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Court Denies DOCCS Officials Qualified Immunity For Imposing PRS

Background

Since 1998, New York State Law has mandated that post release supervision (PRS) be included as part of the determinate sentences of violent offenders. Between 1998 and June 9, 2006 – when the Second Circuit Court of Appeals in Earley v. Murray, 451 F.3d 71 (2d Cir. 2006), held that only a court can impose PRS – the Department of Correctional Services imposed PRS on thousands of inmates with respect to whom the state court judges had not imposed PRS. In 2008, the New York State Court of Appeals held that only the courts had the authority to impose sentences, including the PRS portion of a sentence. See, Garner v. NYS DOCS, 859 N.Y.S.2d 590 (2008) and People v. Sparber, 859 N.Y.S.2d 582 (2008).

During the period between when Earley was decided and when Garner and Sparber were decided, DOCS officials subjected thousands of defendants to the unlawful imposition of PRS and many were re-incarcerated as a result of parole violations connected to unlawfully imposed PRS. Some of these individuals were granted release from prison by means of state or federal writs of habeas corpus and then sued in state or federal court for damages for wrongful confinement. Until the recent decision in Bentley v. Dennison, 2012 WL 426551 (S.D.N.Y. Feb. 10, 2012), the federal courts had granted the defendants' motions to dismiss these claims on grounds of qualified immunity. See, e.g., Scott v. Fischer, 616 F.3d 100 (2d Cir. 2010).

Scott v. Fischer

In 2010, the Second Circuit Court of Appeals held that where DOCS officials imposed PRS ***prior to*** the Court's decision in Earley, qualified immunity protects those officials from claims for money damages brought by inmates who were wrongfully subjected to parole supervision and incarceration. Scott v. Fischer, 616 F.3d 100 (2d Cir. 2010). Qualified immunity is a doctrine which

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AMENDMENTS TO PAROLE LAW STRENGHTEN FOCUS ON REHABILITATION

A Message from the Executive Director, Karen L. Murtagh

For years, perspective parolees have been denied parole based on the serious nature of their crimes, regardless of their accomplishments, education, programming, exemplary disciplinary record and proven rehabilitation during their incarceration. The 2011 amendments to the Executive Law were, in part, an attempt to change that and, if recent case law is any indication of whether that attempt is working, the answer is, yes!

In our last issue of *Pro Se*, we reported on the successful parole case of *Matter of Thwaites v. New York State Board of Parole*, decided by Judge Eckert out of Orange County, Supreme Court. In this issue we are reporting on another successful parole case decided by the same Judge, *Matter of Velesquez v. New York State Board of Parole*. Both cases involved the application of the 2011 amendments to Sections 259-i and 259-c of the Executive Law and both were successful.

In *Matter of Thwaites*, Judge Eckert pointed out that the old Section 259-i listed seven factors for the parole board to consider in determining whether to grant parole but split those factors into two groups. The first two factors, the seriousness of the offense and prior criminal history, were under Section 259-i[1]which related to the setting of the minimum period of incarceration. The remaining five factors, the prisoner's institutional record, performance, if any, in temporary release, release plans, deportation orders, the written statement of the crime victim or the victim's representative and the length of the sentence, were listed under Section 259-i[2][c], a section that governed parole release decisions. Judge Eckert noted that the new amendment to Section 259-i repealed Section 259-i[1] and consolidated all of the factors under one single section, Section 259-i[2][c]. Although a technical amendment, having a complete list of all of the factors that should be considered by the parole board under one section adds clarity to the statute.

More importantly, however, is the amendment to Executive Law Section 259-c[4]. In commenting on this amendment, Judge Eckert noted that it is "of great significance" as it requires the Board to develop new procedures for making parole release decisions. Those new procedures must "incorporate risk and needs principles to measure the rehabilitation of persons appearing before the board, the likelihood of success of such persons upon release, and assist parole board members in determining who should be released to supervision." As noted by Professor Phillip Gentry from Columbia Law School, and quoted by Judge Eckert in his decision, "This addition 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' signals a critical reform and modernization of parole practices. Such procedures, when promulgated, will rationalize parole decision-making by placing the focus primarily on who the person appearing before the Parole 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 she or he committed the crime. This is a shift in policy of potentially sweeping significance."

In both Mr. Thwaites' and Mr. Velasquez's cases, Judge Eckert found that because the statute is remedial in nature it should be given retroactive effect. He also found in both cases that the board's decision was not made in accordance with the 2011 amended parole statute because the parole board "employed past-focused rhetoric, not future-focused risk assessment analysis." As a result, Judge Eckert ordered the parole board to hold new parole hearings for both Mr. Thwaites and Mr. Velasquez at which risk assessment principles and procedures must be utilized.

It is too early to tell whether the amendments to the Executive Law will increase the percentage of individuals who are ultimately paroled, but it is clear from Judge Eckert's decisions that the parole board can no long rely almost entirely on the nature of a perspective parolee's crime to deny parole.

On the contrary, the amendments to the Executive Law require that the parole board must employ an objective risk assessment analysis that has, at its core, the belief that rehabilitation is possible.

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provides that unless a constitutional right is clearly established, prison officials should not be held personally liable for violating the right. It is only when a defendant is personally liable that a plaintiff can recover money damages for the violation of a constitutional right. To determine whether a constitutional right is clearly established, the court asks the following three questions 1) whether the right has been defined with sufficient specificity, 2) whether Supreme Court or federal court of appeals case law supports the existence of the right and 3) whether under existing law a reasonable defendant would have understood that his or her acts were illegal.

