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Court Rules that in Prison, a Cell Phone Is Dangerous Contraband

In People v. Green, 984 N.Y.S.2d 680 (3d Dep't 2014), the defendant, who had been convicted of promoting prison contraband in the first degree, challenged the evidentiary sufficiency of that conviction. The case arose when the defendant was heard conducting what appeared to be a one-sided conversation in his cell, the window of which was covered with a towel. A cell phone charger was found in his cell and a cell phone on his person. An element of promoting prison contraband in the first degree is that the contraband possessed is dangerous. PL §205.25(2). Dangerous contraband is defined as "contraband which is capable of such use as may endanger the safety or security of a [prison or person therein]." PL §205.00(4).

The judicial test for "dangerous contraband in the prison setting" is whether an item has particular characteristics such that there is a substantial probability that the item will be used in a manner that is likely to cause death or other serious injury, to aid in an escape, or to bring about other major threats to a prison's safety or security. See People v. Finley, 10 N.Y.3d 647 (2013). Further, the difference between dangerous contraband and ordinary contraband does not turn on whether an item is legal or illegal outside of prison. For example, someone can legally possess a razor outside of prison, yet a razor is dangerous contraband when it is introduced into a prison. Nor does an item have to be inherently dangerous – like

a razor – to be dangerous contraband. Courts have found the following non-dangerous items to be dangerous contraband in a prison setting: disposable Bic lighters, hand-drawn maps and knotted links of wire. To sustain a conviction of promoting prison contraband in the first degree where an item of contraband is not inherently dangerous, there must be specific, competent proof to support an inference that the use of the contraband could create a dangerous situation in a prison.

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Prisoners' Legal Services Receives 2014 Denison Ray Award

A Message from the Executive Director - Karen L. Murtagh

On September 11, 2014, the New York State Bar Association's Committee on Legal Aid presented Prisoners' Legal Services of New York with the 2014 Denison Ray Nonprofit Organization Award. The Award is named in memory of career legal activist Denison (Denny) Ray, who led legal services programs in New York and other states. The Nonprofit Organization Award recognizes extraordinary commitment to:

- Strengthening access to justice initiatives;
- Delivering or facilitating the provision of civil legal services to low income and/or disadvantaged clients;
- Increasing the provision of pro bono services; and/or
- Marshaling resources to maximize services to the community

I accepted the award on behalf of PLS and had planned on focusing my remarks on the fact that PLS, like other civil legal organizations in New York State, provides vital civil legal services to thousands of low income New Yorkers every year. I wanted to share with the audience, most of whom were civil legal services attorneys, that PLS' clients, just like other civil legal services clients, face significant legal problems associated with what is now referred to as the "essentials of life" such as issues surrounding living conditions, family stability, personal safety and access to health care and education. And then I came across an interview Denny Ray gave to *The Defender Magazine* in October 1985. During that interview, he was asked about the benefits of full-service agencies working on behalf of the needs of the poor. Denny's comments were eloquent and concise and captured my thoughts on the connectivity of the work of all civil legal services agencies much better than anything I could have said. As such, I shared with the attendees three quotes from Denny's interview that have not only withstood the test of time, but also demonstrate the keen insight, commitment and forethought Denny had regarding what needed and still needs to be done to strengthen access to justice for the poor.

Denny:

"It would seem that if at a minimum we merged criminal and civil legal services, there would be a louder and more effective voice for the poor community. Now when a person gets arrested for an alleged crime, the public defender winds up providing the representation. Then the person goes to jail and Prisoners' Legal Services deals with conditions of confinement. Meanwhile, their families start suffering from problems with public assistance, housing, consumer needs and a host of other things. The Legal Aid Society then deals with that part of it. But it seems that 'never shall the twain meet.' If these organizations got together to take a look at familial problems and the legal system which is impacting in several ways on that family, they would find that together they could accomplish a lot."

Denny went on to say:

"Today my civil clients are victims of the society they live in, just as were my clients 20 years ago in the Deep South. But unlike the 1960s Civil Rights Movement, there is no movement today to change society in order to eliminate the inherent discrimination and unfairness that holds down people who are poor. And so long as there is the grinding toll taken by poverty on the lives of its victims, some of those people will commit crimes."

