understand the need for solitary confinement of a limited duration, I believe that its use as a prison management tool can and has been extended beyond what is necessary to keep our prisons safe. In hosting a program that poignantly addressed the issue of prolonged solitary confinement my hope is that we have shed some light on the issue and we have opened a dialogue for examining the utility and abuses of solitary confinement in our prisons.

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The issue before the Thwaites court was whether the new guidelines, which became effective two weeks after the petitioner's hearing but before the decision in his administrative appeal, should be given retroactive effect. Based on the principle that remedial legislation should be given retroactive effect in order to effectuate its beneficial purpose, the court concluded that the new guidelines should apply to the petitioner's hearing.

The court found however, that the Board's decision focused on the nature of the petitioner's crime and thus was entirely backward looking. When the Board reasoned that petitioner's discretionary release was inappropriate and incompatible with the welfare of the community so as to deprecate the seriousness of the crime, it was employing past focused rhetoric, not future focused risk assessment analysis. Such reasons fail, the court wrote, to sustain a rational determination on the inquiry at hand: whether there is a reasonable probability that if an inmate is released, he will live and remain at liberty without violating the law and that his release is not incompatible with the welfare of society and will not deprecate the seriousness of the crime as to undermine respect for the law.

The court found that the Board's decision was arbitrary and capricious, irrational and, based upon the Parole Board's failure to articulate any rational non-conclusory basis, other than its reliance on the seriousness of the crime, why the Board could not believe there is a reasonable probability that if petitioner is released, he would live and remain at liberty without violating the law. Further, it was undisputed that the Board's decision was not made in accordance with the 2011 amendments to the Executive Law. For this reason, the court ordered a new hearing at which the Board will utilize risk assessment principles and procedures.

News and Briefs

Prisoners' Legal Services of New York was created to provide legal assistance to prisoners in New York State prisons. Our primary mission is to assist prisoners with matters relating to prison conditions. **PLS does not** handle matters relating to overturning criminal convictions. We have form materials about the procedures for direct appeals and state and federal collateral attacks. However, other than our form materials, neither the regional offices (located in Ithaca, Plattsburgh, Albany and Buffalo) nor the Pro Bono Project can answer questions that individuals might have about substantive issues relating to criminal appeals, such as the law relating to Miranda warnings or search and seizure issues.

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

**A HEARTFELT THANK YOU AND
ANOTHER REQUEST FOR HELP!**

**From Karen L. Murtagh,
Executive Director, PLS**

Happy New Year and thanks to all our readers who took the time to write to Governor Cuomo urging him to include PLS in the Executive Budget – your efforts were successful! For the first time in over 20 years, Prisoners' Legal Services was included in the Executive Budget. We are tremendously appreciative of our readers for their support and to Governor Cuomo and his administration for their fiscal commitment to PLS and their acknowledgment of the critical role which PLS plays in the fair administration of justice. Yet, appreciative as we are, the recommended appropriation is half of last year's operating budget. As a result, if additional monies are not added to the current appropriation, PLS will be forced to layoff half of our current 18 member staff, leaving us with a statewide staff of only 9 employees to provide critical legal services to over 55,000 prisoners. **And so, once again, I am urging our readers to send letters and make phone calls to the legislature urging them to add \$1.5 million to PLS' current appropriation. YOUR VOICE MATTERS so please send your letters to:**

Hon. Sheldon Silver, Assembly Speaker
Albany Office
LOB, Room 932
Albany, NY 12248

Hon. Dean Skelos, Senate Majority Leader
Albany Office
Legislative Office Building, Room 909
Albany, NY 12247

STATE COURT DECISIONS

Disciplinary

**Preserving Issues and Cell Search
Conducted When Inmate Was Not
Present**

In Matter of Morales v. Fischer, 934 N.Y.S.2d 526 (3d Dep't 2011), the court considered the issue of whether during the administrative hearing process the petitioner had preserved the issue that he raised in his Article 78 challenge to a Tier III disciplinary hearing. When a search of Mr. Morales's cell resulted in the recovery of contraband, he was removed to the SHU. The search was then continued, and additional contraband was recovered, including a substance that was determined to be drugs. Mr. Morales was charged with and found guilty of having violated a number of rules.

In his Article 78 proceeding, Mr. Morales argued that the hearing should be reversed because he was denied his right to be present during the part of the search that took place after he went to SHU. The respondent argued that because the petitioner had not raised this issue at the hearing, it was unpreserved for court review. The court however disagreed. The court ruled that lack of preservation that arises from the failure to raise an issue at the disciplinary hearing should be confined to those instances in which the hearing officer would be able to correct the deficiency if it were brought to his or her attention. Here, where the alleged error arose from a defect that appears on the face of the hearing record, raising the issue in an administrative appeal gives the administrative body an adequate opportunity to correct the error, thus preserving it for judicial review.