In Scott v. Fischer, the court characterized the plaintiff's claim as one seeking compensatory and punitive damages for being given a term of PRS that was not imposed by judicial sentence and for her subsequent arrest and incarceration for non-compliance with PRS. The Court said that while it was "now" (2010) clearly established that the administrative imposition of PRS was unlawful, it had not been clearly established when in 2002 when DOCS administratively imposed PRS on the plaintiff. Thus, the defendants could not be held liable for damages.

Next, the Scott Court considered whether following her arrest and re-incarceration for violating PRS, the plaintiff had pleaded sufficient facts to set forth a viable claim that the DOCS defendants had violated clearly established constitutional law by failing to take action to remove her administratively imposed PRS or to release her from custody. With respect to this issue, the Scott Court held that because the plaintiff had not alleged that any of the DOCS defendants were personally involved in the claimed constitutional violation that occurred after Earley had been decided, the plaintiff had no basis for seeking damages from these defendants for what happened to her after Earley was decided.

The reasoning in the Scott decision was recently cited with approval by the Second Circuit in King v. Cuomo, 2012 WL 718301 (2d Cir. Mar. 7, 2012).

Bentley and Betances

The three plaintiffs in Bentley v. Dennison, along with the 21 plaintiffs representing a putative class in the related case Betances v. Fischer, brought their actions against high ranking officials in DOCS and the Division of Parole (DOP). They alleged that in the years following the Earley decision, "in flat defiance of clear constitutional commands," DOCS and DOP officials had subjected them to unlawful custody by continuing to impose PRS that had been declared unlawful, arresting and re-incarcerating them for technical violations of those terms of PRS, and in one case, administratively imposing a new term of PRS. Like the defendants in Scott v. Fischer, the Bentley/Betances defendants moved to dismiss the complaints, arguing that the plaintiffs' constitutional rights were not clearly established at the time that those rights were allegedly violated and therefore they were protected by qualified immunity. The argument was based on the defendants' claim that in the two years following the Earley decision, there was confusion in the state courts about whether the Earley decision was binding on the State and what remedies it required.

In Bentley/Betances, most of the terms of PRS were initially imposed on the plaintiffs prior to the Earley decision when, according to the Scott decision, the unconstitutional nature of such action had not been established. However, DOCS officials imposed PRS on plaintiff Betances in 2008, almost 2 years after Earley had declared such action unconstitutional, and each of the Bentley/Betances plaintiffs was subjected to PRS after Earley and then incarcerated for technical violations of his PRS after Earley.

Because this decision arose in the context of the defendants' motion to dismiss, for the purpose of the motion, the court accepted the plaintiffs' allegations as true. The Bentley/Betances plaintiffs claimed that each of the plaintiffs upon whom DOCS officials had imposed PRS was incarcerated for violating the terms of PRS after the Earley decision and before Garner and Sparber were decided. The plaintiffs alleged that the DOCS and DOP defendants were responsible for setting and enforcing policies that directly caused the deprivation of the plaintiffs' constitutional rights. Specifically, the plaintiffs alleged that between the

date of the Earley decision and the spring of 2007, the defendants identified over 8,000 inmates upon whom DOCS had administratively imposed PRS, including 1,600 who had already been released, and in spite of having identified inmates and parolees who were in custody due to administratively imposed PRS that had been declared a nullity by Earley, the defendants continued to arrest people for technical violations of parole and to re-incarcerate them and to impose PRS on individuals who had not been sentenced to PRS.

The Court's Ruling

The court rejected the defendants' argument that they were qualifiedly immune because following the Earley decision there was confusion in the state courts about whether the decision was binding on the state courts and the nature of the remedy established by the Earley decision. The court held that although some state courts disagreed about the reach of the Early decision, and some state courts held that they were not bound by Earley, there was no disagreement or confusion about the core constitutional holding announced by Earley: terms of PRS imposed by the executive branch were nullified and if the state wanted to re-impose them, it could seek resentencing before a judge.

The court quickly disposed of any argument that Bentley/Betances was controlled by the Second Circuit's decision in Scott. In Scott, the court noted, the Second Circuit held that DOCS officials – the only defendants – could not be held responsible for the plaintiff's parole revocation hearing because it was initiated and conducted solely by DOP ***and no facts were pled*** which would show that the defendants were aware of the hearing. In Bentley/Betances, the plaintiffs named DOP and DOCS officials as defendants. In addition, the Bentley/Betances court found, Scott's complaint did not allege that the DOCS defendants knew whether her PRS had been administratively or judicially imposed. Here, the court noted, the plaintiffs alleged and submitted proof that a DOCS defendant had stated under oath that by the spring of 2007, the DOCS defendants had identified most of the inmates in its custody to whom Earley was applicable. Thus, the court concluded, the Bentley/Betances plaintiffs had clearly and plausibly alleged that the defendants knew that the plaintiffs' terms of PRS had been administratively imposed when those plaintiffs were returned to DOCS custody for unlawful incarceration and that the DOCS officials were deliberately indifferent to these known violations of the plaintiffs' rights.

The court also rejected the defendants' argument that even after the Earley decision, the law was unclear as to the appropriate remedy for the wrongful imposition of PRS. Rather, the court held, the district court judge to whom the Earley decision remanded Mr. Earley's habeas petition, gave the defendants **28 days** to resentence Mr. Earley. Here, the court noted, the defendants did not seek resentencing until **23 months** after the Earley decision, and during that period, they continued to impose PRS, make arrests for wrongfully imposed PRS and re-incarcerate individuals upon whom they had unlawfully imposed PRS. According to the Bentley/Betances decision, this conduct was not contemplated by the Earley decisions, which clearly held that administratively imposed PRS was a nullity and that the individuals upon whom DOCS had imposed PRS had to be resentenced or released.

