# Pro Se

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## Court Reverses Termination of Incarcerated Father's Parental Rights

In 2010, the Cortland County Department of Social Services (Department) brought an action to terminate the parental rights of the parents of a child identified in the lawsuit as Jessalyn J. Jessalyn is the child of a currently incarcerated father. Prior to filing the petition to terminate parental rights, in 2009, the Department had successfully petitioned the court to remove Jessalyn from her mother's custody because, in addition to engaging in conduct indicating that she had significant mental health problems, the mother was in an abusive relationship and had previously assaulted Jessalyn. The court ordered Jessalyn to be removed from the mother's custody, issued a protective order against the mother and ordered the mother to undergo mental health counseling and drug and alcohol evaluations, to participate in certain programs and to make suitable arrangements so that Jessalyn could safely live with her.

Two years later, the Department, alleging that Jessalyn's mother and father had permanently neglected her, brought this action to terminate their parental rights. The trial court ruled in the Department's favor and ordered the termination of Jessalyn's parents' parental rights. The mother and incarcerated father, identified as Charles K., appealed.

Reviewing the record, the Third Department concluded in In re Arianna I., 955 N.Y.S.2d 413 (3d Dep't 2012) (see practice point, below for an explanation of why Jessalyn J. is not named in the short form caption), that the Department had failed to make diligent efforts to foster a constructive relationship between Jessalyn and her father. Such efforts could have included, the court wrote, apprising Charles K. of Jessalyn's well-being, developing an appropriate service plan, investigating possible placement of Jessalyn with relatives suggested by Charles K., responding to Charles K.'s inquiries and facilitating phone calls between Charles K. and Jessalyn. In addition, the evidence showed that a caseworker had received a letter from Charles K. in 2009, stating that Jessalyn's mother had neglected her and that it would be better for Jessalyn to live with a family

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## Also Inside . . .

# NEW YORK STATE BAR ASSOCIATION CALLS FOR RESTRICTIONS ON THE USE OF LONG TERM SOLITARY CONFINEMENT

***A Message From The Executive Director* - Karen L. Murtagh**

For more than 135 years the New York State Bar Association (NYSBA or Association) has shaped the development of the law, educated and informed the profession and the public, and responded to the demands of a changing society. Currently the NYSBA has over 77,000 lawyers who represent every town, city and county in the state. The NYSBA is the oldest and largest voluntary state bar organization in the nation. The control and administration of the NYSBA is vested in the House of Delegates, the decision and policy-making body of the Association. Any action taken by the House of Delegates on specific issues becomes official NYSBA policy.

I am a member of the New York State Bar Association's Civil Rights Committee and this past fall, as a committee member, I presented a report on the negative effects of prolonged solitary confinement. The report included recommendations to profoundly restrict the use of solitary confinement and to adopt stringent standards and criteria for separating violent and non-violent prisoners. The Civil Rights Committee unanimously adopted the report and recommendations. On January 25, 2013 the Association's House of Delegates approved the report on solitary confinement, prepared and presented by our Committee. If you have access to the Internet you can watch the House of Delegates meeting and our presentation at: http://www.totalwebcasting.com/view/?id=nysbar.

Our report cited strong evidence that demonstrates long-term negative impacts of housing inmates in solitary confinement. Below is an excerpt from the NYSBA press release regarding our report:

> Of the approximately 56,000 inmates being held in New York's 60 state prisons, about 4,500—or 8 percent— are in solitary confinement at any time, according to the report. Nearly 2,800 New York inmates are serving more than a year in solitary confinement, the report states. A disproportionate number of inmates in isolation are African-Americans and Latinos.
>
> "Inmates in long-term solitary confinement often suffer serious psychological problems, including depression, hallucinations, emotional breakdowns and suicidal behavior," said State Bar Association President Seymour W. James (The Legal Aid Society in New York City.) "New York needs to adopt other means of separating prisoners who violate institutional rules from the general prison population without resorting to such harmful and outdated measures."
>
> Civil Rights Committee Chair Diana Sagorika Sen of New York City (Office of Federal Contract Compliance Programs) said, "The practice is applied at a significantly higher rate to blacks and Latinos, and unduly targets those with mental health and substance abuse problems."
>
> The report cites numerous experts and studies on solitary confinement's detrimental effects on mental health in reaching its conclusions. "Courts of law, legal scholars, medical commentators and independent observers have documented the wide range of

deleterious effects that solitary confinement can have on the confined individual," the report states.

In support of its recommendations, the committee cited a report by the New York Civil Liberties Union issued in October 2012 that found that New York's use of solitary confinement is "arbitrary and unjustified, harms prison and corrections staff, and negatively impacts prison and community safety."

Solitary confinement, according to several studies, has been shown to have an impact on inmate suicide rates, particularly among those suffering from mental illness. A 1996 U.S. Department of Justice study concluded that "based chiefly on overwhelming consistent research, isolation should be avoided whenever possible."

One inmate who was subjected to long-term solitary confinement, quoted in a report by Prisoners' Legal Services of New York, compared being released into the general population after years in isolation to "leaving a hungry dog in a cage and then releasing it. … There is nothing beneficial or therapeutic regarding this confinement."

In addition to the extreme psychological effects that long-term isolation has on inmates, particularly the mentally ill, substance abusers and young inmates, the practice also promotes racial tensions in prison and contributes to additional violent behavior within the prison after isolated inmates are returned to the general population, the report states.