Turning to the substantive issue of whether the petitioner had a right to be present during the search, the court first addressed the question of whether the petitioner was wrongfully removed before the search was completed. Here the court found that Directive 4910(V)(C)(1) provides that an inmate is permitted to observe a search of his or her cell when he or she is removed for the purpose of conducting the search unless a determination is made that such presence endangers the safety or security of the facility. Here, the court found, the petitioner was impermissibly removed to the special housing unit in the absence of a determination that having him observe the search would endanger the security of the facility. As the petitioner had only been found guilty of those charges that resulted from the search that was conducted after he had been wrongfully removed from the corridor in front of his cell, the court ruled that the hearing must be annulled and all references to it and the underlying charges expunged from the petitioner's institutional records.

Court Approves Imposition of Same Punishment Upon Remittal

Injah Tafari successfully challenged a determination of guilt as to one of several charges that were brought against him. As his relief, the court remitted the case to the DOCCS for further proceedings. The Commissioner dismissed the charge which the court had reversed but did not lower the penalty imposed. Mr. Tafari filed a second Article 78, claiming that having eliminated one of the charges that had resulted in the previously imposed penalty, the penalty should have been reduced.

In Matter of Tafari v. Prack, 932 N.Y.S.2d 599 (3d Dep't 2011), the Appellate Division agreed with the Supreme Court that the unreduced penalty was not a violation of the original order remitting the case. Rather, the court wrote, "inasmuch as the Commissioner dismissed the charge [with respect to which the court had found that the petitioner's rights to due process of law had been violated] and the penalties assessed for the remaining charges of which petitioner had been found guilty were within

the permissible range and were not shocking to one's sense of fairness," there was no error.

Third Department Finds H.O. Qualified to Make Handwriting Comparison

In Matter of Collins v. Fischer, 932 N.Y.S.2d 916 (3d Dep't 2011), the court affirmed the lower court's dismissal of an Article 78 challenge to a Tier III hearing. At that hearing, the petitioner defended himself against charges that he had harassed female employees by sending them sexually explicit letters. At the hearing, the hearing officer compared the letters to a sample of petitioner's handwriting and found that they were written by the same person. The court held that the hearing officer, as trier of fact, is qualified to make an independent comparison of the letters and the handwriting samples.



Second Department Reverses Denial of DLRA Resentencing Motion

In People v. Berry, 933 N.Y.S.2d 94 (2d Dep't 2011), the court reviewed a decision denying the defendant relief under CPL §440.46. This provision of the 2009 Drug Law Reform Act (2009 DLRA) authorizes individuals who were 1) convicted of committing a Class B felony drug offense and 2) sentenced to an indeterminate term, to apply for resentencing to a determinate term. According to the memo submitted in support of the bill, the first of the DLRA reform laws was enacted in 2004 because the drug laws then in place provided **inordinately** (extremely) harsh punishment for low level non-violent drug offenders and wasted valuable state tax dollars which could be used more effectively to provide drug treatment to addicts and harsh punishment to violent criminals. And, the

court noted, the Legislature also concluded that it was appropriate to provide an opportunity for retroactive sentencing to individuals serving such inordinately harsh punishments. Perhaps most importantly, while the Legislature did not make resentencing mandatory, the court wrote, it included a statutory presumption in favor of resentencing. See, People v. Beasley, 850 N.Y.S.2d 140 (2d Dep't 2008) and People v. Braithwaite, 880 N.Y.S.2d 669 (2d Dep't 2009).

In this case, based on the fact that the defendant had violated parole, the lower court, finding release to parole supervision made him ineligible for that statute's relief, denied the motion. The lower court went on to say that even if the defendant was eligible for resentencing, substantial justice dictated denial of the motion.

On appeal, the People conceded that pursuant to the Court of Appeals' Decision in People v. Paulin, 929 N.Y.S.2d 36 (2011), holding that "prisoners who have been paroled and then reincarcerated for violating their parole, are not for that reason barred from seeking relief under CPL §440.46," the supreme court erred in concluding that the defendant was ineligible for resentencing by virtue of his parole violation. In addition, the court found, the supreme court's determination that substantial justice dictated the denial of the resentencing motion was based on the defendant's record of committing drug offenses and his commission of an offense while on parole. Under the circumstances, the court wrote, these factors are insufficient to overcome the statutory presumption in favor of resentencing. Explaining its decision, the court noted that the defendant's offense consisted of "typical low-level drug selling activity, as did his other offenses," and that his recent offenses did not involve violence or weapons. While the Court of Appeals and the Second Department have indicated that a defendant's status as a parole violator may be relevant to a determination of whether substantial justice dictates denial of resentencing, it is "merely one factor to consider, and does not mandate denial of a resentencing motion."