Ultimately, the Bentley/Betances court held that the defendants were not immune from liability for their post-Earley conduct because the plaintiffs had plausibly alleged that 1) by early 2007, the defendants knew who was under administratively imposed PRS; 2) the defendants intentionally sought to evade Earley by urging state courts not to follow the Earley decisions; 3) the defendants knew that they would be bound by court orders to comply with Earley on a case-by-case basis but refused to apply its holding broadly without such orders, and 4) the defendants continued administratively imposing PRS through at least April 2008, revoking such PRS on the basis of parole violations through at least 2009, and imprisoning people based on those violations through at least July 2009.

Finally, the Court found that beginning in July 2008, the defendants had an affirmative legal duty to seek resentencing of the individuals upon whom they had administratively imposed PRS and that the plaintiffs had plausibly alleged that the defendants had failed to do so. Whether or not the defendants complied with their affirmative duties after June 2008, the court wrote, is a separate question of fact. But, the court held, there is no dispute that the defendants had clear affirmative duties after June

2008, and if a fact finder determines that they failed to comply with those obligations, they will not be protected by qualified immunity.

The defendants have appealed the court's decision.

STATE COURT DECISIONS

Disciplinary

HO's Failure to Produce Exculpatory Evidence Leads to Reversal

In Matter of Moustakos v. Venetozzi, 937 N.Y.S.2d 638 (3d Dep't 2012), the petitioner was found guilty of assaulting another inmate. Prior to the start of the hearing, the petitioner asked his employee assistant for all relevant reports concerning the incident. The record indicated that the employee assistant had given the petitioner the relevant documents, but did not provide a list of what documents the employee assistant gave the petitioner nor were the documents included in the record.

In his Article 78, the petitioner stated that he was given some documents, but produced a memo from an officer that, he stated, had not been provided to him. The memo reported that the victim of the assault had told the officer that he did not know the identity of his assailant. Finding a violation of the petitioner's right to present documentary evidence, the court ruled that "in light of the exculpatory nature of the memorandum and the absence of any proof that it was disclosed to petitioner prior to the hearing," the hearing should be annulled and the matter remitted for further proceedings not inconsistent with the court's decision.

Court Finds That Secretly Observing Officers Through a Peephole Constitutes Stalking

In a recent decision involving the charge of stalking, the Third Department held that the charge of stalking is sufficiently proven even where the conduct is not directed at a specific person and the person whom the inmate was allegedly stalking was unaware of the inmate's activity. See Matter of Vega v. Fischer, 936 N.Y.S.2d 364 (3d Dep't). An inmate is guilty of stalking when he or she engages in conduct "directed at a specific employee, visitor or other person when the inmate knows, or reasonably should know, that such conduct is likely to cause reasonable fear of material harm to the physical health, safety or property of such person." See 7 N.Y.C.R.R. 270.2(b)(2)(v). In Vega, the petitioner argued that his conduct – observing female corrections staff in a staff restroom through a peephole – did not fall within the conduct prohibited by the rule because 1) the officers were unaware of the conduct and therefore the conduct was unlikely to cause fear of material harm and 2) the conduct was not directed at a specific employee. The court rejected these arguments, finding that "where petitioner's conduct was directed specifically at the female correction officers who were assigned to work in the unit in which he was housed, the conduct is directed at specific employees within the language of the rule and that even a secret stalker reasonably should know that, once discovered, his conduct of spying on female correction officers while they used the staff restroom would be likely to cause reasonable fear of material harm to their health and safety. Accordingly, the court found that the determination of guilt was supported by substantial evidence.

Prisoners' Legal Services of New York represented the petitioner in Matter of Vega v. Fischer.

Court of Appeals Fails to Modify Standard for Considering Confidential Information

In Matter of Williams v. Fischer, 18 N.Y.3d 888 (2012), the Court of Appeals had the opportunity to reconsider the standard used to evaluate when confidential information is a sufficient basis for finding an inmate guilty of a prison rule violation – and to find that where an inmate is represented by counsel, the confidential information should be available for review by the inmate's attorney – but chose to do neither. Rather, in reviewing the Appellate Division decision confirming the hearing officer's determination of guilt, which was based primarily on information from a confidential informant, the Court of Appeals simply reiterated the standard that has been used since at least 1995: Information from a confidential informant may constitute substantial evidence to support a prison disciplinary determination so long as the hearing officer makes an independent assessment of the informant's reliability. Here, the Court held, the hearing officer's examination of the correction officer who interviewed the confidential informant was sufficient in that it enabled the hearing officer to gauge the basis for the informant's knowledge and reliability. Specifically, the court held, the hearing officer established that the confidential account was detailed and specific, that there were valid reasons to conclude that the informant was reliable and that there was no reason to think that the informant was motivated by a promise of reward from prison officials or by a personal **vendetta** (grudge) against the petitioner.

The petitioner was represented by Prisoners' Legal Services of New York.