And he concluded by saying:

"As a nation we are very stupid to allow poverty to exist for the ultimate consequences infect us all – we are deprived of the contributions poor people could make but for their constant need to struggle for survival, and we lose our own lives and property to acts of crime committed by a person for who we offer no other hope. To come full circle in this conversation, if the rest of society won't look at the nexus between the victimization of poor people and criminal conduct, at least we who practice poverty law, civil and criminal should do so."

Thank you to the New York State Bar Association's Committee on Legal Aid for presenting the 2014 Denison Ray Award to PLS and thank you to Denny Ray for your service, insight and foresight.

Prisoners' Legal Services Celebrates 40 Years!

A Message from the Executive Director - Karen L. Murtagh

On October 24, 2014, Prisoners' Legal Services of New York (PLS), in partnership with the New York State Bar Association and Albany Law School, will celebrate its 40th anniversary of providing critical civil legal services to incarcerated New Yorkers by hosting an evening to commemorate the first PLS clinic at Albany Law School and the ultimate creation, through the work of the NYSBA, of PLS as a statewide agency.

As most of you know, it all started with Attica. The 1971 Attica uprising happened because incarcerated New Yorkers had no way to air their grievances and no access to legal counsel. In response, then-Appellate Division Third Department Presiding Justice J. Clarence Herlihy called for the implementation of a prison grievance process and access to legal representation for prisoners to allow them to present their claims in court. In turn, in 1974, Albany Law School created its first clinic: Prisoners' Legal Services.

Although not incorporated as a statewide non-profit until 1976, the concept of a statewide PLS began to germinate even before the 1974 opening of the PLS clinic at Albany Law School. In late 1973, the New York State Bar Criminal Justice Section created, and asked now retired Judge Phylis Skloot Bamberger to chair, a new committee to consider, among other things, civil representation of indigent prisoners. In 1974, after months of research and investigation, Judge Bamberger's committee issued an in-depth Draft Proposal for the Provision of Legal Services to Indigent Inmates in New York State Correctional Facilities.

The proposal first discussed the constitutional mandate of providing prisoners with access to the courts and then analyzed the difficulty in providing such access. It engaged in an exhaustive review of the existing legal services including an in-depth description of the various law clinics, legal aid and public defender programs, local bar associations, law libraries and prison law clerks available to prisoners at the time. Judge Bamberger's committee found that, even with all of the existing legal services available to prisoners, "inmates in New York [were] not being given the legal assistance necessary to make their right of access to the courts a reality." In light of this, the committee proposed "a comprehensive systematic program initiated at the state level" to provide prisoners access to the courts.

The proposal noted that there were approximately 13,100 New Yorkers incarcerated in 12 facilities across the state. The committee concluded that, in light of the inmate population, location of the institutions, and the workload, there should be three Regional Offices staffed, at a minimum, by a total of 67 staff. The committee proposed that the staff should include a Project Director, Assistant Director, Research Attorney, 3 Regional Directors, 20 staff attorneys, 18 paralegals, 18 support staff, 3 investigators and 1 bookkeeper.

To help move this proposal forward, in 1975, the New York State Bar Association prepared and submitted a grant application to set up the framework for this new statewide organization. The grant application, submitted to the New York State Office of Crime Control Planning, requested \$32,192 to, among other things, incorporate a not-for-profit corporation, draft its charter and by-laws, select members for the Board of Directors, draft job descriptions, locate suitable office space for the three regional offices, and develop a blueprint for full implementation of the legal services program consistent with Judge Bamberger's committee's findings. The grant was awarded and the requested funds were furnished by the Federal "Law Enforcement Assistance Administration" (LEAA). As a result, on March 24, 1976, Prisoners' Legal Services of New York was incorporated.

That same year, Governor Hugh Carey included \$1,000,000 in his Executive Budget for the funding of Prisoners' Legal Services of New York and PLS began operating as a statewide organization providing critical civil legal services to incarcerated New Yorkers.