The court went on to find that because the facts underlying the defendant's conviction and other criminal offenses were not unusually serious, and his prison record included no serious infractions and

many positive accomplishments, the presumption that the defendant is entitled to benefit from the reforms enacted by the legislature based upon its judgment that the prior sentencing scheme for drug offenses like that committed by defendant was excessively harsh, has not been rebutted. As substantial justice did not dictate denial of the defendant's motion, the court ruled, it should have been granted.

First Department Reverses Denial of Resentencing Motion

In People v. Cephas, 934 N.Y.S.2d 410 (1st Dep't 2011), the First Department reviewed a lower court's denial of the defendant's 440.60 motion to be resentenced. The lower court decision ruled that substantial justice did not dictate granting the motion because the defendant had a long criminal history and, while he completed programs during his term of incarceration, he had relapsed into a life of crime and drugs upon his release. The First Department reversed the decision, finding that substantial justice did not dictate denial of the motion and, in an exercise of discretion, replaced the indeterminate sentence with a determinate sentence of 12 years and 3 years post release supervision.

In reaching its decision, the First Department noted that the defendant was an exemplary prisoner and had completed several work programs and substance abuse treatment programs. In addition, he had received highly favorable evaluations from corrections officials, including a social worker. Moreover, the court noted, the defendant had been accepted into a 2 year residential treatment program with a higher level of support than he had been given in the past. Under the circumstances, the court concluded, the positive factors cited by the defendant outweighed the extent of his criminal history.

Court of Claims

One Claimant Succeeds In Establishing Liability For Wrongful Confinement; a Second Fails to Do So

Successful Claim

In 2007, Thomas Greaves, having pled guilty to a felony offense, was sentenced as a second felony offender to a term of 3 years and 5 years post release supervision **to run concurrently** to a prior undischarged sentence. This is the sentence that was noted on his sentence and commitment order, the document which DOCCS uses when it calculates an inmate's legal date computation. Because, however, Penal Law §70.25(2-a) requires that the sentence imposed on a second felony offender run consecutively to any prior undischarged sentences, DOCCS computed Mr. Greaves's legal dates as though the sentences were running consecutively. This calculation was in **derogation of** (deviated from) the court's actually imposed sentence. Had the sentence been calculated according to its terms, Mr. Greaves' maximum expiration date would have been 7/21/09 and his conditional release date would have been 2/15/09.

Only after Mr. Greaves protested that he was being held beyond the terms of his sentence did DOCCS notify the sentencing court that the sentence did not conform to the requirements of P.L. §70.25(2-a). The sentencing court declined to resentence Mr. Greaves, following which, on 12/31/09, DOCCS released Mr. Greaves, well past his release dates.

Thomas Greaves then filed a claim in the Court of Claims, asking that he receive damages for the time that he was wrongfully imprisoned. The court defined the issue before it as: whether the defendant may be found liable for DOCCS' failure to follow the dictates of the sentencing court's unequivocal and complete order of commitment. See Greaves v.

State, Claim No. 118149, (Sept. 29, 2011). The court categorically rejected the argument that the issue before it was whether DOCCS merely miscalculated the sentence or whether it properly held Mr. Greaves in accordance with the requirements of the Penal Law.

Both parties moved for summary judgment on the issue of liability. The court stated that to establish a claim for false imprisonment, the claimant must show that 1) the defendant intended to confine him, 2) the claimant was conscious of the confinement and did not consent to it and 3) the confinement was not otherwise privileged.

Under McLean v. City of NY, 878 N.Y.S.2d 238 (2009), the defendant argued it was immune from liability because **discretionary governmental conduct** (conduct involving the exercise of discretion) is always immune from liability and **ministerial conduct** (requiring the following of instructions, without power to exercise any personal discretion in doing so) only gives rise to liability where the claimant demonstrates the existence of a special relationship between the claimant and the defendant. The court rejected this argument, finding that the defendant's reliance on McLean was misplaced. The governmental immunity at issue in McLean, the court wrote, applies to torts arising from the *negligent* performance of governmental function. The tort of wrongful confinement/false imprisonment, the court stated, is intentional conduct. The court found that the defendant's assertion of McLean was based on a mischaracterization of the claim as one alleging an error by DOCCS in sentence computation whereas the claim before sought to impose liability for intentional misconduct. For this reason, the court found that the defendant was not protected by immunity.

The defendant also argued that because it acted in excess of its authority and not without authority, its conduct was privileged. Privileged conduct protects a defendant from liability for false imprisonment/wrongful confinement. The defendant argued that because Criminal Procedure Law §440.40 authorizes DOCCS to have an inmate returned to the sentencing court for resentencing in accordance with the sentencing laws, its conduct was privileged. The court rejected this argument,

noting an “obvious flaw:” “DOCCS is given the authority and procedures by which to return an inmate to the sentencing court because DOCCS lacks jurisdiction to alter the terms of the commitment order whether or not the commitment order is proper.” “There is a clear distinction,” the court wrote, “to be drawn between those situations in which a sentencing court is silent with respect to a component of sentencing and DOCCS calculates a sentence to fill the **interstice** [gap] in a mandatory sentencing scheme that was left by the sentencing court’s silence, and the situation here, where DOCCS altered the clear and express mandate of the sentencing court from concurrent to consecutive sentences.”