Failure to Ascertain Reason That Witnesses Refused to Testify Leads to New Hearing

The petitioner in Matter of McFadden v. Bezio, 937 N.Y.S.2d 702 (3d Dep't 2011), was found guilty of threats, extortion, solicitation and correspondence violations. He challenged the hearing, alleging that the hearing officer had violated his right to call witnesses when the hearing officer refused to determine why the requested witnesses had refused to testify. The employee assistance form indicated that both witnesses were unwilling to testify, but did not indicate the reason for the refusals. The court found that the notation alone was not a sufficient basis upon which to summarily deny petitioner's right to call witnesses and thus it was **incumbent upon the hearing officer** (it was the hearing officer's responsibility) to attempt to validate the reason for their refusals. Not having done so, the court found, was a violation of the petitioner's regulatory right to call witnesses and as such, the court ruled, rehearing was the appropriate remedy.

Watch Commander May Serve as Tier III Hearing Officer If Not Otherwise Involved in the Incident at Issue

The watch commander on duty at the time of an incident that led to an assault ticket could serve as the Tier III hearing officer, as long as the watch commander did not actually witness the incident, was not directly involved in it, and did not investigate it, the Third Department ruled in Matter of Vega v. N.Y.S. Dep't of Corr. Svcs., 937 N.Y.S.2d 705 (3d Dep't 2012). The court found that the mere fact that a hearing officer knows of the underlying incident because he was the watch commander at the time of the reporting of the incident does not deny the inmate a fair and impartial hearing. In refusing to disqualify the hearing officer, the court cited 7 N.Y.C.R.R. §254.1, which says that the only persons who shall not conduct a Tier III hearing are those who actually witnessed the incident, were directly involved in it, or investigated it, as well as the review officer who reviewed the misbehavior report.

Tier III Hearing Officer Must Have Information Establishing Reliability of Hearsay Informants

A Tier III hearing officer considering a charge that an inmate wrote an anonymous threatening letter must have some evidence to establish the reliability and credibility of confidential informants, the Fourth Department ruled in Matter of Brown v. Fischer, 936 N.Y.S.2d 831 (4th Dep't 2012). The misbehavior report in the case contained no firsthand information, but it did contain information that the corrections officer who wrote the report had received from a corrections counselor. The counselor had been told by unnamed inmates that the charged inmate was going to write a letter after being removed from certain duties at the prison. The corrections officer also compared the threatening letter with a sample of the inmate's handwriting and concluded that they were written by the same person.

The court noted that, although a hearing officer is not required to interview informants to determine the credibility of their **hearsay** (not firsthand) statements, the hearing officer must have some reasonable method for establishing informants' reliability—which would be enough to establish their credibility as well. For example, when information is sufficiently detailed or apparently based on personal knowledge, an informant's credibility could be established. In this case, however, the hearing officer did not have information that would enable him to judge the credibility of the unnamed inmates who informed the counselor about the letter. Therefore, the court found, the misbehavior report was not substantial evidence supporting the charges.

The court then moved on to examine the handwriting samples. A hearing officer may make his or her own comparison of handwriting samples, the court noted, and determine guilt if there are sufficient similarities between them, even without expert testimony. But in this case, the court found that there were insufficient similarities between the two samples to constitute substantial evidence that they were written by the same person. Thus the hearing determination was annulled, and, because the inmate had already served his penalty, all references to the charges were expunged from his record.

Improper to Deny Doctor as Tier III Witness When Nurse Administrator Not Familiar With Inmate's Condition or Medication

The Third Department annulled the Tier III hearing disposition and sent the matter back for further proceedings in Matter of Barone v. Prack, 937 N.Y.S.2d 477 (3d Dep't 2012), because the hearing officer improperly denied the inmate's request for testimony from the doctor who had treated him.

The inmate was charged with refusing a direct order and urinalysis procedure violation after he failed to provide a urine sample in a three-hour period. His defense was that the medication he was taking caused difficulty urinating. To address this issue, the hearing officer called only the nurse administrator, who was not familiar with the inmate's condition or his medication. On the record in this case, the court found that the nurse administrator was not qualified to provide the necessary medical opinion and that the doctor's testimony would not have been redundant.

Sentencing

Court Rules Defendant Had Not Reached His Maximum Expiration Date for Purposes of Resentencing

In People v. Williams, 899 N.Y.S.2d 76 (2010), the Court of Appeals held that "an expectation of finality arises for the purposes of double jeopardy when a defendant completes the lawful portion of an illegal sentence and exhausts any appeal taken." In People v. Lingle, 926 N.Y.S.2d 4 (2011), the Court held that resentencing to add a period of PRS *prior* to the completion of a sentence does not violate due process.

The defendant in People v. Brinson, 933 N.Y.S.2d 728 (2d Dep't 2011), appealed a lower court ruling that he had not reached his maximum expiration date with respect to a sentence for which the court had imposed a determinate term but had failed to impose a period of post release supervision. The lower court ruled that resentencing to add PRS was lawful and the Second Department agreed.

Following Mr. Brinson's conviction of several offenses, the court imposed an indeterminate sentence of 3 to 6 years to run consecutively to a determinate sentence of 10 years. The court did not impose a period of PRS in relation to the determinate term. After Mr. Brinson had been incarcerated for more than 10 years, he was resentenced to add a period of PRS to the determinate term. Mr. Brinson appealed from the resentencing, arguing that because he had been incarcerated for more than 10 years, he had completed his 10 year determinate sentence at the time of resentencing and thus the resentence violated the prohibition against double jeopardy and his due process rights.

