Pro Se

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Did DOCCS Exec Make Reasonable Efforts to Excise Plaintiffs' Unlawfully Imposed Post Release Supervision or to Organize a Re-Sentencing Process?

This is the question that the Second Circuit in Vincent v. Yelich, 2013 WL 2396020 (2d Cir. June 4, 2013), says must be answered "Yes" for Anthony Annucci, now Acting Commissioner of DOCCS, to be entitled to qualified immunity with respect to claims that beginning in the summer of 2006, DOCCS' treatment of the individuals upon whom DOCCS imposed post release supervision (PRS) was unconstitutional. Qualified immunity is a **doctrine** (policy) which protects, for instance, a DOCCS official from having to pay **damages** (money) for violating a prisoner's constitutional rights. A court will find that a state official is entitled to qualified immunity when the right that he or she is alleged to have violated was not clearly established. A right is clearly established when the **contours** (outline) of the right are sufficiently clear that a reasonable official would understand that what he is doing violates that right. Qualified immunity, the court noted, protects all but the plainly incompetent or those who knowingly violate the law.

In Vincent, the court reviewed the district court's dismissal of several complaints involving eleven former prisoners upon whom the DOCCS defendants had unlawfully imposed post release supervision. The complaints alleged that the plaintiffs had suffered the impact of the defendants' conduct after June 6, 2006. On that date, the Second Circuit held, in Earley v. Murray, 451 F.3d 71 (2d Cir. 2006), that only a court can impose a sentence and that the administrative imposition of post release supervision by DOCCS was unlawful. As a remedy the court held that the DOCCS defendants

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IMPORTANT IMMIGRATION INFORMATION AT YOUR FINGERTIPS

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

Despite the length of time that you have lived in the United States or the ties that you have developed with family and community in this country, if you are not a U.S. citizen (i.e., born in the U.S. or naturalized) and you have been convicted of certain crimes, you may be placed into removal proceedings before an immigration judge and subject to removal from the United States. Immigration violations are considered civil in nature rather than criminal and thus, although you have a right to be represented by counsel in immigration court, you do not have a right to have a court-appointed attorney. Because of this, you could be forced to prepare for your removal hearing on your own.

In an effort to assist immigrants in preparing to represent themselves in immigration court, the New York State Department of Corrections and Community Supervision (DOCCS), in cooperation with the New York State Bar Association (NYSBA) Committee on Immigration Representation, has recently introduced *pro se* immigration legal materials to the Secure Offender Network Law Library (SON). These immigration materials are currently available in English and Spanish and were donated to DOCCS by the Vera Institute of Justice, Legal Orientation Program (LOP), Center on Immigration and Justice and the U.S. Department of Justice, Executive Office for Immigration Review.

The immigration materials provide basic information about your rights as an immigrant during the proceedings along with information on how to apply for various forms of relief from removal including, but not limited to, cancellation of removal, asylum, withholding of removal and seeking protection pursuant to the United Nations Convention Against Torture Treaty. As with other legal materials made available on PREMISE, DOCCS has provided a User Guide and a Table of Contents that will assist you in accessing the immigration law materials. Also, it is our understanding that the immigration materials can be printed at the same cost of any other legal materials accessed on the PREMISE system once a Print Request form is completed and submitted.

Other useful information on immigration laws is also available on PREMISE. For instance, the Immigration and Nationality Act, or INA is the basic body of immigration law. The INA is divided into titles, chapters, and sections and is located within the United States Code (U.S. Code) in Title 8 which deals with "Aliens and Nationality". In addition, the Code of Federal Regulations, commonly referred to as the CFR, provides the interpretation and implementation of laws enacted by Congress. Title 8 of the CFR deals with the interpretation and implementation of immigration ("Aliens and Nationality") laws that are listed in Title 8 of the U.S. Code. Another publication that is available in most of the DOCCS law libraries in print form is "Representing Immigrant Defendants in New York" published by the Immigrant Defense Project of the New York State Defenders Association.

The NYSBA Committee on Immigration Representation, with the assistance of PLS, is committed to continue its efforts in assisting DOCCS in obtaining additional immigration resource materials and "Know Your Rights" information that will be made accessible to all prisoners across the state.

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must either **excise** (cut out) the PRS from Mr. Earley's sentence or, within 28 days, produce him for resentencing.