Thus, the court concluded, because DOCCS lacked any authority to revise the clear, unequivocal and complete commitment order, or to do anything more than cause claimant to be returned to the sentencing court, it was acting not merely in excess of jurisdiction, but was acting without jurisdiction. For this reason, its decision to hold the claimant beyond the time required by the order of the sentencing court was not privileged.

Having determined that the defendant had not proven that DOCCS had any authority to ignore a clear and unequivocal sentence and commitment order that addressed every component of the claimant’s sentence, the court held that the defendant was not protected by immunity or privilege. Finding that the claimant was entitled to relief, the court held that the defendants, not having shown that there would have been a basis for confining the claimant after his conditional release date, were liable for damages from that date until the date that the claimant was released.

Unsuccessful Claim

In a second case, Hudson v. State, 2011 WL 6224542 (Ct. of Clms. Nov. 28, 2011), the court found that a claimant with a claim similar to that brought by Mr. Greaves had not established that the defendant was liable for false imprisonment/unlawful confinement. Some of the facts which the Greaves court stressed as being significant in reaching the conclusion that the conduct was not privileged were not present in Hudson.

In Hudson, the claimant was subject to an indeterminate sentence for robbery in the first degree and attempted promotion of prison contraband when, while on parole, he pled guilty to robbery in the first degree and was sentenced to an indeterminate sentence of 10 to 20 years. The district attorney did not file a predicate felony offender statement and Mr. Hudson was therefore not sentenced as a second felony offender. And, because he was not sentenced as a second felony offender, the sentencing court had the option of imposing the sentence to run concurrently or consecutively to the prior undischarged sentence. The sentence and commitment order did not state the relationship of the new sentence to the prior undischarged sentence. Pursuant to P.L. §70.25(1)(a), where the sentence and commitment order is silent as to the relationship between the new sentence and the prior undischarged sentence, the new sentence runs concurrently to the prior undischarged sentence.

When Mr. Hudson was received by DOCCS, his sentences were calculated as though his most recent sentence was running consecutively to the prior undischarged sentence. After much advocacy by Mr. Hudson and his attorneys, DOCCS recalculated the sentences to run concurrently and released Mr. Hudson from prison. By the time of his release, he had been imprisoned for almost 19 months beyond his release date. Alleging that he had been falsely imprisoned, Mr. Hudson sued for damages in the Court of Claims. The defendant countered by arguing that the confinement was privileged.

The court accepted the defendant’s argument that the confinement was privileged. In doing so, it relied on the Court of Appeals decision in Donald v. State of New York, 929 N.Y.S.2d 552 (2011). In Donald, the Court considered whether an individual who had been wrongfully confined due to the administrative imposition of post release supervision was entitled to damages. In concluding that he was not, the Court found that an otherwise unlawful detention is privileged where the confinement was by arrest under a valid process issued by a court having jurisdiction. The Hudson court applied the same reasoning to Mr. Hudson’s claim and granted judgment to the defendant.

In its decision finding the defendant liable, the Greaves court stressed the sentencing court's *unequivocal and complete order of commitment*. That is, Mr. Greaves's sentence and commitment order showed that he was sentenced as a second felony offender to a term of imprisonment that was to run concurrently to a specific undischarged term of imprisonment. Thus, it was clear that the sentence was intended to run concurrently in spite of the fact that Mr. Greaves was sentenced as a second felony offender, a status which requires that the sentence run consecutively.

In Hudson, arguably, the situation was less clear. Although Mr. Hudson should have been sentenced as a second felony offender, the district attorney failed to submit a predicate felony offender statement. In spite of his second felony offender status, the sentence and commitment order did not reflect that Mr. Hudson was a predicate offender. The court did not state that the sentence was to run concurrently with the prior undischarged sentence. Rather, the court was silent as to the relationship between the two. Thus, it was only by operation of law, as opposed to explicit court direction, that the relationship between the two sentences could be determined. Under these circumstances – where the law clearly required that the new sentence run consecutively to the prior undischarged sentence and it was unclear whether the court intended to impose a sentence that was unauthorized by the sentencing laws – the court concluded that while DOCCS's original calculation of the sentence was in excess of its jurisdiction, the agency had not acted without jurisdiction.