Since that time PLS has worked tirelessly to fulfill its mission of providing high quality, effective legal representation and assistance to indigent prisoners, helping them to secure their civil and human rights and advocating for more humane prisons and for a more humane criminal justice system. But it hasn't been easy. Over the years, stagnant budgets and budget cuts have forced PLS to drastically reduce staff. Today, New York's prison population is 54,000 and PLS has a staff of 23, 15 of whom are lawyers. Comparing PLS' current staffing (1 casehandler for every 3,600 prisoners) to the staffing proposed by Judge Bamberger's committee forty years ago (1 casehandler for every 344 prisoners), it goes without saying that PLS is drastically understaffed and underfunded.

And yet, through it all, PLS has continued to provide thousands of incarcerated New Yorkers the legal help they need to adequately prepare themselves for reintegration into society including: ensuring placement in suitable vocational, and educational programs; challenging unjust disciplinary hearings; obtaining critical medical and mental health treatment; advocating for family communication and visitation; and correcting jail time and sentencing errors.

In light of this incredible history and in appreciation of the wisdom and foresight of individuals such as Judge Herlihy and Judge Bamberger, Albany Law School and the New York State Bar Association, on October 24, 2014, PLS will celebrate its 40 year anniversary. Born in response to the Attica uprising and nurtured through the hard work and dedication of numerous individuals over the years, PLS has always been and will always be committed to ensuring access to the courts for all incarcerated New Yorkers.

Note: A special thank you to Judge Bamberger for providing me with a detailed history surrounding the creation of PLS, including the Draft Proposal for the Provision of Legal Services to Indigent Inmates in New York State Correctional Facilities and the original grant application to the NYS Office of Crime Control Planning.

Continued from Page 1 . . .

Here there was testimony from the Supervising Superintendent of the Sullivan Hub that inmates can use cell phones:

- to contact people whom they are prohibited from contacting;
- to avoid Departmental monitoring of their phone calls;
- to carry on criminal activity;
- to develop and execute an escape plan; and
- to orchestrate an injury to someone in or out of prison;

all of which present a significant risk either to the public or the facility.

The Court found that this testimony satisfied the People's burden of establishing the cell phone taken from the defendant was dangerous contraband under the test established by the Court of Appeals in

Finley and affirmed the conviction for promotion of prison contraband in the first degree.

LETTERS TO THE EDITOR

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News and Notes

Legally Blind and Severely Visually Impaired Prisoners at Wende and Sullivan Settle Claims

A class of legally blind and severely visually impaired prisoners (LB/SVI) at Wende and Sullivan Correctional Facilities recently settled a federal lawsuit alleging that the Department of Corrections (Department) had violated their rights to reasonable accommodations under the Americans with Disabilities Act. The private settlement agreement in Medina v. NYS DOCCS, 11 Civ 176 (S.D.N.Y.) will improve access to programs, services and activities. Among the more than 100 accommodations that will be offered are:

- the replacement of corrective lenses or glasses without charge (unless the individual negligently or intentionally broke or lost his lenses/glasses);
- the provision of accommodations recommended by a medical professional;
- the provision of sunglasses to LB/SVI prisoners who require them;
- the provision of bold lined paper to LB/SVI prisoners who need it;
- the provision of instruction to LB/SVI prisoners on the use of all available assistive devices;
- the provision of glare screens to be used on computers;
- the provision of typewriters for in-cell use;
- year-round access to a resource room with three working computers with assistive technology;
- the provision of bold lined paper, a magnifier, 20/20 pens and other reasonable accommodations to LB/SVI prisoners in SHU;
- access to law clerks to assist LB/SVI prisoners with legal research in the law library, and for LB/SVI in SHU, the provision of legal materials on audiotapes if no other accommodations for reading legal materials are available;
- a requirement that before using Oleoresin Capsicum spray or other gas during a cell extraction

involving a LB/SVI prisoner, DOCCS will check with medical staff; and

- the extension of shower time for five minutes beyond the amount of time that is provided to visually typical prisoners.

The Prisoners' Rights Project of The Legal Aid Society and Paul, Weiss, Rifkind, Wharton & Garrison LLP represented the plaintiffs in Medina v. NYS DOCCS.