Following the Earley decision, the complaints considered in Vincent allege, DOCCS and Parole officials continued 1) to require prisoners to serve PRS that was not **judicially imposed** (imposed by a court), 2) to find parolees to have violated the conditions of parole when they were subject only to **administratively imposed** (imposed by DOCCS) PRS, and 3) to imprison parole violators who were not subject to judicially imposed PRS. In Vincent, the DOCCS defendants argued that when they did this, they did not violate clearly established law. Rather, they argued, decisions by some of the New York State courts which were made after the Earley decision cast doubt on Earley's holding.

In Vincent, the Second Circuit rejected the defendants' argument, finding that none of the state court decisions cited by the defendants demonstrated any confusion about whether Earley prohibited DOCCS from imposing PRS. Further, the court wrote, federal constitutional standards rather than state law define the requirements of procedural due process; state court decisions which rejected the Earley holding could not **disestablish** (change the status of) or unsettle the clarity of a federal right. Thus, the court held, not only did Earley clearly establish that DOCCS has no power to alter a sentence, it clearly established the contour of the right that the Vincent plaintiffs are seeking to vindicate.

The court also distinguished the Vincent complaints from the complaint in an earlier case, Scott v. Fischer, 616 F.3d 100 (2d Cir. 2010), where the court had granted qualified immunity to DOCCS defendants whom the plaintiffs were suing for the illegal imposition of PRS. In Scott, the court wrote, the plaintiffs sued for the *imposition* of PRS which occurred prior to the decision in Earley. The court found that the defendants were entitled to qualified immunity because at the time that PRS was imposed, a reasonable state official would not have known that it was unlawful to administratively impose PRS. The claims of Vincent plaintiffs, on the other hand, related to the **post-Earley** (after Earley was decided) *enforcement* of wrongfully imposed PRS and were brought against defendants whom the plaintiffs alleged were responsible for failing either to **excise** (take off their sentences) administrative PRS or to have them re-sentenced (to add judicially imposed PRS).

The court held that the most glaring difference between Scott and Vincent was that defendant Anthony Annucci, then-DOCCS Counsel, was not a defendant in Scott. In the Vincent complaints, then DOCCS counsel Anthony Annucci is a defendant, the complaints focus on his role as DOCCS legal counsel, and the plaintiffs allege that he has been and continues to be responsible for ensuring that DOCCS personnel obey the constitution and the laws of the United States. Further, there was evidence in the record to show that defendant Annucci was coordinator of the work of the entire DOCCS agency with respect to intergovernmental issues. This role, the court noted, would include a resolution of the PRS issues among DOCCS, the prosecutors and the courts with respect to the re-sentencing of individuals upon whom the courts had failed to impose PRS.

Defendant Annucci may be held liable if he was deliberately indifferent to the rights of prisoners by failing to act on information indicating that unconstitutional acts were occurring. Defendant Annucci admitted in a previous court action that he was aware of the Earley ruling that DOCS did not have the authority to add PRS if it was not included by the sentencing judge and that he disagreed with the Earley decision. State v. Myers, No. 4834-08, Sup. Ct. Albany County, Hearing Transcript 6/6/2008. The court noted that the record before it did not show that defendant Annucci took prompt action after the Earley decision to end DOCCS' custody of people who were being unconstitutionally punished for violating administratively imposed PRS. In fact, the court noted, it was unclear whether, after the Earley

decision, defendant Annucci even instructed DOCCS employees to stop adding PRS to sentences that were silent as to PRS.

Based on the analysis set forth above, and on the facts as they appeared in the record, the court held that the district courts had erred in ruling that defendant Annucci was entitled to qualified immunity. The court **remanded** (sent back) the cases to the district court for development of the record on the issue of whether, following the Earley decision, defendant Annucci took prompt action to excise illegal PRS or to arrange to have prisoners upon whom DOCCS had administratively imposed PRS but whose sentences were silent as to PRS brought before the courts for re-sentencing.

LETTERS TO THE EDITOR

Dear ***Pro Se*** Staff,

I am writing to share a victory that I recently achieved as a result of one of the articles in ***Pro Se***. I filed an Article 78 in Albany County Supreme Court. The court ordered me to serve the petition on all parties before January 25. My disabilities are overwhelming and at times burdensome and I was not able to serve any of the parties on time, and did not serve all the parties until February 7. The attorney general moved to dismiss due to untimely service.

I reviewed the ***Pro Se*** practice piece entitled "Beat the Clock" by Brad Rudin and Betsy Hutchings [***Pro Se***, Vol. 12, No. 1].* I explained my disabilities to the judge, enclosed a copy of my medical records, and described how my disabilities limit my ability to do things in the time frame that others might be able to do them. The court accepted my excuse for failure to timely file and denied the respondents' motion to dismiss. Had I not read the article in ***Pro Se***, I would not have known how to oppose the attorney general's motion to dismiss and would have accepted the dismissal of my petition. Now I have a chance to win my case.