The Hudson decision has language that supports the conclusion that a false imprisonment claim will succeed where the court expressly imposes a sentence that is more lenient than that permitted by statute, but not where the court's intent to do this is unclear. After denying the claimant's motion for summary judgment, the court wrote: "A different result would follow if DOCS had contravened a specific direction of the sentencing court, even an invalid one, that Mr. Hudson was to be sentenced as a first offender and/or that the terms were to be calculated to run concurrently." While there was no specific direction in Mr. Hudson's case, there was in Mr. Greaves. And that, it appears

is what separates an unsuccessful false imprisonment claim based on DOCCS' failure to rely on an inmate's sentence and commitment order in calculating his sentence from a successful claim.

Summary Judgment Granted to Claimant Seeking Damages for Sexual Assault by Officer

In Anna O. v. State, 2011 WL 6957587 (Ct. of Clms. Oct. 19, 2011), the claimant, an inmate at Albion C.F., sued for damages after she was sexually assaulted by a correction officer. The claim was based on the state's negligent protection of her. After the defendant answered, the claimant moved for summary judgment. The claimant's motion papers alleged that the officer who raped her had reported to his supervisor that his (the officer's) girlfriend had received a phone call from an unidentified female who said that the officer was having an affair with a female inmate with the initials J.R. Both the supervisor and a captain were also informed by others that the officer was sexually involved with the inmate J.R. The Inspector General opened an investigation into the allegations that the officer and J.R. were sexually involved. The Superintendent of Albion told the I.G. that although the facility's initial investigation had not been conclusive, he thought that the matter was worth investigating further. The IG interviewed J.R. and obtained details of where and when the sexual relations took place. The IG was able to corroborate several details confirming that J.R. and the officer had an inappropriate relationship, but not that it was of a sexual nature. While the IG's investigation of J.R. and the officer was ongoing, facts emerged that were suggestive of an inappropriate relationship between Anna O. and the officer. Ultimately the officer admitted to having had unprotected sexual relations with Anna O. He was criminally prosecuted and pled guilty and his employment was terminated. Following the officer's conviction, the IG issued a report finding that the officer had had sexual relations with J.R. and Anna O.

In the context of the claimant's motion for summary judgment, the facts alleged by the claimant as to what the officer's supervisors knew

about the officer's inappropriate relations with J.R. were not disputed. She based her claim on the failure of the officer's supervisors to prevent him from continuing to work in a position where he had contact with female inmates while they were investigating J.R.'s allegations. This, the claimant alleged, was the proximate and substantial cause of her injuries.

The defendant urged the court to deny the motion for summary judgment, arguing that 1) the officer's supervisors acted reasonably; 2) to the extent that the matter involved official actions involving the exercise of discretion and judgment, defendant cannot be held liable; and 3) the officer acted outside the scope of his employment.

The court noted that summary judgment is a drastic remedy which should not be granted unless it is clear that there are no triable issues of fact.

The Law: Failure to Protect

The State is required to exercise reasonable care to protect inmates in its correctional facilities from a foreseeable risk of harm. The State has a duty to exercise reasonable care in light of what the State actually knew and what the State reasonably should have known. The State, as an employer, will generally not be found liable for the intentional acts of an employee, like the officer here, who perpetrates an act of his own purposes and outside the course of his employment. The State may be held liable in such cases, however, under theories of negligent supervision and/or negligent retention.

To establish **negligent supervision**, the claimant must show that an employer knew or should have known, had the supervision been adequate, of the employee's **propensity** (tendency) for the type of conduct that injured the claimant. **Negligent retention** requires that the claimant show that the employer knew or should have known of the employee's propensity for the sort of conduct that caused the injury. In a negligent retention cause of action, the employer's negligence arises from its having placed the employee in a position to cause foreseeable harm; harm which would most probably have been spared the injured party had the employer taken reasonable care in making decisions with respect to the retention of its employees.

Application of Law to Facts

In Anna O.'s case, the court found that the **uncontroverted** (undisputed) facts showed that prior to the time that the officer engaged in sexual relations with the claimant, the officer's supervisors were well aware of his inclination to engage in unauthorized relationships with inmates. Four months after the Superintendent initiated an investigation, the investigation was still ongoing and the claimant was raped. In spite of the investigation, the officer was permitted to work in a capacity that allowed him access to the inmate population at Albion with little if any additional supervision. Even though there was no corroboration supporting J.R.'s allegation that the officer had engaged in multiple acts of sex with her, there was evidence to demonstrate the officer and J.R. had an *unauthorized* relationship only months prior to the officer's sexual misconduct with claimant. It is not necessary, the court wrote, that the defendant have notice of the propensity of the employee to behave in the exact manner in which he behaved with the claimant but, rather, it is sufficient that the defendant had notice of the employee's propensity to engage in the sort of behavior.

Here, the court found, the evidence clearly showed that, prior to the rape of the claimant, the defendant knew or should have known of the officer's propensity to pursue unauthorized relationships with inmates. Despite this information, his supervisors allowed the officer to remain in a position where he could continue to pursue unauthorized relationships with inmates at Albion. Based on this analysis, the court granted summary judgment to the claimant.