DOCCS Enhanced Victim Services and Rape Crisis Hotline Pilot Project

In 2014, DOCCS launched an initiative that enables inmates in certain facilities (see list of facilities below) to contact community-based Rape Crisis Centers. Inmates who are in need of rape crisis counseling, victim advocacy, and/or emotional support services and who are in the facilities where the pilot project is set up may reach outside support services by dialing #77 from any inmate phone. Communications with rape crisis centers are confidential, meaning that rape crisis counselors will not tell DOCCS anything you report to them unless you authorize them to, or you are under the age of 18. Users of this program should note that although these calls are considered confidential and will not be monitored by DOCCS, the calls will be recorded, and may be accessed by Central Office investigators if they believe an inmate is misusing the program.

This pilot program is available in the following facilities: Albion, Attica, Auburn, Bare Hill, Bedford Hills, Clinton, Coxsackie, Downstate, Eastern, Edgecombe, Elmira, Five Points, Franklin, Great Meadow, Green Haven, Lincoln, Mid-State, Mohawk, Queensboro, Shawangunk, Sing Sing, Southport, Sullivan, Taconic, Ulster, Upstate, and Willard.

An inmate who is not in a pilot program facility can add a telephone number for a Rape Crisis Program to his or her account by submitting a request to his or her ORC. Please remember that calls made from a non-pilot facility are not

considered confidential, and may be recorded and monitored.

As a reminder, if you have been sexually abused or harassed and you decide to file a formal PREA complaint, you can do so by contacting any staff member or the Inspector General's office, either verbally or in writing. You cannot be punished for filing a complaint in good faith based upon a reasonable belief that you have been sexually assaulted or harassed.

DOCCS has advised PLS that it is seeking a grant extension to continue this pilot project. PLS will provide information about any developments in the Rape Crisis Hotline Project in future issues of *Pro Se*. For further information about the community based rape crisis program, or for more information about filing a PREA complaint, please contact PLS.

This article was written by Melissa Loomis, a staff attorney in the Ithaca Office of PLS.

Pat Frisk & Strip Frisk Search Protocol for Transgender Inmates

In 2014, DOCCS revised Directive 4910, Control of & Search for Contraband, to include greater protections for transgender inmates. The following is a summary of the current search procedures for transgender inmates.

- A male officer may pat-frisk a female transgender inmate who has been assigned to a male correctional facility. However, the male officer must use the back of his hand while searching the breast area, and may not pat the inmate's clothed nipples. Furthermore, the officer is instructed to take care to not penetrate the genital opening of the inmate when frisking the clothed inner thigh, groin, or buttocks. A male officer searching a transgender inmate who has been assigned to a female correctional facility is required to follow the same search procedure.

- A female transgender inmate in a male correctional facility who has a permit to possess and wear a bra will not be strip-searched in the presence of other inmates, and will not be required to remove her bra or undershorts/underwear without probable cause. A supervisor with the rank of Sergeant or above must be present when the inmate is required to remove her bra.
- A strip frisk of a transgender inmate will be conducted by staff of the gender according to the gender classification of the facility. (For example, a male staff member will conduct strip frisks of all inmates in a male facility). Staff, however, must use search procedures "as appropriate based upon the anatomy of the inmate."

The Directive instructs staff to conduct themselves in a professional manner, to be aware of the sensitive nature of strip searches and frisks, and to conduct the searches in the least degrading manner possible.

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

STATE COURT DECISIONS

Disciplinary

Confidential Information Not Shown to Be Reliable and Credible

In Matter of Muller v. Fischer, 2014 WL 4355627 (3d Dep't Sept. 4, 2014), the petitioner was found guilty of using threats and intimidation to pressure other inmates to refrain from participating in the election of ILC members. In reaching this conclusion, the hearing officer relied heavily on confidential information. In reviewing an administrative agency decision that is based on confidential information, the Court noted that:

- To constitute substantial evidence of guilt, confidential information must be sufficiently detailed to allow the hearing officer to make an independent assessment of its reliability and credibility;
- When the confidential information from an interview with an inmate is presented by an officer, questioning must show that there is a basis to **gauge** (assess) the informant's knowledge and reliability;
- The hearing officer must make his or her own assessment of the confidential informant's truthfulness and cannot rely solely on the officer's assessment;

Here, the Court found, one of the officer witnesses did not testify about whether the confidential informant had ever given credible information before. A second inmate source of information was unidentified. A second officer who presented information obtained from three inmates did not provide his reasons for finding them credible. Finally, the statements of the confidential informants lacked the specificity necessary to establish that the petitioner was a leader of the

boycott or that he threatened violence. Based on these findings, the Court concluded that the determination of guilt was not supported by substantial evidence and annulled the hearing.