Thank you for the assistance that you provide to prisoners in the State of New York.

Respectfully,

Vernon Jones

Mr. Jones' victory is reported in greater detail in this issue's "Pro Se Victories."

* We will print an updated version of the article "Beat the Clock" in an upcoming issue of ***Pro Se***.

Letters to the editor should be addressed to:
Pro Se
ATTN: Letters to the Editor
114 Prospect Street
Ithaca, NY 14850

Please indicate whether, if your letter is chosen for publication, you want your name published. Letters may be edited due to space or other concerns.

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.

News

Remember to Register to Vote!

When an individual reaches his or her maximum expiration date or is discharged from parole supervision pursuant to Executive Law §259-j (discharge from parole supervision after three years), he or she regains the right to register to vote and to vote. DOCCS Directive 9205 provides that at the expiration of a releasee's sentence, his or her parole officer is required to give the releasee a voter registration form and a copy of the NYS Voter's Bill of Rights. The right to vote is an invaluable right in a democracy. We urge you to preserve your right to vote by registering to vote as soon as your sentence expires.

Pro Se Victories!

Vernon Jones v. Brian Fischer, Albany County Supreme Court, Index No. 6684-12. Vernon Jones successfully opposed the respondents' motion to dismiss for untimely service.

When Vernon Jones filed an Article 78 action seeking judicial review of an adverse grievance determination relating to medical treatment, the respondents moved to dismiss for untimely service of the order to show cause and petition. In his opposition papers, the petitioner asked the court to accept the late service which had been caused by his physical impairments and the effect of medication. He gave concrete examples of how his ability to serve the respondents was hampered by these factors: The effects of his medication made it difficult for him to do legal work for portions of the day; his hearing impairment limits his ability to get assistance from the law library staff; and during the period for serving the respondents, he did not have a working knee brace and could not walk to the law library without pain. The court, noting that service was only 13 days late, concluded that "under the unique circumstances presented here, and for good cause shown and in the interests of justice, pursuant to CPLR 306-b an extension of the time to serve should be granted." The court directed the respondents to serve an answer.

Pro Se Victories! *features 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 decision as to which decisions to mention. Please submit copies of your decisions as Pro Se does not have the staff to return your submissions.*

STATE COURT DECISIONS

Disciplinary

Finding Failure to Provide Meaningful Assistance, Court Reverses Hearing

Following a Tier III hearing at which petitioner was found guilty of three rule violations, all but the charge of harassment was reversed on appeal. Petitioner challenged the Tier III hearing in an Article 78 proceeding, arguing that the hearing should be reversed because he had not received meaningful employee assistance. Prior to the hearing, petitioner notified his employee assistant (EA) that there were 19 witnesses to the event and asked the EA to interview them. In Matter of Canty v. Fischer, 966 N.Y.S.2d 704 (3d Dep't 2013), the court noted that the record of the hearing contained

no evidence that the EA had made any effort to contact the witnesses in spite of the fact that the witnesses were identified by name. The court found that pursuant to 7 N.Y.C.R.R. § 251-4.2, it was the EA's responsibility to interview the witnesses and report back to the accused inmate. Further, the court wrote, the hearing officer made no attempt to remedy the inadequate assistance that had been provided to the petitioner when petitioner raised the issue at the hearing. Citing Matter of Velasco v. Selsky, 621 N.Y.S.2d 725 (3d Dep't 1995) and Matter of Hendricks v. State of N.Y. Dept. of Correctional Services, 560 N.Y.S.2d 534 (3d Dep't 1990), the court held that the inadequate assistance had impaired the petitioner's ability to present a defense, annulled the hearing and ordered that all references to the charges be expunged from petitioner's institutional records.

Moshe Cinque Canty represented himself in this Article 78 proceeding.

Failure to Produce Evidence Leads to Reversal

Jose Bermudez was found guilty of possessing an altered item, threats, disturbance, harassment and refusing an order. In Matter of Bermudez, 964 N.Y.S.2d 774 (3d Dep't 2013), the court reversed the hearing because the hearing officer had refused to produce relevant evidence. The evidence at issue was a **to/from** (memo) written by the officer who was the author of the misbehavior report. At the hearing, the officer acknowledged that he had written a to/from related to the incident but the hearing officer **declined** (refused) to provide petitioner with a copy. The court found that "inasmuch as that document could have been relevant in formulating petitioner's defense and effectuating his questioning of the officer, the determination must be annulled." The case was remitted to DOCCS to conduct a new hearing with respect to all of the charges except the charge of creating a disturbance for which, the respondent conceded, there was insufficient evidence.