Among the recommendations in the report approved by the House of Delegates for addressing problems associated with solitary confinement in New York's prisons are:

- Solitary confinement should be profoundly restricted in state prisons and locally operated jails by adopting strict standards to ensure it is used in very limited and legitimate circumstances.
- Prison and jail officials should adopt stringent criteria for separating violent and nonviolent prisoners; set standards for ensuring separation under the "least restrictive conditions practicable;" identify inmates who should not be in solitary confinement; and reduce the number of Special Housing Unit beds.
- Solitary confinement sentences should be limited to no more than 15 days. Craig Haney, a renowned solitary confinement expert, is quoted in the report as saying that negative psychological effects take effect within 10 days
- The state Legislature should enact measures needed to restrict the use of solitary confinement in state and local facilities across the state. In addition, it should conduct public hearings to examine the harmful effects of long-term solitary confinement.

The report is available at www.nysba.org/solitaryconfinement.

## *IT'S THAT TIME OF YEAR AGAIN*

As you all know, PLS was created in response to the 1971 Attica uprising to provide incarcerated individuals access to lawyers to help them air their grievance and handle civil matters associated with conditions of their confinement. For over 36 years PLS has provided that assistance. As you also know, although PLS is funded by the State, every year we have to fight for continued adequate funding.

It is that time of year again. Recently Governor Cuomo issued his Executive Budget and while we are extremely grateful that he has included PLS in his budget, the funding is less than half of what we need to adequately address the civil legal services needs of the 56,000 New Yorkers that are incarcerated in our state prisons.

Last year, hundreds of our readers wrote letters to our Legislative leaders encouraging them to add funding to Governor Cuomo's current appropriation for PLS. Our thanks goes out to all of those who wrote those letters because they paid off! Although we did not receive the full funding we requested, we were able to keep our four PLS offices open and operating. The lack of adequate funding impacted our ability to accept every meritorious case we reviewed, but we were able to respond to over 8,000 requests for assistance and provide critical civil legal services to thousands of incarcerated New Yorkers.

We successfully challenged numerous disciplinary hearings, resulting in over 51 years of solitary confinement time being expunged from individual's records. We obtained over 54 years of jail time, good time and sentencing credit by successfully challenging improper disciplinary hearings, illegally withheld jail time and faulty sentence calculations. We advocated for the proper care, treatment, programming and placement for numerous prisoners, including juveniles and individuals suffering with medical or mental health issues. We engaged in litigation on issues involving disciplinary hearings, excessive use of force, sentencing and jail time, forced feeding and wrongful confinement. We also published six issues of *Pro Se* which was sent, free of charge, to over 8000 incarcerated New Yorkers.

We need your help again. Please contact our Legislative leaders and urge them to include funding for PLS in the 2013-2014 State budget. Tell our Legislative leaders that funding for PLS is vital to public safety and public health and is a sound economic investment. Remind them that, in these tough economic times, it is critical that they show leadership on the issues that are important to the safety and economic stability of this State.

Below is a letter that you can use to help formulate your message to our Legislative leaders.

**Dear :**

*I write to encourage you to include funding for Prisoners' Legal Services ("PLS") in the 2013-2014 State budget. Created in the wake of the Attica riot to provide prisoners with non-violent conflict resolution and meaningful access to the courts, for over 36 years PLS has fulfilled its purpose. And in this time of economic crisis, when everyone is being asked to tighten their belts, this is exactly the time to keep an organization like this around.*

*Why? Because by correcting jail time and sentencing errors, PLS saves the State millions of dollars every year. In 2012, PLS saved the State approximately $4.8 million by successfully advocating for illegally withheld good time, jail time and sentencing time. But that is not the only reason PLS should be funded.*

*This past year PLS answered over 8,000 requests for assistance. PLS's work has improved prison conditions and provided prisoners with a mechanism to peacefully air their grievances thus helping to prevent another costly prison uprising. In addition, PLS's advocacy work in the area of proper programming, medical and mental health care and maintaining family contacts has been instrumental in helping to prepare prisoners for reintegration into society and, in turn, significantly reducing the recidivism rate. With reported increases in prisoner suicides throughout the State and continued increases in prisoner complaints, now is the time to guarantee adequate funding for a program that protects the public while saving the State millions of dollars!*

*Sincerely yours,*

*YOUR NAME*

Send your letters to:

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

Senator Jeffrey Klein
President of the IDC
Legislative Office Building, Rm 913
Albany, NY 12247

Senator Dean Skelos
Republican Collation Leader
Legislative Office Building, Rm 909
Albany, NY 12247

**Please: PASS THIS INFORMATION ON TO YOUR FAMILY MEMBERS, FRIENDS AND ANYONE WHO IS WILLING TO WRITE A LETTER IN SUPPORT OF PLS. Please also feel free to write to your own State representatives urging them to support funding for PLS in the 2013-2014 New York State budget.**

***Continued from page 1 . . .***

member than to be placed in foster care. The caseworker admitted to knowing that Charles K.'s brother had petitioned for custody of Jessalyn and admitted to not investigating whether Jessalyn would have been better off with him than with a foster care placement. Charles K. also requested visitation with Jessalyn, which the Department failed to facilitate, and said that he would seek custody when he was released from prison.