The Albany Office of Prisoners' Legal Services represented the petitioner in this Article 78 proceeding.

Court Finds Statement Made During Therapy Session Was Not a Threat

During a therapy session, the petitioner in Matter of Archie v. Fischer, 989 N.Y.S.2d 702 (3d Dep't 2014), stated that he thought about choking his psychiatrist, and in graphic detail, described how he would like to strangle another doctor who had treated him. The therapist wrote a misbehavior report charging the petitioner with threats and engaging in conduct involving the threat of violence. The Court's review of the record led to the conclusion that the determinations of guilt were not supported by substantial evidence. While the petitioner did not deny making the statements, the therapist who wrote the misbehavior report acknowledged that she did not know whether the petitioner actually meant to harm the individuals or was speaking out of frustration. Further, the Court noted, the petitioner's statements were made during a therapy session where he was encouraged to express his feelings. And "significantly," the Court wrote, there was no evidence in the record that the statements were intended as threats. Under the circumstances, the Court concluded that there was no violation of the cited disciplinary rule and annulled the determination.

Thomas Archie represented himself in this Article 78 proceeding.

Recovery of Drugs Not Required to Prove Smuggling

According to a misbehavior report charging the petitioner with smuggling, a video tape showed petitioner, during a visit, taking an object out of his mouth and, “in a motion consistent with placing the object in his rectum,” putting the object in his pants. His visitor gave a signed statement that she had smuggled pills into the facility for the petitioner. An X-ray was negative for contraband. After he was found guilty, the petitioner filed an Article 78 challenge to the determination of guilt.

In Matter of Gren v. Annucci, 991 N.Y.S.2d 169 (3d Dep’t 2014), the Court found that, although no contraband was recovered, the determination of guilt was supported by substantial evidence. The petitioner’s denial of the charges and his visitor’s testimony that her statement had been coerced raised credibility issues which the hearing officer had the discretion to resolve. The Court also rejected the petitioner’s argument that he was improperly denied the X-ray report or the testimony of the X-ray technician, because the hearing officer acknowledged that the X-ray was negative for contraband, making the requested witness and documentary evidence redundant. Based on this analysis, the Court confirmed the determination of guilt and dismissed the petition.

Bogdan Gren represented himself in this Article 78 proceeding.

Court Rules Officer On Duty and Aware of Incident Can Serve as Hearing Officer

In Matter of Bellinger v. Venettozzi, 990 N.Y.S.2d 733 (3d Dep’t 2014), the petitioner argued that the hearing officer should have recused herself because she was on duty at the time of the incident at issue in the hearing and was aware that it had occurred. The Court rejected this argument, relying on earlier Third Department decisions, see for example, Matter of Turner v. Fischer, 954 N.Y.S.2d 281 (3d Dep’t 2012) (holding that the hearing officer was not

biased and was not required to recuse himself, even though he might have acquired general knowledge of the incident through his status as a high ranking security officer; he was not present during the incidents in question and did not participate in the investigation, and there was nothing to indicate that he failed to conduct the hearing in a fair and impartial manner) and Matter of Vega v. NYS DOCS, 937 N.Y.S.2d 705 (3d Dep’t 2012) (holding that the hearing officer was not disqualified from presiding over the hearing, despite the fact that he was the watch commander at the time of the incidents leading to the misbehavior report and knew of them; the hearing officer did not actually witness the incidents, was not directly involved in them, and did not investigate them). Similarly, in Matter of Echevarria v. Fischer, 984 N.Y.S.2d 527 (4th Dep’t 2014), a decision issued by the Fourth Department of the Appellate Division, the Court rejected a challenge to a hearing officer who had been the Officer of the Day on the day that the incident that led to the misbehavior report had occurred.