Jose Bermudez represented himself in this Article 78 proceeding.

Failure to Follow Regulations Leads To Reversal of Hearing

In Matter of Mingo v. Chappius, 966 N.Y.S.2d 233 (3d Dep't 2013), the petitioner argued that his Tier II hearing for possession of contraband and excess clothing should be reversed because he had not been permitted to observe the cell search that led to the alleged recovery of the items with respect to which he was charged. The Appellate Division reversed the Supreme Court decision dismissing the petition, annulled the determination of guilt and ordered the Commissioner to expunge all references to the charges from petitioner's institutional record.

Directive 4910(V)(C)(1) provides that if an inmate is removed from his cell prior to a search, he must be placed outside the immediate area of the search but allowed to observe the search. Only if in the opinion of supervisory staff the inmate presents a danger to the safety and security of the facility will the inmate be removed from the area and not allowed to observe the search. At his hearing, petitioner testified that when the officers came to search his cell, they ordered him to go to the shower while his cell was being searched and objected to not having been allowed to be present during the search. In response to the hearing officer's questions, the petitioner admitted that he had not raised this concern with the housing sergeant. The record showed that the hearing officer did not make any further inquiry into whether petitioner had been denied the opportunity to observe the search and if so, whether there was a legitimate reason for the denial.

The respondent defended the validity of the search, arguing that there had actually been two searches and because the petitioner had been attending a program during the first search, they did not have to allow him to observe the second search which took place after he returned from programming.

The court rejected the respondent's argument, finding that because petitioner had returned from programming in time to observe the second search and had asked to be allowed to do so, and because he had been placed in the shower without any determination that he was a security risk, the respondent had violated the Department's Directive. The court went on to hold that "since it is well settled that [DOCCS] must adhere to its own regulations, 'the determination must be annulled and the matter expunged from petitioner's disciplinary records.' " In reaching this decision, the court relied on Matter of Johnson v. Goord, 731 N.Y.S.2d 918 (3d Dep't 2001) and also cited Matter of Morales v. Fischer, 934 N.Y.S.2d 526 (3d Dep't 2011) and Matter of Holloway v. Lacy, 695 N.Y.S.2d 148 (3d Dep't 1999).

Gregory Mingo represented himself in this Article 78 proceeding.

DOCCS Provided Reasonable Accommodation at Hearing

In Matter of Medina v. NYS DOCS, 961 N.Y.S.2d 339 (3d Dep't 2013), the court rejected the petitioner's arguments that at his four Tier II hearings, the respondent had failed to accommodate his visual impairment. The court found that the respondent had provided the petitioner with enlarged copies of the misbehavior reports and had read the reports aloud several times. The respondent also offered magnification to assist petitioner in reading the materials. Commenting that while the petitioner may have preferred other accommodations, the court found that the accommodations provided were reasonable and enabled petitioner to comprehend the charges against him and to understand and knowledgeably participate in the hearings.

The court however, did agree that one of the hearings had to be reversed because the transcript omitted the testimony of the author of the misbehavior report upon which the hearing officer relied. The court found that the failure to record that testimony **precluded** (prevented) meaningful review of the hearing and required remittal for a new hearing upon those charges.

Anthony Medina represented himself in this Article 78 proceeding,

Parole

Court Upholds Condition Barring Petitioner From Contact With His Wife

In Matter of George v. NYS DOCCS, 2013 WL 3213626 (3d Dep't May 30, 2013), the petitioner challenged a condition of parole prohibiting him from having contact with his wife for at least one year and requiring that he enroll in a domestic violence prevention program. Petitioner refused to sign the conditions and after exhausting his administrative remedies, brought this Article 78 challenge to their imposition.

The court's analysis begins with a summary of the petitioner's background, noting that he was convicted of murder in the second degree and had a federal conviction for drug and weapons offenses. Petitioner married his wife while he was in prison and after he was paroled, was accused of attacking his wife. While petitioner's parole was revoked, the revocation was related to charges that did not involve domestic violence and petitioner was not criminally convicted of charges relating to domestic violence.

The court then summarized the law relating to parole conditions, noting that the Parole Board (Board) has the discretion to determine the conditions upon which an inmate is released and its decision in that regard is not subject to **judicial review** (review by the courts) if it is made in accordance with the law.