The Court wrote, "While Charles' incarceration undoubtedly caused significant problems for [the Department] in promoting a constructive relationship with his daughter, that circumstance alone does not relieve the agency of its statutory duty in that regard." Here, the court found, there was no evidence indicating that the Department made more than a **cursory** (hurried) effort to promote a constructive relationship between the parent and child. For that reason, the court ordered the dismissal of the petition against Charles K.

***Practice Point****: This case is captioned "In re Arianna I." because there were two children involved in the termination proceeding, Arianna I. and Jessalyn J. Arianna and Jessalyn did not have the same father. Due to space limitations, the editors of* ***Pro Se*** *elected to focus on the portion of the decision which discusses the termination of the parental rights of an incarcerated father. This portion of the decision relates only to Jessalyn.*

## *Pro Se Victories!*

If you win a case, send ***Pro Se*** a copy of the decision and we will consider writing an article about your victory. Please send a copy – not the original – as we are not able to copy and return decisions to you. Look for our new feature: ***Pro Se Victories!***

# News and Briefs

## Yale Law Journal Prison Writing Contest

In ***Pro Se***, Volume 22, Number 3, we announced that the Yale Law Journal was holding a Prison Law Writing contest. Here are the winners of the contest:

**First Place:** Elizabeth Reid, Kent, Washington. Ms. Reid's submission was entitled, "The Prison Rape Elimination Act (PREA) and the Importance of Its Enforcement: Holding Guards Who Rape Accountable."

**Second Place:** Ernie Drain, St. Clairsville, Ohio. Mr. Drain's submission was entitled, "The Meaning of Imprisonment."

**Third Place:** Aaron Lowers, Vacaville, California. Mr. Lower's submission was entitled, "Solano Justice."

**Honorable Mention:** William Blake, Elmira, New York and Andre Patterson, Joliet, Illinois. Mr. Blake's submission was entitled, "A Sentence Worse than Death." Andre Patterson's submission was untitled.

**Finalists From New York State:** Justin Hightower, Malone, NY; Steve Rodriguez, Woodbourne, NY; Tarshawn Thompson, Attica, NY.

The submissions from the first, second and third place winners will be published in the Spring 2013 edition of The Yale Law Journal.

## Letters to the Editor

We read all of the letters that you send to ***Pro Se.*** Due to the number that we receive, we are not able to respond to each letter. If you have a question about how a decision discussed in ***Pro Se*** might affect you, send your question to the regional PLS office which handles requests for assistance from the prison where you are located (see back page of this issue). If you are commenting on an article, know that we have read and considered your comments even though we may not be able to respond.

# STATE COURT DECISIONS

## Disciplinary

## Guilty Plea Precludes Legal Challenge Even When Other Charges Are Reversed

In Matter of Hernandez v. Fischer, 955 N.Y.S.2d 456 (3rd Dep't 2012), the Third Department reviewed a Tier III hearing which was transferred to the Appellate Division because the petition raised a question of substantial evidence. In this case, the petitioner was given a misbehavior report for possession of contraband after a search of his cell led to the recovery of weapons and tattoo equipment. At the hearing, the petitioner pled guilty to possessing the tattoo equipment and not guilty to the charge of possessing weapons. The Third Department held that the plea of guilty to possession of tattoo equipment **precludes** (bars) any challenge to that portion of the determination. The charge of possessing weapons, however, the court ruled, had to be annulled because the officer who conducted the search had, without justification, refused to allow the petitioner to observe the search. The court remitted the case to the respondent to reassess the penalty based on the remaining violation.

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*Jared Hernandez represented himself in this Article 78 proceeding.*

## Lack of Foundation for Drug Test Results Leads to Reversal

In Matter of Campbell v. Prack, 953 N.Y.S.2d 411 (3rd Dep't 2012), the petitioner challenged the hearing officer's determination, based on urinalysis testing, that the petitioner had used alcohol. The petitioner alleged that there was no foundation for admission of the test results because there was no evidence that the reagents used to test his urine specimen came from the same lot number as Directive 4937 requires.

When the petitioner raised this issue at his hearing, the hearing officer spoke to the officer who had tested the urine. However, the court noted that much of this testimony was inaudible and the officer could not provide specific information regarding the procedure followed, including the lot number of the reagents used, without referring to his paperwork, which he did not have with him. The hearing officer apparently obtained this information off the record, but, "significantly," the court wrote, "the clarification was not made a part of the record through additional testimony." Thus, the court found, a proper foundation was not laid for the hearing officer's reliance on the positive test results. For this reason the court held that the determination of guilt was not supported by substantial evidence and must be annulled and all references to this matter expunged from petitioner's institutional record.

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*Donald Campbell represented himself in this Article 78 proceeding.*

## HO's Failure to Investigate a Witness's Reason for Refusing to Testify Leads to Reversal of Hearing

In Matter of Delgado v. Fischer, 953 N.Y.S.2d 410 (3d Dep't 2012), the Third Department held that a hearing officer violated the petitioner's right to call witnesses when he failed to investigate the authenticity of an inmate's statement that he was refusing to testify because he had been threatened by correction officials.

In this case, the petitioner was charged with using drugs. The basis for the misbehavior report was urinalysis testing. He called another inmate as a witness to testify as to the test taking procedures. According to the record, the witness refused to testify because he had no knowledge of the incident. However, petitioner introduced a statement from the witness affirming that he did have knowledge of the incident but had been threatened by prison officials and feared retaliation if he testified. The hearing officer denied petitioner's repeated requests that the witness be interviewed.