Improper Housing Assignment of Inmate With Physical Impairment

Mark Carlson, formerly an inmate in DOCCS custody, brought an action in the Court of Claims seeking damages for, among other actions, DOCCS's decision to assign him to a cell on an upper floor. Mr. Carlson is an amputee who wears a right lower leg prosthesis. After the claim was filed, the defendant moved for summary judgment. The court dismissed several claims, but Mr. Carlson's claim that he suffered injuries as a result the

Department's negligent placement of him in an upper level dorm survived. See, Carlson v. State, 932 N.Y.S.2d 812 (3d Dep't 2011). In reaching this result, the court noted that matters of security, classification and transfer of inmates fall within the broad discretion of the Commissioner. Discretionary determinations made by correction officials in fulfilling their responsibility for the safety and security of correctional facilities are "quasi-judicial." As such, the corrections officials who make these determinations are absolutely immune from suit as long as the determinations are made in accordance with the relevant statutes and regulations. Thus, the Department's decision to house Mr. Carlson at Gowanda C.F. was a discretionary decision and the defendants had **absolute immunity** (cannot be held responsible) for injuries which may have resulted from that determination.

The defendant failed to establish, however, that the decision as to *where to house* Mr. Carlson while he at Gowanda C.F. involved discretionary considerations that extended to Mr. Carlson's medical condition, physical handicaps and special needs. Although an affidavit from an official in Classification and Movement was filed describing the process that DOCCS uses to determine to which prison an inmate will be sent, the affidavit did not set forth procedures for determining the appropriate housing area within the chosen prison. Because of the absence of proof as to the discretion used in determining the appropriate housing area, the court found that the defendant was not immune from suit for negligent housing placement and denied its motion for summary judgment on the claim that DOCCS had negligently assigned Mr. Carlson to an upper floor housing area.

The court found an additional basis for denying summary judgment with respect to Mr. Carlson's claim relating to his housing assignment after he sought medical treatment for his impairment. DOCCS has an obligation to render reasonable and adequate medical care to its inmate's without delay. In the Carlson court's view, once Mr. Carlson sought medical intervention for his prosthesis, decisions pertaining to not only his treatment but also to whether and how he would **ambulate** (walk) within the facility by reason of that condition,

became matters of medical care and treatment, rather than a simple matter of classification and assignment. Thus, the court held, Mr. Carlson would be allowed to pursue his allegations of improper treatment with respect to his placement on an upper level tier.

Court Finds That Solitary Confinement Was Unlawful Imprisonment

Whether an inmate is placed in the special housing unit for the purpose of administrative segregation pending a disciplinary, administrative segregation or involuntary protective custody hearing, the department's regulations require certain specific procedures for each time of confinement which must occur with specific time frames. Relevant in this case were the requirements for administrative segregation and those for confinement to protect an inmate from harm by other inmates.

Administrative segregation is solitary confinement for inmates whose presence in general population is a threat to the safety and security of the facility. 7 N.Y.C.R.R. §301.4(b). An inmate may be placed in SHU for up to 14 days pending the resolution of an administrative segregation recommendation. 7 NYCRR §301.4(a). An inmate whom the Department believes needs to be protected from other inmates, on the other hand, can only be placed in solitary confinement against his will for 72 hours. 7 NYCRR §251-1.6(b).

Steven Makas was served with an "administrative segregation" recommendation based on his need for protection and not on the need to remove him from general population because his presence was a threat to the safety or security of the facility. He was held there for 13 days. Twice during this period he was taken out and, he says, questioned about inmates who were dealing drugs. The log book shows that these meetings were denominated "hearings," but no evidence showing that a hearing was convened was produced. After 13 days, Mr. Makas was released from solitary confinement.

Mr. Makas then brought an unlawful imprisonment claim in the Court of Claims, alleging that he had been wrongfully confined in order to pressure him to provide information about prisoners who were selling drugs. The Department denied the allegation, asserting that he had been placed in SHU for his own protection, that is, the defendant said, “[T]hey wanted to segregate Mr. Makas because he might have been threatened by the Latin Kings gang.” Mr. Makas denied that he had been threatened by the Latin Kings.

In order to prevail on an unlawful imprisonment claim, the claimant must allege that the defendant intended to confine him; that the claimant was conscious of the confinement; that the claimant did not consent to the confinement and that the confinement was not privileged. To defeat a claim for wrongful confinement, the Department must show that the confinement was legally justified, that is, imposed in accordance with DOCCS regulations. See Lee v. State, 508 N.Y.S.2d 285 (3d Dep’t 1986).