The court rejected the petitioner's argument that the conditions were arbitrary and capricious. Citing Matter of Boehm v. Evans, 914 N.Y.S.2d 318 (3d Dep't 2010), the court noted that parole conditions which are "rationally related to the inmate's criminal history, past conduct and future chances of recidivism are not arbitrary and capricious" and that parole conditions that are reasonably related to **legitimate** (valid) **penological** (relating to the practice of prison management and criminal rehabilitation) goals are a permissible basis for restricting an inmate's fundamental rights to associate and marry.

Applying the law to the facts before it, the court found that petitioner's extensive criminal history involving firearms and violence, an employment termination relating to threatening a co-worker, the alleged assault upon his wife (which petitioner's wife reported to parole authorities) and his wife's statements to the parole officer (later withdrawn) that petitioner had repeatedly beaten her and threatened to harm her and that she believed that he was capable of carrying out his threats, were persuasive evidence that the challenged conditions were reasonably related to legitimate penological objectives and rationally related to petitioner's history and potential recidivism.

Albany County Supreme Court Holds That Executive Law Amendment Does Not Require Rule Making

In the last issue of ***Pro Se*** we reported on the decision in Matter of Morris v. NYS DOCCS, 963 N.Y.S.2d 852 (Supreme Court, Columbia County 2013), holding that the 2011 amendments to Executive Law § 259-c(4) require the Division of Parole to create procedures focused on risks and needs principles to measure the rehabilitation of persons appearing before the Board and the likelihood of success of such persons upon release. The Morris court held that based on the application of case law to the language in the statutory amendment, the statute requires the Division of Parole to enact regulations and found that the Division's reliance on a Memo issued by the Chairwoman of the Parole Board did not satisfy the statutory requirements.

In its decision in Matter of Partee v. Evans, 2013 WL 3315108 (Supreme Court, Albany County June 25, 2013), the Supreme Court, Albany County, disagreed with the Morris decision, holding that while the amendment to the statute requires that the Board establish written procedures, because these procedures will not be fixed general principle to be applied by the Board of Parole without regard to other facts and circumstances relevant to the regulatory scheme of the statute it administers, the Board is not required to publish the procedures as a regulation. In support of this result, the court cited to Matter of NYC Transit Authority v. NYS Department of Labor, 88 N.Y.2d 225 (1996). The Partee court took the position that unless an agency's policy dictates the outcome and mandates a certain result without discretion, the policy does not constitute rule making and does not have to be published as a regulation. In this case, the Partee court held, there is no indication that the change in the statute required the respondent to adopt a fixed guideline or policy which will determine the outcome of cases before the Parole Board without regard to other facts and circumstances relevant to the underlying regulatory scheme.

Based on this analysis, the Partee court found that the respondent's failure to file written procedures with the Secretary of State did not render the parole decision in violation of lawful procedure and the court declined to follow the rationale set forth in Morris.

Cedric Partee represented himself in this Article 78 proceeding.

Court of Claims

Claimant's Right to Discovery About the Background of Another Prisoner

In Robinson v. State of New York, 2013 WL 3482124 (Ct. Clms. May 3, 2013), the court was faced with the issue of deciding what evidence about another prisoner, and what records relating to the creation of the double-bunking directive, the State must provide to a prisoner-claimant during discovery. In Robinson, the claimant alleged that while he was double bunked, as a result of the State's negligently assigning him to share a cell with a prisoner whom the State knew had been convicted of especially violent crimes, the claimant was seriously assaulted by his cell-mate. The basis of the negligence claim is that the State should have known of the **foreseeable risk** (a danger that a reasonable person would know was likely to occur) of attack by his cell-mate and failed to take reasonable steps to protect the claimant from harm. In this case, the claimant alleged that his cell-mate was serving a life sentence for the stabbing death of his wife and the stabbing and attempted murder of his wife's roommate. The claimant also alleged that before he was assaulted, he had made three requests to be moved to a different cell.

In discovery, the claimant asked for the following items used to assess whether the claimant's cell-mate should be excluded from double bunking:

> The cell-mate's pre-sentence report;
> The cell-mate's sentencing minutes; and
> The name and DIN of the inmate who had double bunked with the cell-mate immediately before the claimant was double bunked with his assailant.

The defendant refused to produce these documents, arguing that they were confidential pursuant to Criminal Procedure Law (CPL) §390.50 and 9 N.Y.C.R.R. §8000.5(c)(2)(i).