The court rejected his argument, noting that the Court of Appeals had rejected a similar argument in the context of a challenge to a lower court ruling that a defendant was serving a sentence that rendered him subject to the Sex Offender Registration Act (SORA). See People v. Buss, 872 N.Y.S.2d 413 (2008). In Buss, the defendant was serving multiple determinate and indeterminate sentences. The Court concluded that a prisoner who has been given multiple sentences is subject to all his sentences for the duration of his term of imprisonment. That is, the defendant does not serve a series of sentences but rather his sentences are combined into one sentence and no one sentence is completely served until the defendant has completed the entirety of the sentences imposed.

In reaching this result, the Buss Court looked to Penal Law §70.30. This section of the law provides a method for calculating an inmate's sentence when he is serving more than one indeterminate or determinate sentence. The Court reasoned that while the primary function of P.L. §70.30 is to allow for the ready calculation of parole eligibility, because underlying P.L. §70.30 is the proposition that concurrent and consecutive sentences yield single sentences either by merger (in the case of concurrent sentences) or aggregation (in the case of consecutive sentences), it is reasonable to apply this section to the question of whether a prisoner who has been given multiple sentences is subject to all of the terms of his sentences for the duration of his term of imprisonment.

The Brinson court – noting that the Court of Appeals had stated in People v. Williams, that because defendants are charged with the knowledge of the relevant law that apply to them they are presumed to be aware that a determinate sentence without a term of PRS is illegal and may be corrected by the sentencing court at some point in the future – ruled that defendant Brinson was also charged with the knowledge that by statute (P.L. § 70.30), DOCCS aggregates each prisoner's sentences into a single sentence. Thus, the court found that defendant Brinson had no reason to expect that the individual sentences nonetheless survive, "such that, as he serves the aggregated sentence, he is sequentially completing his punishment for each particular conviction." For this reason, the Brinson court found that defendant Brinson, who was still serving what the statute regarded as a single combined sentence at the time of the resentencing, did not have an expectation of finality in the portion of the sentence attributable to his 10 year determinate sentence.

Court of Appeals Defines 2009 DLRA 10 Year Look Back Period

The 2009 Drug Law Reform Act (DLRA) provides that certain individuals convicted of class B drug felonies who are serving indeterminate sentences, with certain exceptions, can move to be resentenced to determinate sentences. See Criminal Procedure Law §440.46. The exception considered by the Court of Appeals in People v. Sosa, 18 N.Y.3d 436 (2012), is found in CPL § 440.46(5). This subsection provides that an applicant for resentencing cannot have been convicted of an "exclusion offense." The statute defines the exclusion offense at issue in Sosa as "a crime for which the person was previously convicted within the preceding ten years, excluding any time during which the offender was incarcerated for any reason between the time of commission of the previous felony and the time of commission of the present

felony, which was: (1) a violent felony offense as defined in §70.02 of the penal law." In Sosa, the Court of Appeals was faced with the question of whether the 10 year "look back period" runs from the date of the application for resentencing, as the defendant argued, or from the date upon which the indeterminate sentence for the class B drug conviction was imposed, as the People argued.

In March 2003, based on conduct that occurred in August 2002, defendant Sosa was sentenced as a second felony offender to an aggregate sentence of 10 to 20 years for the crimes of criminal possession of a controlled substance in the third and fourth degrees. In 2009, he moved for resentencing under the 2009 DLRA. The People opposed the motion, arguing that defendant Sosa's conviction of a violent felony offense (criminal possession of a weapon) in November 1995 qualified temporally as an exclusion offense because the underlying crime was committed less than ten years before the 2002 drug crimes for which the defendant sought resentencing. The defendant argued that under the statute, the 10 year look back period extends from the date of the resentencing application. The sentencing court and the First Department of the Appellate Division agreed with the defendant's reading of the statute.

In addressing the issue of from what date the look back period runs, the Court of Appeals first noted that since the First Department issued its decision in Sosa, the other three departments of the Appellate Division had reached the same conclusion as was reached by the First Department: The 10 year look back period runs from the date of the resentencing application. See, People v. Lashley, 920 N.Y.S.2d 421 (2d Dep't 2011); People v. Carter, 926 N.Y.S.2d 328 (3d Dep't 2011); People v. Hill, 916 N.Y.S.2d 710 (4th Dep't 2011).

The Court went on to find that the position urged by the People, which it wrote, "functions to exclude from the ten year look back calculation any period of incarceration stemming prospectively from the non-violent drug felony conviction as to which sentencing relief is sought," would have the effect of rendering permanently ineligible for resentencing not only any defendant who had committed a violent felony within 10 years of the crime for which the defendant was seeking resentencing, but any otherwise eligible defendant whose prison term subsequent to a prior violent felony operated under the statutory toll to bring that prior violent felony within the look back period.

The Court rejected the People's argument for two reasons. First, the Court wrote, if the legislature had intended the interpretation urged by the People, it was capable of legislating that result in a direct manner. The legislature clearly stated that predicate violent felony offenders were not eligible for resentencing. Had the legislature intended to exclude from eligibility for resentencing defendants who had been convicted of a single violent felony offense, it could have done so exactly as it did with predicate violent felony offenders.

Second, the Court found no "textual" ground for the People's argument that "the preceding ten years" – a period that would ordinarily, the Court wrote, be understood to extend backward from the present, really meant the ten years preceding the crime with respect to which the defendant seeks resentencing. Ultimately, the Court found that the Legislature had addressed the questions textually, "both by flatly providing that the relevant look back period is the preceding ten years, excluding from the calculation thereof only pre-drug felony incarceration time, and by unmistakably manifesting its judgment that the designedly rehabilitative course of a defendant's incarceration subsequent to conviction for a low-level, nonviolent drug felony may improve and be probative of his or her capacity for a responsible life at liberty."