Adrian Bellinger and represented himself in Matter of Bellinger v. Fischer. The Wyoming County-Attica Legal Aid Bureau represented the petitioner in Matter of Echevarria v. Fischer.

Parole

Court of Appeals Reverses Parole Rescission

In a decision that conflicted with several lower court decisions analyzing the same issue, the Court of Appeals reversed an Appellate Division decision and held that the Board of Parole had improperly **rescinded** (took back) a parole release decision. The rescission considered in Matter of Costello v. NYS BOP, 2014 WL 2883871 (Jun. 26, 2014), was issued after members of the law enforcement community protested the Board’s decision to release the petitioner and submitted statements from the victim’s family concerning the impact of the crime on them, i.e.,

victim impact statements. Even though the Court concluded that the rescission proceedings had been properly initiated, “under the particular circumstances of this case,” the Court wrote, “the Board improperly rescinded petitioner’s parole release which should be reinstated.” On July 14, 2014, roughly two weeks after this decision was issued, Pablo Costello, who had spent almost 35 years in prison and was 58 years old, was released to parole supervision.

The Court did not describe the “particular circumstances” which caused it to reach this result. The Court also wrote that it was not minimizing the importance of victim impact statements in parole board hearings or “the powerfully presented evidence of the grief and loss experienced by the family of the victim in this case.” Rather, the Court wrote that it hoped that this decision would “strongly encourage” the Board and District Attorneys to comply with CPL §440.50(1) and Executive Law §259-i(2)(c)(A)(v) so that the effect of a crime on a victim and his or her family will be fully considered before a decision is made.

Court Reverses Parole Denial

In Matter of Ramirez v. Evans, 987 N.Y.S.2d 415 (2d Dep’t 2014), the Second Department reversed a parole denial finding that the Board had denied release solely on the basis of the seriousness of the offense and that further, contrary to the law, its explanation for doing so was set forth in conclusory terms. The Court ordered that a new hearing be held at which the Board would utilize COMPAS, a device for measuring an inmate’s rehabilitation and likelihood of success upon release.

Santiago Ramirez represented himself in this Article 78 proceeding.

Court Finds Parole Denial Was Based Solely on the Seriousness of the Crime

In Matter of Bruetsch v. Stanford, 2014 WL 1910238 (Sup.Ct. Sullivan Co. May 11, 2014), the petitioner had been sentenced to 15 years to life in

connection with the death of his wife. This appeal was from the 9th parole hearing held in connection with this sentence. At the time that the challenged hearing was held, petitioner had served 26 years.

In reviewing the hearing, the court noted that there is one thing that the parole board cannot do and two things it must do:

- The Board cannot base its decision to deny parole solely on the serious nature of the underlying crime;
- While the Board need not consider each guideline separately, and has broad discretion to consider the importance of each factor, the Board must consider the guidelines;
- The reasons for denying parole must be given in detail and not in conclusory terms.

Here, the court found, the Board based its decision to deny parole release solely on the serious and violent nature of the instant offense, did not consider all of the guidelines or factors and the decision was in conclusory terms. In addition, the court found that the Board mischaracterized the crime, viewing it as premeditated when neither the trial court nor the jury understood it as such.

The court found that no reason other than the crime’s **heinous** (evil) nature existed for denying parole. The petitioner had a perfect disciplinary record, had outside clearance, had completed every program offered by DOCCS and had no criminal history. He submitted numerous letters of recommendation for his release from correction officers, officials and members of the community.

The court commented that while the Board discussed factors other than the nature of the crime, the discussion was perfunctory and the Board based its decision solely on the nature of the offense. In spite of the fact that every other factor was positive and therefore favored release, the court wrote, the Board “somehow” concluded that the petitioner’s release would be incompatible with the welfare and safety of the community and would **deprecate** (show a lack of respect for) the serious nature of the

instant offense as to **undermine** (weaken) respect for the law.