In addition, claimant asked for documents generated in connection with the development of the double-bunking directive. The defendant argued that the preliminary information and correspondence relating to the double-bunking directive – Directive 4003 – were not relevant and were subject to the **public interest privilege** (documents which are subject to one or more privileges cannot be discovered).

To resolve these disputes, the court first looked at Civil Practice Law and Rules (CPLR) §3102 which provides that there shall be full disclosure of all matter material and necessary to the prosecution or defense of an action. The court noted that there are three types of materials that are protected from disclosure:

> Privileged matter which is absolutely immune from discovery;
>
> Attorney work product which is absolutely immune from discovery; and
>
> Materials prepared for trial which may be discoverable upon a showing of substantial need and undue hardship.

Cell-mate's Pre-Sentence Report and Sentencing Minutes

The claimant argued that the cell-mate's crimes made it inappropriate for him to be double bunked and that the State **acknowledged** (said) that it had considered the presentence report and sentencing minutes when it determined whether the cell-mate was appropriate for double bunking. Since the State relied on these materials, the claimant argued, the information is material and necessary to the prosecution of this action and the defendant should produce the documents. Section 390.50 of the CPL provides that pre-sentence reports are confidential and may not be made available to any person or

public or private agency except where required or permitted by statute; where the statute permits or requires an agency to receive a copy of the pre-sentence report, that agency must retain it under the same conditions of confidentiality as apply to the agency which wrote it. Relying on the provisions of CPL §390.50, the court ruled that the cell-mate's pre-sentence report is absolutely privileged from discovery.

The court found, neither CPL §390.50 nor any other statute **addresses** (talks about) the confidentiality of sentencing minutes. Nor did the defendant cite any case law where discovery of sentencing minutes was at issue. The court found that the policy reasons for protecting pre-sentence reports from disclosure – that they may contain personal mental health and medical information − did not exist for sentencing minutes. Having reviewed the sentencing minutes and finding no reason for not disclosing them to the claimant, the court ordered the production of the sentencing minutes.

Name and DIN of Cell-Mate's Previous Cell-Mate

Claimant asked for the name and DIN of his cell-mate's previous cell-mate to show that there had been problems with his assailant in the past. He wanted the name and DIN of the cell-mate because, he said, the complaints of prisoners made to DOCCS officials are not always made or noted in writing. He pointed out that he had made complaints about his cell-mate that had not been noted in writing or if they had, set forth an inaccurate version of his complaint. Claimant therefore wanted to be able to contact the other cell-mate and question him about his experiences with the assailant. The court found that the defendant had not offered any compelling reason to prevent the claimant from knowing the name of the prisoner who was housed with the assailant immediately prior to his placement with the claimant. Defendant had not given any details as to why release of this information would result in a risk to safety or security. Nor was the court aware of any statutes that would prevent disclosing this information. The court found that it was possible that the prior cell-mate feared for his safety while sharing a cell with claimant's cell-mate and conveyed that fear to DOCCS officials, and, that such evidence would have bearing on whether the defendant should have known that double-celling the claimant's assailant created a foreseeable risk of harm to the claimant. Under these circumstances, and given the seriousness of the claimant's injuries, the court found that the privacy interest of the prior cell-mate in keeping his identity confidential was outweighed by the claimant's need for the information. Therefore, the court ordered the defendant to provide the claimant with the prior cell-mate's name.

Documents Relating to the Drafting and Revisions of Directive 4003

Claimant argued that the "paper trail" for Directive 4003 (also published as 7 N.Y.C.R.R. 1701.1 through 1701.8) is relevant because the defendant relies on the Directive to support its position that the Directive permits double-celling claimant's cell-mate in spite of his commission of violent crimes; in making this argument, the defendant notes that the Directive prohibits doubling bunking of only those inmates who are serving sentences for crimes involving acts of violence resulting in serious physical injuries to multiple victims or intentional and depraved infliction of extreme physical pain resulting in serious injury to one victim. Claimant argues that the plain language of the Directive prohibits requiring another inmate to share a cell with the inmate who assaulted him. Claimant argues that if the quoted language does not apply in his case, he is entitled to know what types of crimes the language was intended to include when the directive was drafted.

Defendants argue that Public Officers Law §87(2)(g)(i)-(iii) protects from disclosure **intra agency material** (memos, reports, email, etc. that staff working for an agency send to each other) unless it is:

> Statistical or factual tabulations or data;
>
> Instructions to staff that affect the public; or
>
> A final agency policy or determination.