Parole

Court Orders Parole Board to Hold New Hearing in Light of 2011 Change to Parole Procedures

An inmate who was denied parole in January 2011 must be given a new hearing to give effect to the 2011 amendment to Executive Law §259-c(4), which requires the Board to use procedures to measure inmates' rehabilitation and likelihood of success. This was the ruling of a justice of the Supreme Court, Orange County in Matter of Velasquez v. N.Y.S. Board of Parole, 2012 N.Y. Slip Op. 6271 (Sup. Ct. Orange Co. Feb. 6, 2012).

In the 2011 session the state legislature amended Executive Law §259-c(4) to require the Parole Board to come up with procedures that "incorporate risk 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."

This amendment had not yet been signed into law when Mr. Velasquez, who was serving an aggregate sentence of 18-1/3 years to life for murder in the second degree and robbery in the first degree, appeared before the Parole Board for the first time in January 2011. The Board denied parole, citing the seriousness of his crimes and his disciplinary infractions while incarcerated. Mr.Velasquez administratively appealed the decision, and after the Board affirmed it in late May 2011, he filed an Article 78 petition in Supreme Court.

The court first stated the general rule that parole release is a discretionary function of the Board, and its decision should not be disturbed by a court unless shown to be irrational "bordering on impropriety," and therefore arbitrary and capricious. The court then discussed the 2011 amendment to Executive Law §259-c(4), which the court called "remedial in nature and designed to modernize decision-making in the area of parole release." Citing its December 2011 decision in Matter of Thwaites v. N.Y.S. Board of Parole, 934 N.Y.S.2d 797 [see the previous issue of *Pro Se*, Vol. 22, No. 1], the court stated that the amendment should apply retroactively. In this context, retroactivity means that any case which was open on the effective date of the amendment, whether on administrative appeal or in court, could get the benefit of the new law. It does not mean however, that the individuals whose parole denials were final and non-appealable on the effective date of the amendment – whether because the prisoner had not appealed the denial within 30 days, had not perfected the appeal within the required time, had not filed an Article 78 proceeding with 4 months of the date upon which their appeals were rejected or had failed to appeal the dismissal of an Article 78 proceeding challenging a denial of parole – can use the Velasquez decision to argue that their claims should be reopened.

Turning to the Board's written decision, the court found that, as in Thwaites, the Board relied almost entirely on the nature of the inmate's crimes to justify denying parole. There was no future-focused risk assessment of the kind the amendment calls for. Thus the Board's reasoning failed to support a rational determination of "whether there is a reasonable probability that, if such 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 his crime as to undermine respect for the law" (citing the standard laid out in Executive Law §259-i(2)(c)).

Because the Board's decision was not made in accordance with the 2011 amendment, the court vacated the denial of parole release and **remanded** (sent the case back) to the Board with instructions to hold a new hearing with a different panel.

Parole Board Rule Allowing One Member to Set Parole Violator's Time Assessment Conflicts With Executive Law, Violates Due Process

The regulation in 9 N.Y.C.R.R. §8005.20(c)(6) that allowed a single member of the Parole Board to determine re-incarceration time after a parole violation by a person previously convicted of homicide, kidnapping, or sex crimes conflicts with Executive Law §259-i(3)(f) and violates due process, and is therefore void, the First Department held in Matter of Mayfield v. Evans, 938 N.Y.S.2d 290 (1st Dep't 2012).

The case involved a parolee whose underlying convictions were for manslaughter in the first degree, robbery in the first degree, and attempted murder in the second degree. After he was charged with parole violations and taken into custody, his attorney negotiated a disposition with Parole and the Administrative Law Judge, in which he would plead guilty to one charge in exchange for an 18-month time assessment. Thereafter, a Parole Board Commissioner issued a decision fixing the parolee's date for consideration of re-release at 36 months. The decision was only one sentence, noting that the parolee had prior convictions for robbery and attempted murder and that his violation occurred just 1-1/2 months after release.

The parolee, represented by the Legal Aid Society, filed an administrative appeal. After Parole rejected it, he filed an Article 78 petition in Supreme Court, New York County, arguing that the lone commissioner's decision was arbitrary, violated Executive Law §259-i(3)(f)(x), and denied him due process of law. The court denied the petition, rejecting all three arguments. The parolee then moved to reargue the part of the court's decision that rejected his contention that the parole regulation in §8005.20(c)(6) violates Executive Law §259-i(3)(f). After reargument, the court again decided that the regulation was not "out of harmony" with the Executive Law section. The parolee then appealed to the Appellate Division, First Department.

The First Department opinion noted that generally, the process by which alleged parole violations are handled is governed by Executive Law §259-i(3)(f). But in the case of parolees, such as Mayfield, who have been convicted of homicide, sex crimes, kidnapping, or related offenses, the time-assessment part of the parole revocation procedure is governed by 9 N.Y.C.R.R. §8005.20(c)(6). This regulation states that for these parolees, all parole violation decisions must be reviewed by a member or members of the Board of Parole, and a single member shall make the final decision that imposes a time assessment.