Looking at the record as a whole, the court concluded that not only did the record fail to clarify on what specific grounds the Board denied parole, other than the seriousness of the crime, but also strongly supported parole release for an inmate who had served nearly double his minimum sentence.

In the absence of any reasoning for its decision denying parole, the court held that the decision was arbitrary and capricious. The court ordered that a new hearing be held and a decision issued within 45 days of the entry of judgment.

Albany County Supreme Court Reverses Petitioner’s Fourth Denial of Parole

In 1994, Robert Stokes was sentenced to 15 years to life. After his fourth parole denial, he filed an Article 78 petition asserting that the Parole Board had failed to consider all of the factors that it was required to consider and relied solely on the serious nature and circumstances of the crime that he committed. In Matter of Stokes v. Stanford, 2014 WL 2598133 (Sup. Ct. Albany Co. June 9, 2014), the court began its analysis by noting that the 2011 amendments to Executive Law §259-c(4) require the Board to consider an inmate’s efforts at rehabilitation. Further, in Matter of Davis v. Travis, 739 N.Y.S.2d 300 (3d Dep’t 2002), the court wrote, the Third Department had held that the Parole Board’s decision must be sufficiently detailed so as to apprise the petitioner of the reason for the denial of his parole release. Here, the court found that while the Parole Board at the parole hearing noted numerous factors which would support a decision that petitioner be released to parole, its determination denying release was based only upon the finding that the petitioner committed murder during a robbery and that his pleas to the murder resolved three pending robberies. Thus, the court found, the Board had failed to make any analysis of the petitioner’s steps toward rehabilitation, his post release plans, and why and how those factors were dismissed. “Absent any discussion of what petitioner needs to do to improve his chances of release,” the court

wrote, “the determination lacks a rational basis in the record.” Further, the court found, although the determination “parrots applicable statutory language,” the Board did not even attempt to explain the disconnect between its conclusion that petitioner should be denied parole and his rehabilitation efforts and his low risk scores.

Robert Stokes represented himself in this Article 78 proceeding.

Miscellaneous

To Challenge Wrongful Removal from Program, Inmate Must First Use Inmate Grievance Program

In Matter of Hawes v. Fischer, 990 N.Y.S.2d 367 (3d Dep’t 2014), the petitioner challenged his removal from a treatment program run jointly by DOCCS, the Office of Mental Health and the Office of People with Developmental Disabilities. Before filing the Article 78, the petitioner wrote to the Department’s Deputy Director of Program Services (DDPS) complaining about his removal. He received a response saying that his removal from the program was appropriate. The Respondents moved to dismiss the petition, arguing that the petitioner had failed to exhaust his administrative remedies.

The Court found that to exhaust his administrative remedies, prior to filing the Article 78 the petitioner was required to file an inmate grievance and, if the grievance was denied, appeal and get a decision from the Central Office Review Committee (CORC). The Court further found that the petitioner’s letter to the DOCCS DDPS did not satisfy the grievance requirement, holding that issues like the removal from a treatment program are the proper subjects of the inmate grievance program. Based on this analysis, the Court affirmed the lower court’s decision dismissing the petition.

Bobby Hawes represented himself in this Article 78 proceeding.

Child Support Payments Deducted from Inmate Account Do Not Rebut Finding that Father Abandoned Child

In *In re Melerina M.*, 988 N.Y.S.2d 388 (4th Dep't 2014), the Department of Social Services successfully petitioned to terminate an incarcerated father's parental rights. The court concluded that the father had abandoned his daughter based on the evidence that in the six months prior to commencement of the action, the father had no contact with his daughter. The absence of contact was proven by showing that during the six month period, the father had failed to visit his daughter or to communicate with her or with DSS, although he was able to do so. The court concluded that the father had failed to **rebut** (disprove) the presumption of abandonment that arose from the failure to communicate or visit with his daughter by showing that he was unable to maintain contact with his daughter or that he was prevented or discouraged from doing so by DSS.