In Makas v. State, Claim No. 115757 (Ct. Clms. Sept. 30, 2011), the court found that there was no evidence to support the claim that Mr. Makas had been confined for his own protection and in any event, the Captain who so confined him lacked the authority to confine him for his own protection for more than 72 hours. (7 N.Y.C.R.R. §251-1.6(4)(d) has a provision for extending the 72 hour protective custody status, but that provision must be initiated by the Superintendent or someone in direct control of the inmate during the 72 hour confinement.) Thus, it does not appear that DOCCS used a valid process for confining Mr. Makas. And, the fact that no evidence supporting the alleged threats to Mr. Makas’s safety were produced further undercut the claim that the confinement was for Mr. Makas’s own protection.

Summarizing the evidence against the defendant’s argument that the confinement was privileged, the court noted that there was a complete lack of evidence 1) that the claimant’s life was threatened, 2) that an investigation led to the initial confinement, 3) that an investigation was conducted during the claimant’s confinement, or 4) that there were any reasons relating to the claimant’s safety that resulted in his release from solitary confinement. From the absence of such evidence, the court made an inference that that there was no

legitimate cause to place the claimant in solitary confinement and that the Department failed to comply with its regulations for prehearing confinements. Accordingly, the court concluded that the confinement was not privileged and that the defendant was not protected by immunity. The court granted damages in the amount of \$25.00 per day.

Miscellaneous

Right to Confidentiality Waived By Grievance Alleging Inadequate Medical Care

In Scott v. Smith, 2011 WL 6820987 (3d Dep’t Dec. 29, 2011), the court considered the issue of whether an inmate waives his right to privacy when he files a grievance concerning his medical treatment. Prior to filing this action for damages, the plaintiff filed a grievance asserting that he had been denied adequate medical treatment. In response, the facility doctor wrote a letter summarizing the tests and procedures that he had done and the resulting diagnoses. The plaintiff then grieved the doctor’s actions as violating his right to confidential medical treatment.

The court noted that prison inmates have a right to have the privacy of their medical information maintained, to the extent consistent with the provision of adequate medical care and the safety and good order of the facility. However, the court continued, when an inmate places his medical condition at issue through the use of the grievance process, he waives the right to confidentiality within that limited context.

Here, the court wrote, the plaintiff’s first grievance concerned the facility doctor’s alleged failure, in the context of making a professional judgment, to inquire into the essential facts underlying the plaintiff’s medical condition. This **nonfeasance** (failure to act), the plaintiff alleged, denied his right to medical care. In response, the facility doctor informed the Superintendent of the steps that he had taken and the conclusions that he had reached.

Under these conditions, the court wrote, the court agreed with the decision of the lower court that the plaintiff had waived his right to confidentiality within the context of the grievance process.

Court Finds FOIL Denial Improper

When Bradford Applegate was charged with drug use, he made a FOIL request for training materials, and any other manufacturer's information regarding the cleaning, maintenance and testing procedures pertaining to the SYVA/Emit Viva Jr. urinalysis machine. DOCCS denied the request, asserting that the materials could not be disclosed due to copyright concerns. When DOCCS counsel's office denied his appeal, Mr. Applegate filed an Article 78 challenging the Department's denial of his request. In Matter of Applegate v. Fisher, 89 A.D.3d 1303 (3d Dep't 2011) (no unofficial cite – N.Y.S.2d – available at this time), the court found that the bare assertion of copyright concerns was insufficient to justify the blanket denial of access to the requested materials. If duplication is prohibited by federal copyright law, the court wrote, the Department could have provided a copy of the materials for inspection, or as petitioner expressly requested, the address of the manufacturer, so that the petitioner could obtain the materials directly. The court further found that the Department's alternate basis for non-disclosure – that disclosure would endanger the life or safety of a person – to be **patently** (obviously) without merit.

The court also found that without sufficient justification, the Department withheld several pages of the tester's logbook, the record of all urine that was tested on the dates covered by the log book pages and the computerized results of all urinalysis tests conducted on those dates. The court ordered the records produced.

The Department administratively reversed the Tier III hearing in the context of which the inmate made these FOIL requests.

FEDERAL COURT DECISIONS

Prescribing Over-the-Counter Pain Medications Rather Than Narcotic Pain Medication is Not Deliberate Indifference

In Sepulveda v. Harris, 2011 WL 2689357 (N.D.N.Y. Jul. 11, 2011), the court dealt with the questions of whether the plaintiff's Eighth Amendment rights were violated when DOCCS discontinued prescription pain medication and authorized non-prescription medication only.

Since 1992, the plaintiff, an inmate in DOCCS custody, has been prescribed a variety of pain medications for serious medical conditions. Over the course of several years, DOCCS doctors discontinued Tylenol 3, Baclofen, Neurontin and Ultram and replaced them with Ibuprofen. The plaintiff alleged that this was a violation of his Eighth Amendment rights to be free from cruel and unusual punishment. Specifically, he alleged that all of the defendants had conspired to make him suffer excruciating pain, several defendants had failed to provide adequate medical treatment when they discontinued the prescription medication and that several defendants were deliberately indifferent to his serious medical needs because, although aware that the plaintiff was suffering as a result of the discontinuance of proper prescription medication, they failed to investigate and remedy the situation. The defendants moved to dismiss the complaint, arguing that it was reasonable to discontinue plaintiff's narcotic medication because, unrelated to the prescription drugs that he was taking, the plaintiff had tested positive for opiates. Dismissal is appropriate where, accepting the plaintiff's factual allegations as true, the allegations fail to state a claim upon which relief may be granted.