The appellate court pointed out that, under this arrangement, the time assessment of the Administrative Law Judge (or other presiding officer at the revocation hearing) is transformed into nothing more than a recommendation to a single member of the Board, who is not bound by it. The court reviewed the changes the legislature made to time assessment procedures in 1991, when it amended Executive Law §259-i(3)(f) to provide that any presiding officer at a parole revocation hearing (not just a Board member) may fix the date for reconsideration for re-release. The court found that §8005.20(c)(6), which the Division of Parole adopted after the 1991 amendment, directly conflicted with the changes the legislature made. The court therefore held that §8005.20(c)(6) is an invalid **usurpation** (takeover) of legislative authority, and Parole must bring its regulations into conformity with the Executive Law.

The court then moved on to the parolee's due process argument. The court stated that, unlike a prisoner who hopes to get parole, a parolee who is accused of violating the terms of parole has due process rights (citing the United State Supreme Court case Morrissey v. Brewer, 408 U.S. 471 (1972)). Although the rights that are due are not the "full panoply of rights" afforded before a person has been convicted of a crime, there must be some sort of hearing to ensure that a violation finding is based on facts and informed by knowledge of the parolee's behavior. The court found it significant that the procedure in §8005.20(c)(6) gives the parolee no opportunity to be heard by the final decision-maker. The court therefore held that §8005.20(c)(6) failed to meet the minimum state and federal constitutional requirements of due process.

The First Department reversed the Supreme Court order and judgment and remitted the matter to the Parole Board to promptly provide the parolee with a new hearing, where he would be given the opportunity to address the final decision-maker on an appropriate time assessment.

Letters to Parole Board About Impact of Crime Justified Rescission of Parole

The Third Department confirmed the Parole Board's decision to **rescind** (withdraw its determination) an inmate's parole and impose a 24-month hold after the Board received letters about the impact of the crime from the victim's family and former employer. Matter of Diaz v. Evans, 935 N.Y.S.2d 224 (3d Dep't 2011). The Board granted parole at the third appearance of the inmate, who had served 18 years of a sentence of 15-to-life for murder in the second degree. The victim in the case had been a prosecutor in the Bronx District Attorney's office. After hearing about the grant of parole, several members of the victim's family and the Bronx District Attorney's office submitted letters in opposition. The Board deemed the letters new information, suspended the inmate's release, and scheduled a recission hearing. Following the hearing, the Board found that there was substantial evidence warranting rescission and imposed a 24-month hold.

In confirming this decision, the Third Department noted that the Board has broad discretion under 9 N.Y.C.R.R. §8002.5 to rescind parole when there is substantial evidence of significant information not previously known by the Board. The court stated that the letters and statements received after the initial grant of parole contained detailed descriptions of "the ongoing devastating impacts" of the inmate's crime, beyond the information in the pre-sentence investigation report or sentencing minutes. Therefore, the court found that these statements and letters constituted substantial evidence to support rescission of parole.

Miscellaneous

Third Department Upholds Force-Feeding Order for Inmate on Hunger Strike

The Third Department affirmed an order from the Supreme Court, Washington County authorizing the involuntary medical treatment and feeding of an inmate who went on a hunger strike in an effort to get DOCCS to transfer him from Great Meadow C.F. Bezio v. Dorsey, 937 N.Y.S.2d 393 (3d Dep't 2012).

More than a month into the strike, when the inmate had lost over 11 percent of his body mass, DOCCS brought an action in Supreme Court seeking permission to force-feed him by way of a tube that passes through the nose, down the throat, and into the stomach. The court held a hearing, at which the medical director of Great Meadow testified that the inmate's self-imposed starvation was causing significant damage to his organs and that, without intervention, he would suffer organ failure and death. The court found an immediate and substantial risk to the inmate's health and issued a temporary order permitting DOCCS to feed him by any means it found to be in his best interest.

The inmate appealed to the Third Department, but at some point after that, he was transferred to another prison and began eating solid foods again. The Third Department noted that it first had to decide whether it would decide the case at all, since it was **moot** (there was no longer a controversy) in light of the inmate's transfer and return to a normal diet. The court decided that it would decide the central issue in the case—whether the state has the right to force-feed an inmate who does not intend to kill himself but does want to bring attention to his pleas for transfer. The court made this exception to the usual rule of not deciding moot cases because the issue (1) could easily recur, (2) will typically not be reviewed by an appellate court before circumstances change, (3) is of public importance, and (4) represents a new and substantial issue not yet decided by the Third Department.

At the outset, the court noted that New York courts recognize the right of a competent adult to make decisions regarding his or her medical treatment, including a decision to decline life-sustaining treatment or other necessary medical care. But this principle has never been extended to situations where a person voluntarily takes action to create a life-threatening condition and then declines medical treatment necessary to counteract his or her impending death. Regardless of the inmate's assertion that he did not intend to commit suicide with his hunger strike, the court pointed out that the state will intervene to prevent suicide, and New York courts have drawn a clear line between the right to decline medical treatment and the right to take one's life.

The court also explained that the privacy interest involved in medical treatment decisions is not viewed the same way for prison inmates as it is for free citizens. Quoting the landmark United States Supreme Court case of Turner v. Safley, 482 U.S. 78 (1987), the Third Department stated that a prison regulation that impinges on an inmate's privacy right is valid if it is "reasonably related to a legitimate **penological** (relating to the punishment and rehabilitation of criminals) interest."

In conclusion, the court found that the state's interest in protecting the health and welfare of persons in its custody outweighs and individual inmate's right to make personal choices about what nourishment to accept.