The court found that given the witness's claim of coercion, the hearing officer had a duty to inquire further into the refusal to testify. The court held

that the hearing officer's failure resulted in a deprivation of the petitioner's constitutional right to call witnesses and annulled the determination of guilt, directing that all references to this matter be expunged from the petitioner's institutional records.

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*Umar Delgado represented himself in this Article 78 proceeding.*

## 2nd Dep't: Charges of Harassment, Soliciting and Direct Order Not Supported by Substantial Evidence

In a misbehavior report, the petitioner in Matter of Farooq v. Fischer, 951 N.Y.S.2d 579 (2d Dep't 2012), was charged with having solicited information from a prison librarian about magazine subscriptions that were available on the internet. Following this act of solicitation, a correction officer told petitioner not to make such a request in the future. In the second misbehavior report, petitioner was charged with soliciting such information a second time from the librarian and disobeying a direct order. The second report also charged him with harassment, alleging that following the second solicitation, the petitioner "hovered" near the librarian's work area for an extended period of time, causing her to feel uncomfortable. Petitioner was found guilty of the charges and filed an Article 78 petition challenging the determination of guilt.

The Appellate Division, Second Department, found that the charges of solicitation and harassment were not supported by substantial evidence. First, the court found, the evidence was insufficient to demonstrate that the petitioner's two requests for information about magazine subscriptions that were available on the internet was a solicitation of goods and services that is prohibited by Rule 103.20. Second, the court found, the evidence was insufficient to demonstrate that petitioner's mere presence in the library, absent any communication with the prison librarian, **constituted** (added up to) harassment of the prison staff as is forbidden by Rule 107.11.

The court found that the charge of failing to obey an order was supported by substantial evidence, including the petitioner's plea of guilty to the charge. However, as Petitioner had already completely served the sanction imposed, the court reversed the determination of guilt as to the three charges it had found were not supported by substantial evidence, let the fourth charge stand and found that there was no need to **remit** (send back, in this case to DOCCS) the case for a new punishment in keeping with its decision.

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*Mian Farooq represented himself in this proceeding.*

## Court Rules on Materiality of Witnesses When a Defense of Retaliation is Raised

It is not unusual for a prisoner to assert that a misbehavior report was written in retaliation for engaging in conduct that angered an officer or correction official. Yet, hearing officers, asserting that such testimony is not sufficiently related to the charges, almost as frequently refuse to call witnesses who have information about the retaliation. In Matter of Lopez v. Fischer, 952 N.Y.S.2d 694 (3d Dep't 2012), the Third Department once again reversed a hearing where the prisoner raised the defense of retaliation but the hearing officer refused the witness requests that were related to the defense.

In Lopez, the petitioner was charged with violent conduct, assault on staff, unhygienic act, interference with an employee and wasting food after he allegedly knocked his food on the floor and dumped his drink on an officer who delivered the lunch tray. The petitioner testified that the report was written in retaliation for numerous harassment grievances that he had submitted against the officer who had written the report. The hearing officer denied petitioner's request to call as witnesses two officers who had conducted investigations into the petitioner's recent complaints, finding that their testimony would be **immaterial** (not related to the charges). In finding the petitioner guilty of the charges, the hearing officer stated that the incident was not the result of retaliation.

Following the determination of guilt, the petitioner filed an Article 78 challenge to the hearing. The Supreme Court, Chemung County dismissed the petition and the petitioner appealed to the Appellate Division. The Appellate Division

disagreed with the lower court decision. It found that the petitioner filed his grievances against the charging officer shortly before the officer wrote the misbehavior report. Given the close proximity between the filing of the grievances and the writing of the misbehavior report – the last grievance was written one week before the misbehavior report was issued – and the information that the investigations had been completed, the court found that testimony of petitioner's witnesses was material to his defense. Further, the court wrote, one of the requested witnesses had escorted petitioner from his cell and interviewed him immediately following the incident. For these reasons, the court held, the testimony of the requested witnesses was material, the hearing officer erred in denying the witnesses, and this denial was prejudicial to petitioner's ability to present his retaliation defense.

However, the court also found that because the Hearing officer had put forth "a good faith reason" for the denial, the violation was only of the petitioner's regulatory – as opposed to his constitutional – right to call witnesses. For this reason, the appropriate remedy, the court held, was a reversal of the hearing and remittal to DOCCS for a re-hearing.

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*Adrian Lopez represented himself in this Article 78 proceeding.*

## Hearing Officer Wrongfully Denied Inmate's Request for a Witness

Larry Gross was charged with smuggling and stealing property from the mess hall after a correction officer claimed to have discovered a packet of Kool-Aid while frisking Mr. Gross as he was leaving the messhall. At his hearing, Mr. Gross asked that the cook, to whom the correction officer claimed to have turned over the packet of Kool-Aid, be called as a witness. The hearing officer denied the request, stating that her testimony was irrelevant because she was not present during the frisk and could only testify that the officer had given her the Kool-Aid and she had destroyed it. The hearing officer found Mr. Gross guilty and Mr. Gross filed an Article 78 challenge, raising the wrongful denial of a witness as one of his claims.