In assessing the sufficiency of the plaintiff's claims, the court had to consider whether the plaintiff had sufficiently pled that the defendants were deliberately indifferent to his serious medical

needs. The test is twofold. The plaintiff must first show that there is a serious medical need. Second, the plaintiff must show that prison officials demonstrated deliberate indifference by having knowledge of the risk and failing to take measures to avoid the harm. Prison officials who actually know of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm was not ultimately averted.

The court first addressed the issue of whether the plaintiff had sufficiently pled that he suffered from a serious medical condition. This is known as the objective prong of the inquiry. To satisfy this prong, the plaintiff must allege more than negligence, but less than conduct undertaken for the very purpose of causing harm. Commenting on this prong of the inquiry, the Second Circuit, in Smith v. Carpenter, 316 F.3d 178 (2d Cir. 2003), commented, “Because society does not expect that prisoners will have unqualified access to health care, a prisoner must first make a threshold showing of serious illness or injury to state a **cognizable claim** [a claim which may be heard by the court].” Expanding on this premise, in Brock v. Wright, 315 F.3d 158 (2d Cir. 2003), the Court wrote, “[W]hether a medical condition is serious depends on certain factors, such as (1) whether a reasonable doctor or patient would perceive the medical need in question as important and worthy of comment or treatment, (2) whether the medical condition significantly affects daily activities, and (3) the existence of chronic and substantial pain.” Here the court found that the plaintiff had plausibly pled the existence of a serious medical condition in that he had been continuously prescribed pain medication since 1992 to treat chronic pain and had been diagnosed with numerous painful medical conditions including arthritis, bulging discs in his neck and back, muscle spasms, degenerative osteoarthritis, arthropathy in his right shoulder, lumbar facet syndrome, a pinched nerve and sciatica in his right leg a narrowing of the spinal canal and bone spurs.

The court next looked at the proof that the defendants were **deliberately indifferent to** (consciously and intentionally ignored) those conditions. This is known as the subjective prong of the inquiry. To succeed in an Eighth Amendment claim based on deliberate indifference, the plaintiff

must prove that the defendants knew of and disregarded his or her serious medical needs by either intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed. Here the court found, the defendants’ decision to discontinue narcotic pain medication and treat him with over the counter pain medication and a TENS unit was based on the plaintiff’s use of opiates. Under these circumstances, the court held, the plaintiff’s Eighth Amendment claim amounted to “mere disagreement with health care providers as to the most appropriate and effective treatment for his conditions” and did not rise to the level of a constitutional violation. See also Aquino v. Girdich, 2007 WL 201170 (N.D.N.Y. Jan. 23, 2007) (holding that replacing plaintiff’s prescription medication with over-the-counter pain medication did not constitute deliberate indifference where the plaintiff admitted to misusing the prescription medication); Douglas v. Stanwick, 93 F.Supp.3d 320 (W.D.N.Y. 2000).

Several months after the Sepulveda decision, in a case with a different fact pattern, the Second Circuit, in Hill v. Curcione, 657 F.3d 116 (2d Cir. 2011), issued a decision holding that following a use of force, a county jail medical department employee’s failure to refer the plaintiff for a nerve conduction study and to prescribe painkillers stronger than Motrin was not evidence of deliberate indifference to a serious medical need. In reaching this result, the Court reiterated that medical malpractice does not rise to the level of a constitutional violation unless the malpractice involves a culpable recklessness – an act or failure to act by a prison doctor that **evinces** (shows) a conscious disregard of a substantial risk of serious harm.

In Hill, the medical care provider defendants moved to dismiss the complaint against them for failure to state a claim. The district court granted the motion. On appeal, after stating that only enhanced medical malpractice might be sufficient to establish an Eighth Amendment violation, the Court stated that mere disagreement over the proper treatment does not create a constitutional claim. See also, Reyes v. Gardener, 93 F.App’x 283 (2d Cir. 2004); Rush v. Fischer, WL 2011 6747392 (S.D.N.Y. Dec. 23, 2011). So long as the treatment given is adequate, the fact that a prisoner might prefer a different treatment does not give rise to an Eighth

Amendment violation. Thus, the Court wrote, the test is one of medical necessity, not one simply of medical desirability. Here, the Court found, the facts alleged – the failure to order a nerve conduction study and to prescribe stronger pain medication – do not show deliberate indifference on the part of the medical care providers.

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