FEDERAL COURT DECISIONS

SCOTUS Holds That In-Prison Interrogation Is Not Custodial Per Se

Following Randall Fields's unsuccessful appeal of his state (Michigan) conviction for third degree criminal sexual assault, Mr. Fields filed a federal habeas action arguing that while serving a jail sentence for an offense that was unrelated to the conviction that he was challenging, he had been subjected to custodial interrogation without being given Miranda warnings. The federal district court agreed with Mr. Fields, as did the Sixth Circuit Court of Appeals. See Fields v. Howes, 617 F.3d 813 (6th Cir. 20010).

The Supreme Court however, reversed the Sixth Circuit decision, holding that for the purposes of Miranda, Mr. Fields was not taken into custody when he was escorted from his cell and interviewed in a prison conference room by sheriff's deputies about allegations that before he went to prison, he had had sexual contact with a minor. See Howes v. Fields, 132 S.Ct. 1181 (2012). This was so, the Court found, even though Mr. Fields had not asked for the interview or consented to it in advance; was not advised that he was free to decline to speak to the deputies; Mr. Fields several times asked to end the interview but did not ask to go back to his cell; the interview lasted between 5 and 7 hours and continued past the time that Mr. Fields generally went to bed; the deputies were armed; Mr. Fields was required to wait 20 minutes after he ended the interview for an escort to arrive and one deputy used a very sharp tone and profanity and told Mr. Fields that if he did not want to be cooperative, he would have to go back to his cell. The facts supporting the Court's conclusion included the facts that Mr. Fields was told he could leave and return to his cell whenever he wanted to, he was not physically restrained or threatened, the interview room was a well lit average sized conference room in which Mr. Fields was comfortable, Mr. Fields was offered food and water and the door to the conference room was sometimes open.

Because this was a federal habeas proceeding, Mr. Fields had to show that by failing to read him his Miranda rights, the deputies violated clearly established Supreme Court law. In ruling that the deputies conduct violated clearly established Supreme Court precedent, the Sixth Circuit relied on the Supreme Court's decision in Mathis v. United States, 391 U.S. 1 (1968), and found that the interview in question was a custodial interrogation within the meaning of Miranda, reasoning that Mathis v. United States "clearly established that isolation from the general population, combined with questioning about conduct occurring outside the prison makes any such interrogation custodial per se."

The Supreme Court disagreed with this reading of Mathis. The Court found that, as relevant to the case before the Court, Mathis simply held that a prisoner who otherwise meets the requirements for Miranda custody is not taken outside the scope of Miranda because he was incarcerated for an offense which was unconnected to the matter about which he is being questioned.

When a prisoner is questioned, the Court wrote, the determination of "custody" must focus on all the features of interrogation. In Howes, the Court found, some of the facts lent support to the defendant's argument that the requirements for Miranda custody were met, but they were offset by others. Most important to the Court was that Mr. Fields was told at the outset of the questioning, and reminded thereafter, that he was free to leave and could go back to his cell anytime he wanted. In addition, Mr. Fields was not physically restrained or threatened, was interviewed in a well lit conference room where the door was at times open and he was offered food and water. These facts, the Court concluded, "are consistent with an environment in which a reasonable person would have felt free to terminate the interview and leave, subject to the ordinary restraints of life behind bars."

Retaliation Claim Does Not Survive Summary Judgment, Even Though Actions Taken Against Inmate Closely Followed Filing of Grievances

The Federal District Court for the Western District of New York dismissed an inmate's civil rights complaint, which included a claim of unconstitutional retaliation, in part because the only evidence of retaliation was how closely in time his removal from ASAT and from his porter job followed his filing of grievances. Medina v. Skowron, 806 F.Supp.2d 647 (W.D.N.Y. Aug. 18, 2011).

The inmate was enrolled in ASAT and was working as a hall porter at Wende C.F. in March 2008. In the span of three days, the ASAT teacher gave him a counseling notification (a.k.a. "yellow slip") for violating the dress code and a misbehavior report for creating a disturbance in class. Two weeks later, the inmate filed a grievance against the teacher. Ten days after that, he was notified of his termination from ASAT. He filed a grievance over this decision the following day. Five days later, he was notified that he was being removed from his porter job. He grieved this action as well.

All of his grievances were denied. The committee found that he was properly removed from ASAT because of lack of progress and that he was properly removed from his porter job because of security concerns and for working outside his designated area. Significantly, the ASAT teacher had told a corrections officer that the inmate had been in an area he was not supposed to be in and was "staring or glaring" at her. The inmate filed a civil rights action in federal court against the ASAT teacher and other staff at Wende C.F.

The court began its discussion of the retaliation claim by laying out what is needed to win such a claim: a plaintiff must allege, and ultimately prove, that (1) he engaged in constitutionally protected speech or conduct, (2) the defendant took adverse action against him, and (3) there was a causal connection between the protected activity and the adverse action. The filing of prison grievances is a constitutionally protected activity, the court noted. Removal from ASAT and a porter job are clearly adverse actions. But in this case, according to the court, virtually the only evidence of the Wende C.F. staff's intent to retaliate is the **temporal proximity** (closeness in time) of the inmate's filing of grievances and the actions taken against him. The court stated that it is "well settled" that temporal proximity alone is insufficient to show retaliatory motive, particularly when defendants have come forward with legitimate reasons for their actions. The record in this case supports the Wende C.F. staff's actions, the court found, "and no reasonable finder of fact could conclude otherwise." Therefore, the inmate could not prove a causal connection between the protected activity and the adverse actions.

Because the court found that there was no genuine issue as to any material fact and that the defendants were entitled to judgment as a matter of law, the court granted the defendants' summary judgment motion and dismissed the inmate's complaint.

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