In Matter of Gross v. Yelich, 956 N.Y.S.2d 283 (3d Dep't 2012), the court agreed with the petitioner, reversed the hearing and ordered the matter remitted to DOCCS for a re-hearing. In reaching this result, the court found that, contrary to the hearing officer's finding, the cook did have relevant testimony: It was possible that she would dispute the charging officer's version of the events by testifying that he did not turn any Kool-Aid over to her, thereby casting doubt on the truthfulness of the officer's charges and supporting the petitioner's claim of innocence. As such, the court ruled that the denial of the witness based upon speculation as to what her testimony would have been was error. Because the hearing officer put forth a good faith basis for his denial, the court found that remittal for a new hearing is the proper remedy.

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*Larry Gross represented himself in this Article 78 proceeding.*

## Substantial Evidence Did Not Support Finding That Petitioner Possessed Drugs

Prior to Isham Moore's transfer from Livingston C.F to Collins C.F., his clothing was searched by a total of three officers in two different searches. No contraband was recovered and after the first search, Mr. Moore had no contact with his property. Nonetheless when his property arrived at Collins C.F., it was searched again, and when drugs were found in the left front pocket of a pair of Mr. Moore's sweatpants, he was charged with possession of drugs and smuggling. Mr. Moore was found guilty of the charges and filed an Article 78 challenge to the hearing, arguing that the determination of guilt was not supported by substantial evidence.

In Matter of Moore v. Fischer, 954 N.Y.S.2d 283 (3d Dep't 2012), the court noted that the officer who had first searched petitioner's property before it left Livingston had testified at the hearing. He said that he had searched petitioner's cell and his property, including the sweatpants and had not found any drugs. He also testified that immediately following the search, petitioner was escorted to the SHU and had no further contact with his property. Two other Livingston C.F. officers testified that

after petitioner was placed in SHU, they searched his property again and also found no drugs or contraband. Petitioner's property was then sealed for transfer to Collins C.F. where it was searched and the drugs were found.

Although the hearing officer concluded that petitioner had had no access to his property after it was searched, he also found that the petitioner was guilty of the charges based on the correction officers' denials that they had planted drugs in his property and one officer's acknowledgement that it was possible that he might have missed the drugs in the course of his search.

The court found that the determination of guilt was not supported by substantial evidence, writing, "[a]n administrative determination is supported by substantial evidence when one could reasonably reach the agency's determination on the basis of the evidence presented." Here, the court found, reasonable evidence connecting petitioner to the contraband is lacking. "The uncontradicted truth is that after petitioner's property left his hands, it was searched by three different Livingston C.F. officers, with no drugs found." Under these circumstances, the court found, the determination of guilty must be annulled and all references thereto expunged from petitioner's institutional records.

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*Isham Moore represented himself in this Article 78 proceeding.*

## Parole

# Mental Competence and Parole Revocation Hearings

A parole revocation hearing must be adjourned if the parolee is mentally incompetent. So decided the First Department in Matter of Lopez v. Evans, 957 N.Y.S.2d 59 (1st Dep't 2012). This case arose when Parolee Lopez, then a resident of a psychiatric facility, allegedly assaulted another resident and was charged with a criminal offense and served with a notice of parole violation. In the criminal proceeding, Mr. Lopez was found to be mentally "unfit to proceed" and the criminal charges (misdemeanors) were dismissed.

Within days after the reports which were the basis for finding that Mr. Lopez was unfit to stand trial were issued, a parole revocation proceeding was commenced. The basis of the revocation was the same incident that gave rise to the criminal charges. Petitioner's counsel objected to going forward with the hearing because, by reason of his mental disability, as determined in the criminal case, petitioner was unable either to understand the nature of the proceeding or to assist in his own defense. The administrative law judge, (ALJ) overruled the objection, held the hearing and revoked petitioner's parole. The ALJ recommended a time assessment of 24 months. The determination was upheld on appeal.

In his Article 78 proceeding, the petitioner argued that the parole revocation hearing should not have gone forward in light of the finding made two days before the hearing commenced, that petitioner was unfit to stand trial on criminal charges based on the same conduct that was alleged to have constituted the parole violation. The Supreme Court, Bronx County dismissed the petition and petitioner appealed to the First Department.

The First Department held, that the basic requirements of due process applicable to a parole revocation proceeding should now be **construed** (interpreted) to **preclude** (prohibit) going forward with such a proceeding in the event that it is determined that the parolee is not mentally competent to participate in the hearing or to assist his counsel in doing so.

Having reached this result, however, the court declined to reach two related issues. Since a determination of incompetency was made two days before the parole revocation proceeding was commenced, the court held that the appeal did not present the court with the questions of whether the parole board had authority to determine a parolee's competence to undergo a revocation hearing, and if it did not, what should be done when a parolee charged with a violation appears to be incompetent.

## Court Reverses Denial of Appeal and Orders a Re-Hearing

Larry Comfort is serving a sentence of 20 years to life relating to convictions for criminal sale and possession of a controlled substance consecutively to a sentence of 1½ to 3 years from a conviction of attempted escape. At a parole hearing, the Board denied parole and ordered him held for 18 months. Mr. Comfort challenged the denial in an Article 78 proceeding.