These exemptions from disclosure, the court notes, relate to the Freedom of Information Law and not to discovery in civil law suits. The defendant also sought to protect the information from disclosure by citing the public interest process privilege and the deliberative process privilege. However, because the defendants did not provide the documents to the court which were responsive to the claimant's request, the court was not able to determine whether any of the information is relevant and material, subject to privilege or should be disclosed to the claimant. Thus, the court failed to rule on this portion of the claimant's request until the defendant turned the requested information over to the court for review.

Practice Point: ***Pre-trial discovery in prisoners' rights cases is usually of great importance to the success of the case. In these cases, the defendants – usually DOCCS employees and officials – have possession of much of the evidence that the prisoner-claimant needs to prove his claim. The prisoner-litigant, therefore, needs to think creatively about what information DOCCS might have that would help the claimant prove his or her allegations. Once a claimant identifies the records that will help prove his/her case, the next hurdle is overcoming the defendants' objections to producing the requested materials. As you can see from the decision in Robinson v. State, claimants should expect to argue against the defendants' objections and may very well prevail (be successful).***

Court Finds State is Absolutely Immune From Liability for Wrongful Confinement

After his Tier III hearing was reversed by the Third Department because the determination of guilt was not supported by substantial evidence, David Loret filed a wrongful confinement action in the Court of Claims seeking damages for the 30 days that he spent in punitive confinement. In Loret v. State, 964 N.Y.S.2d 430 (3d Dep't 2013), the court held that the State is entitled to **absolute immunity** (cannot be sued for money damages) for the actions of correctional facility employees with respect to disciplinary proceeding brought against Mr. Loret.

The court's ruling was based on its finding that prison disciplinary proceedings are "quasi judicial," that is, like judges in court proceedings who are also immune from suit, hearing officers consider testimony and evidence and make judgments. When the State, through the enactment of the Court of Claims Act, waived its immunity from suit for the actions of its officers and employees in the everyday operations of government, the State retained its immunity for those governmental actions requiring expert judgment or the exercise of discretion. Thus, the State is not liable for the consequences of later-reversed Tier III hearings unless the employees who conducted them exceeded their authority or violated the governing statutes and regulations.

In Loret, the court found that the claimant had not stated any facts to support his claim that the correctional facility employees responsible for his discipline had acted in excess of their authority or in violation of any relevant rules or regulations. For this reason, the court found that the state was immune from liability and dismissed the claim.

David Loret represented himself in this Court of Claims proceeding.

HELP PLS CELEBRATE
NATIONAL PRO BONO WEEK

National Pro Bono Week is a time to celebrate and recognize the dedicated work of *pro bono* volunteers. It is also a time to educate the community about the legal issues our clients face. This year, National Pro Bono Week is scheduled for October 20-26th. For our part, Prisoners' Legal Services will host an event entitled ***Bookends: The Effects of Incarceration on Children and the Elderly.***

To that end, we are asking incarcerated individuals with children to share *short stories, poems or artwork* that shed light on how their incarceration has affected their relationships with their children. In addition, we are asking elderly incarcerated individuals to share their stories about aging in prison.

If you submit a story, poem or artwork, we would like to have background information about your youth and how you became incarcerated. This information will allow us to provide the attendees with a better understanding of you and your struggles. **Along those lines, we are asking you to fill out and return the attached information sheet with your submission**.

By sharing your first-hand stories, we hope to educate the public about the issues you face and recruit attorneys to take cases *pro bono*, thus increasing access to justice for indigent incarcerated persons across the State. If you, or someone you know, would like to contribute a story, poem or art to our event, please send it to:

PLS Pro Bono Coordinator
41 State Street, Suite M112
Albany, NY, 12207

Please send us your stories, poems or artwork by September 15th, 2013. While we cannot guarantee that each piece will be read or displayed, we encourage all submissions and will do our best to integrate each one into the event.

Please note that contributing your story, poem or artwork for the Pro Bono Event described above is not the same as seeking legal assistance/representation from PLS. If you are seeking legal assistance, you should write separately to the appropriate PLS office.

I, _____, consent to PLS including this submission as part of its
(print name)
National Pro Bono Week event. I understand that my contribution will be retained by PLS after the event.

_____ _____
Signature Date

PLEASE INITIAL ON THE APPROPRIATE LINE(S):

_____ PLS may use my real name.

_____ I am submitting a ***story, poem or letter*** and authorize PLS to use it at their event.

_____ I am submitting ***artwork*** and hereby consent to PLS using my donated piece as part of its fundraiser. I understand that, should the artwork be sold, the proceeds will go to PLS.