In Matter of Comfort v. Evans, 956 N.Y.S.2d 338 (3d Dep't 2012), the court, citing Executive Law §259-i(5), stated that, "The Board's decision whether to grant discretionary release is 'deemed a judicial function and shall not be reviewable if done in accordance with the law.' " Thus, judicial intervention is warranted only when there is a showing of irrationality bordering on impropriety. In this case, wrote the court, the Board considered the appropriate statutory factors in denying petitioner's request for parole including the seriousness of petitioner's crimes, positive educational and program achievements, exemplary disciplinary history and plans for release. However, the Board also considered the significant opposition to petitioner's release which took the form of letters that were submitted in response to a request from the State Troopers Police Benevolent Society. This request incorrectly claimed that petitioner was criminally liable for his brother's shooting of a police officer. Given this misrepresentation, the court wrote, and the appearance that the letters in opposition were prompted by the erroneous characterization of the petitioner's crimes, it was error for the Board to consider the tainted letters and to give them significant weight. Based on this analysis, the court found that the judgment must be reversed and ordered the Board of Parole to conduct another hearing.

## Board of Parole Can Consider Youthful Offender Adjudication

In Matter of Amen v. N.Y.S. Division of Parole, 954 N.Y.S.2d 276 (3d Dep't 2012), the petitioner challenged the Board's denial of his request for parole release because in denying him parole, the Board considered an arrest that did not result in prosecution and his youthful offender adjudication. The court dismissed the petition, stating that in Matter of Gardiner v. N.Y.S. Division of Parole, 850 N.Y.S.2d 722 (3d Dep't 2008), the court had held that it was permissible for the Board to consider arrests without prosecution and that in Matter of Martin v. N.Y.S. Division of Parole, 851 N.Y.S.2d 664 (3d Dep't 2008), the court had held that it is permissible for the Board to consider youthful offender adjudications.

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*Anpu Amen represented himself in this Article 78 proceeding.*

***Practice Point**: Matter of Gardiner v. N.Y.S. Division of Parole does not in fact state that the Board may, in deciding whether to release an individual to parole supervision, consider arrests for which there are no prosecutions. In Gardiner, the court noted that "although the record [before the parole board] improperly includes arrest information on sealed criminal matters, the Board did not rely on this information and we deem it harmless." Thus, it appears that in Amen, the court overstated its holding in Gardiner. The Gardiner court did not hold that it was permissible for the Board to consider arrests for which there were no prosecutions.*

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## Miscellaneous

# Distance From Home to Prison Leads To Modification of Visitation Order

Walter Telfer and Nicole Pickard are the parents of a child born in 2004. In 2006, the Family Court of Broome County awarded custody of the child to the mother and granted the father visitation, as mutually agreed upon. See Matter of Telfer v. Pickard, 952 N.Y.S.2d 691 (3d Dep't 2012). For a few months in 2009, the child's mother brought him to visit his father at a prison located close to where the mother lived. She stopped bringing the child to visit when the father was transferred to a prison 5 hours from where she lived. During this period, the father continued to send cards and letters to the child and occasionally sent money as well. In mid 2010, the father petitioned to modify the visitation order, requesting at least one visit annually and sought enforcement of the portion of the order that required the mother to send the father a photograph of the child every two months. Following a hearing, the court ordered visitation every 4 months, the costs of which were to be paid by the father. The order specified that such costs include all associated travel expenses and the costs of lodging and food for the child and mother.

The mother appealed. The court affirmed the order. In reaching this result, the court noted the following:

- A petitioner seeking to modify an existing visitation order must show a change of circumstances that reflects a genuine need for the modification so as to ensure the best interests of the child;

- It is assumed that visitation with the non-custodial parent is in the best interests of the child, even when the non-custodial parent is incarcerated; and

- Having to travel a long distance does not necessarily preclude visitation.

Based on the application of these principles to the facts of the case, the court found that there was no error in the Family Court's determination that a change of circumstances warranted modification of the visitation order and no reason to disturb the Family Court's determination that three visits a year was in the child's best interest.

## Pro Se Victories!

Al Green v. State of N.Y. Claim No. 108974

Al Green successfully tried a case by video conference obtaining a verdict in the amount of $264.00 with interest for property that was lost or destroyed while he was at Wende C.F. Included in the lost property was Mr. Green's wedding ring. In this litigation, Mr. Green proved that property which he had with him at Wende was not delivered to him when he was moved to Attica. He then proved the cost, age, condition and perceived market value of the lost property, to which the court applied a reasonable level of depreciation.

Christopher Shapard v. State of N.Y., Claim No. 111626

Christopher Shapard successfully litigated a case by video conference, obtaining a verdict in the amount of $452.25 for property that was lost or destroyed at Wende C.F. when Mr. Shapard was moved into SHU. The court found that the defendant had failed to rebut Mr. Shapard's prima facie showing that he had placed his property in the control of the officers at Wende who had not returned it. Rather the court found, the evidence offered by the defendant served only to highlight clear inconsistencies with respect to when Mr. Shapard's property was packed up and the possibility that his property may have been left unprotected for two days. The Court found that Mr. Shapard had proven that the missing items were valued at $573.87 and, applying a reasonable level of depreciation, reduced the value to $273.87.

The award was increased due to the award of interest for the period between the loss of the property and the award.

***Pro Se Victories! features brief descriptions of successful unreported pro se litigation. In this way, we recognize the contribution of pro se litigants. We hope that this feature will encourage our readers to look to the courts for assistance in resolving their conflicts with DOCCS. The editors choose which unreported decisions to feature from the decisions that our readers send us. Where the number of decisions submitted exceeds the amount of available space, the editors make the difficult choice as to which decisions to mention. Please submit copies of your decisions as Pro Se does not have the staff to return your submissions.***

# LETTERS TO THE EDITOR

Dear ***Pro Se***,

I just wanna say OMG! I am a brand new reader and I'm addicted. Thank you for such good reading material. It just feels good to know that I am not alone in my fight.

I was amazingly touched by Terrence Reid's letter to the editor published in the October 2012 issue of ***Pro Se***. I really would like to humble myself to him and send a message of encouragement to remain strong and please know that you are not alone! Kudos my brother!

I myself am writing from Lakeview S-Block. This is my first time in the NYS prison system and trust me, I've seen an eyeful. I am more than convinced to get home and dedicate my life to my wife and two daughters. I sent a letter to my wife asking that she send a Christmas donation. If there is any way that I can help from inside please feel free to contact me. Keep up the good work! I tip my hat to all of your staff. Trust you have a friend for life.

Respectfully,

Marc Mascuzzio

# FEDERAL COURT DECISIONS

## Using Racial Slurs While Groping Buttocks Is Not Unconstitutional

Plaintiff Castro-Sanchez claimed in a federal lawsuit that during a strip frisk, an officer had pulled down his (the plaintiff's) pants, groped his buttocks, and used a racial slur. The plaintiff alleged this was a violation of his Eighth Amendment right to be free from cruel and unusual punishment. See, Castro-Sanchez v. NYS DOCS, 2012 WL4474154 (S.D.N.Y. Sept. 28, 2012). Shortly after filing this and several other claims, the court dismissed the claim for failure to state a claim upon which relief may be granted. This means that the court concluded that even if it accepted the facts alleged by the plaintiff as true, the conduct would not have violated the plaintiff's 8th Amendment rights.

Sometime later, the court appointed counsel for the plaintiff with respect to the remainder of his claims. The lawyer made a motion to amend the complaint to add the dismissed 8th Amendment claim. The court denied the request.

In reaching this result, the court first stated that "leave to amend should be freely given when justice so requires." The court went on to write that "while this rule is founded on a policy in favor of granting leave to amend, a motion to amend may be denied for "futility, bad faith, undue delay or undue prejudice to the opposing party." An amendment is futile when the proposed claim could not withstand a motion to dismiss pursuant to Federal Rule of Procedure 12(b)(6). An amendment is unduly prejudicial when it would 1) require the opponent to expend significant additional resources to conduct discovery and prepare for trial; 2) significantly delay the resolution of the dispute; or 3) prevent the plaintiff from bringing a timely action in another jurisdiction."

To win a motion to amend, the plaintiff would also have to show that he has a viable claim. To establish an 8th Amendment violation, a prisoner must allege that the conduct about which he is complaining was *objectively* sufficiently serious. See Wilson v. Seiter, 501 U.S. 294 (1991). Objectively, cruel and unusual punishment is conduct which violates "contemporary standards of decency." See Hudson v. McMillian, 503 US 1, 8

(1992). Where *excessive* force is involved, contemporary standards of decency are violated. But, "***de minimis*** (minor) uses of physical force, provided that the use of force is not of a sort repugnant to the conscience of mankind," are not included among the uses of force which are prohibited by the constitution.

To assess whether the conduct at issue was of the type that could violate a prisoner's 8th Amendment rights, the court referred to the Second Circuit's decision in Boddie v. Schneider, 105 F.3d 857 (2d Cir. 1997). In Boddie, the Court of Appeals stated that a small number incidents in which a prisoner is verbally harassed, touched, and pressed against without his consent does not constitute a violation of the 8th Amendment unless one of those incidents is severe enough to be objectively, sufficiently serious or the incidents, when viewed as a whole, are **egregious** (extremely offensive).

At issue in Boddie was the plaintiff's allegation that an officer squeezed his hand; touched his penis; and said, "You know you're a sexy black devil and I like you;" that she later pressed her body against his. The Second Circuit found that the conduct alleged did not meet the objective standard of cruel and unusual punishment.

The second part of an 8th Amendment analysis arises from the principle that only the unnecessary *and* ***wanton*** (cannot be justified) infliction of pain implicates the 8th Amendment. See Wilson v. Seiter, 501 U.S. 294 (1991). This is a *subjective* standard that looks to the defendant's state of mind: from the defendant's perspective, was his or her conduct unnecessary and wanton? In the context of physical force, the finding of a sufficiently culpable state of mind will turn on "whether force was applied in good faith or maliciously and sadistically for the very purpose of causing harm. See Hudson v. McMillian, above.

The Second Circuit Court of Appeals has not yet determined the test to apply to determine whether a prison official or officer who is alleged to have sexually abused a prisoner has a culpable state of mind. The Court has however, observed that it is possible that a prison official who sexually abuses a prisoner will be found to have a sufficiently culpable state of mind such that his or her conduct can be said to violate a prisoner's 8th Amendment rights.

In Mr. Castro-Sanchez's case, however, the court found that because the groping of the plaintiff's buttocks during a single strip search was not as serious as the conduct alleged in Boddie, the plaintiff had failed to allege a sufficiently serious violation of his right to be free from cruel and unusual punishment. For this reason, the court denied the plaintiff's motion to amend the complaint to reassert the 8th Amendment claim relating to the strip frisk.