_____ I authorize PLS to use my submission on their website, in *Pro Se*, and/or for other informational purposes.

We would also like the following information so that we may properly introduce your piece:

In what year were you incarcerated? _____

For what crime(s) were you incarcerated? _____

_____

If you are an incarcerated parent, please describe what your life was like with your children prior to being incarcerated:

_____

_____

_____

_____

_____

_____

If you are an elderly prisoner, please describe your "average" day in prison: _____

_____

_____

_____

_____

_____

Please feel free to attach additional pages if you need more space.

Miscellaneous

Department of Buildings Ordered to Reconsider Applications for Licenses

In three recent Article 78 actions, the First Department reversed the lower courts' decisions to dismiss petitions challenging the Department of Buildings' decisions to deny renewals of the petitioners' stationary engineer licenses. See, In re Nuziale v. LiMandri, 967 N.Y.S.2d384(1st Dep't 2013); In re Donovan v. Limandri, 967 N.Y.S.2d 720 (1st Dept. 2013); In re Robles v. LiMandri, 967 N.Y.S.2d 722 (1st Dep't 2013). The petitioners were formerly incarcerated individuals who had been convicted of, respectively, theft of funds, conspiracy and unlawfully accepting the property of another. The respondent had granted the petitioners' previous applications for renewals of their licenses on which their convictions were disclosed.

As relevant to these cases, Correction Law §752 provides that no application for a license shall be denied by reason of the individual's having been previously convicted of criminal offense unless 1) there is a direct relationship between the conviction and the specific license sought or held by the individual or 2) the issuance or continuation of the license would involve an unreasonable risk to property or to the safety or welfare of the specific individuals or the general public.

In these cases, the court found that the respondent had arbitrarily concluded that the petitioners' convictions bore a direct relationship to the duties and responsibilities of a stationary engineer. The court concluded that the petitioners' prior convictions resulted from the misuse of administrative powers in their former positions which gave them control over hiring, payroll and selection of vendors. Such actions, the court found, have no relationship to the equipment maintenance duties inherent in the stationary engineer license. Thus, the court reasoned, the first exception to the general prohibition of discrimination against persons previously convicted of criminal offenses did not apply.

The court went on to hold that the respondent could not have rationally found the petitioners to pose an unreasonable risk to public safety or welfare so as to satisfy the second exception to the general prohibition. As to two of the petitioners, the court found that there was no evidence that they had submitted false documents related to their stationary engineer licenses or implicated public safety. As to all three of the petitioners, the court found that it was undisputed that they had been employed without incident for many years and had positive employment evaluations and letters of reference. In contrast, the court said, the respondent offered only "speculative inferences unsupported by the record" to raise an issue concerning any potential risk to the public.

The court vacated the judgments of the lower courts and remanded the matters to the respondent for further procedures consistent with its decisions.

Court Finds Prisoner's "Non-appearance" Improper Basis for Dismissal

Chester S. Thomas, an individual in DOCCS' custody, petitioned the Family Court of Monroe County, alleging that the respondent named in the petition had violated a prior order of the court. Due to petitioner's failure to appear by telephone or video at a scheduled day and time, the court dismissed the petition. Mr. Thomas appealed, and in Matter of Thomas v. Smith, 963 N.Y.S.2d 894 (4th Dep't 2013), the court held that while the family court had the power to dismiss the petition **with prejudice** (the petitioner cannot re-file) for **failure to prosecute** (move forward in the action), there must be a showing of exceptional circumstances or of unreasonable neglect to prosecute. Here, the court found, there were not

such exceptional circumstances nor could it be said that there was an *unreasonable* neglect to prosecute. In fact, the court said, the record before the court does not establish the basis for the petitioner's failure to appear by telephone or video. Rather, the court staff reported to the court that they had tried to call the *correctional facility* and could not get through. Based on this record, the court reversed the order dismissing the case, reinstated the petition and remitted the matter to the family court.

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PLS would like to thank those who were able to send donations to help defray the costs of publishing Pro Se. Your contributions are very much appreciated.

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Patrick Anson

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Please **DO NOT** send requests for legal representation to ***Pro Se***. Send requests for legal representation to the PLS office noted on the list of PLS offices and facilities served which is printed in each issue of ***Pro Se***.

Pro Se On-Line

Inmates who have been released, and/or families of inmates, can read ***Pro Se*** on the PLS website at www.plsny.org.

Pro Se
114 Prospect Street
Ithaca, NY 14850

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:

ALBANY, 41 State Street, Suite M112, Albany, NY 12207
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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