## Second Circuit Fails to Reach Merits of Challenge to HO's Handwriting Comparison

Many prisoners have been accused of smuggling, gang activity and **a myriad of** (many) other prison rule violations as a result of letters which prison officials alleged the prisoners wrote. Sometimes this is the result of the recovery of an unsigned letter which a prison official determines to have been written by the prisoner and sometimes it is the result of a signed letter which is in an envelope with the prisoner's name and DIN as the return address. In either case, unless the prisoner admits to having written the letter, the hearing officer must decide whether the charged prisoner wrote the letter in question. Generally, the hearing officer does this by comparing the handwriting on the letter to a sample of the prisoner's handwriting.

Over the years, prisoners and their advocates have identified a number of problems that this method of fact finding presents. First, the more distinctive a prisoner's handwriting, the more easily it is mimicked. Thus, a prisoner wanting to deliver a threat via a letter, and wanting to retaliate against another prisoner with distinctive handwriting can write a threat letter in the other prisoner's handwriting. Or, in a less dramatic example, an inmate whose handwriting has a few similarities to the handwriting of the writer who actually wrote the letter, can be found guilty based on an insignificant number of similarities, and sometimes without taking into account noticeable differences between the charged inmate's handwriting and the handwriting of the person who wrote the letter.

Victor Woodard brought a federal civil rights action after the Attorney General agreed to administratively reverse a Tier III hearing where the determination of guilt was based on the hearing officer's finding that there were similarities between Mr. Woodard's handwriting and that of the person who wrote an anonymous threatening letter recovered by prison officials. The suit sought damages for the time that Mr. Woodard spent in SHU as a result of the hearing officer's determination of guilt. The suit alleged that the determination of guilt violated Mr. Woodard's Fourteenth Amendment rights to due process of law because there was insufficient reliable evidence upon which to have found him guilty.

Specifically, Mr. Woodard argued that while it would be constitutionally acceptable for a handwriting comparison made by a lay person to **corroborate** (strengthen) other evidence suggesting that an individual wrote, for example, a threatening letter, it was not constitutionally acceptable to rely on such a comparison where it is the only evidence of guilt. Mr. Woodard asked the court to find that a lay person's conclusion that two pieces of writing were written by the same person was not a sufficiently reliable basis upon which to base a determination of guilt.

The Second Circuit has held that the due process standard for sufficiency of evidence at a prison disciplinary hearing is that the disposition must be supported by "some reliable evidence of guilt." Sira v. Morton, 380 F.3d. 57 (2d Cir. 2004). The defendants in this civil rights suit argued that the hearing officer's determination, reached by comparing the threatening letter to a sample of Mr. Woodard's actual writing, that Mr. Woodard had written the threatening letter was some evidence of guilt.

The defendants also argued that they were "qualifiedly immune" from liability. The doctrine of qualified immunity protects a prison official (or other state actor) from having to pay damages for violating a prisoner's civil rights when a reasonable prison official could not have been expected to know that his conduct was unconstitutional. In this instance, the defendants argued that if the Court held that the determination of guilt made by the hearing officer was not supported by some evidence, there was neither Supreme Court nor Second Circuit precedent (prior decisions) which put them on notice that it was unconstitutional to rely on handwriting analysis done by a lay person.

After considering the arguments of the parties, the Second Circuit, in Woodard v. Shanley, 2012 WL 6176756 (2d Cir. Dec. 12, 2012), decided that at the time that the hearing officer decided Mr. Woodard's case, there was not case law from the Second Circuit or the United States Supreme Court which would have provided notice to a reasonable hearing officer that relying on his own handwriting comparison was an insufficient evidentiary basis upon which to find a prisoner guilty of writing a threatening letter. Thus the Court ruled that the defendants were entitled to qualified immunity.

When defendants successfully raise the issue of qualified *immunity*, the court can decide whether it will rule on the underlying constitutional issue, even though the court has decided to find that at the time that the defendant engaged in the allegedly unconstitutional conduct, a reasonable defendant would not have known that the conduct was unconstitutional. In this case, Mr. Woodard urged the Court to reach the issue of whether a determination of guilt based solely on a lay person's handwriting comparison is some reliable evidence of guilt. The Court declined (decided not) to do so.

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*Prisoners' Legal Services of New York represented Mr. Woodard.*

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## PLS Offices and the Facilities Served

Requests for legal representation and all other problems should be sent to the local office that covers the prison in which you are incarcerated. Below is a list identifying the prisons each PLS office serves:

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**Prisons served:** Bayview, Beacon, Bedford Hills, CNYPC, Coxsackie, Downstate, Eastern, Edgecombe, Fishkill, Great Meadow, Greene, Greenhaven, Hale Creek, Hudson, Lincoln, Marcy, Midstate, Mohawk, Mt. McGregor, Otisville, Queensboro, Shawangunk, Sing Sing, Sullivan, Taconic, Ulster, Wallkill, Walsh, Washington, Woodbourne.

**BUFFALO, 237 Main Street, Suite 1535, Buffalo, NY 14203**
**Prisons served:** Albion, Attica, Collins, Gowanda, Groveland, Lakeview, Livingston, Orleans, Rochester, Wende, Wyoming.

**ITHACA, 114 Prospect Street, Ithaca, NY 14850**
**Prisons served:** Auburn, Butler, Cape Vincent, Cayuga, Elmira, Five Points, Monterey Shock, Southport, Watertown, Willard.

**PLATTSBURGH, 121 Bridge Street, Suite 202, Plattsburgh, NY 12901**
**Prisons served:** Adirondack, Altona, Bare Hill, Chateaugay, Clinton, Franklin, Gouverneur, Moriah Shock, Ogdensburg, Riverview, Upstate.

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