On appeal, the father argued that the lower court was **precluded** (prohibited) from finding that he had abandoned his child because during the six months prior to the filing of the termination petition, 20% of the money in his inmate account had been deducted to pay for child support. The Court noted that the child support order had suspended payment of child support during the father's incarceration and that according to DSS, no payments had been received. However, the Court held that even if the funds had been deducted from the father's account, under the circumstances of this case, it would still conclude that deduction of child support payment "does not constitute communication with the child or [DSS] sufficient to defeat an otherwise viable claim of abandonment."

The Rumor Mill

Prisoners' Legal Services has received a large number of requests from inmates for information regarding a rumor that determinate ("flat") sentencing and/or post-release supervision will be repealed

effective September 1, 2015. According to some versions of the rumor, any person serving a determinate sentence as of that date will have their sentence converted into an indeterminate sentence.

The rumor is false, but it is understandable how it arose. When former Governor George Pataki first proposed determinate sentences, in 1995, he met with resistance from the Democratically controlled State Assembly. The proposal was eventually passed as a two-year "pilot project" scheduled to expire in 1997. It has been renewed in two year increments every other year since then. Thus, all statutes that reference determinate sentences state that they will expire on September 1st of the next odd-numbered year, to be replaced by an identically worded statute without the reference to determinate sentences. However, there is no reason to believe that determinate sentencing will not be renewed again in 2015. (Indeed, far from retreating from determinate sentencing, the Legislature has made more and more offenses subject to it since 1995, including all drug offenses and sex offenses.) Moreover, even were determinate sentencing to expire, its expiration would not affect determinate sentences imposed prior to the expiration date.

FEDERAL COURT DECISIONS

Court Finds DOCCS Substantially Burdened Prisoner's Religious Rights

Finding that the choice either to provide a urine sample by drinking water during a religious fast or to face disciplinary action placed a substantial burden on a prisoner's First Amendment right to practice his religion, the Second Circuit Court of Appeals reversed a decision from the Western District of New York dismissing the prisoner's claims under the free exercise clause of the First Amendment. The facts that led to the lawsuit known as *Holland v. Goord*, 758 F.3d 215 (2d Cir. 2014), arose when, during Ramadan, prisoner-plaintiff Holland (Holland or plaintiff), a practicing Muslim, was unable to provide a urine sample when requested to do so. Officers gave him the opportunity to drink water but as the prisoner's

religion prohibited the intake of food or water during daylight hours during Ramadan, the plaintiff said he was then unable to urinate or to drink but offered to drink water and provide a sample after sunset, when his fast ended. Having failed to produce a urine sample within 3 hours of being asked to do so, Holland was ticketed for failing to comply with urinalysis procedures, found guilty at a Tier III hearing and sentenced to 90 days of keeplock and 90 days loss of good time. Holland's administrative appeals were successful, and after spending approximately 2 ½ months in keeplock, and having been barred from participating in Islamic services, including the Muslim feast celebrating the end of Ramadan, he was released to general population.

In 2005, Holland filed a complaint asserting that his free exercise rights under the First Amendment and the Religious Land Use and Institutionalized Persons Act (RLUIPA) had been violated by the order to provide a urine sample and by his resultant keeplock confinement and requesting damages and injunctive relief.

In 2010, the parties moved for summary judgment. A motion for summary judgment is appropriate where there are no disputed issues of **material** (significant to the legal claim) fact and the issue before the court is whether, as a matter of law, the plaintiff or the defendant is entitled to judgment in its favor.

In 2012, seven years after the complaint was filed and while the motions for summary judgment were pending, and without notifying the court or the plaintiff, DOCCS amended its urinalysis testing procedures to provide that inmates participating in an approved religious fast should not be required to provide a urine sample during fasting periods. Rather, the Directive provides, such requests should be scheduled during other periods of the day.

In 2013, finding that the order to provide a urine sample placed only a **de minimis** (trivial) burden on the plaintiff's free exercise and RLUIPA rights, the district court granted summary judgment in favor of the defendants. A de minimis burden is a burden that is so small as to be of no legal significance.

On appeal, the Second Circuit judges disagreed with the district court's conclusion, finding that its precedent "squarely dictates" that Holland's First Amendment right to practice his religion was unconstitutionally burdened. The question at issue here, the Court found, quoting Turner v. Safley, 482 U.S. 78, 89 (1987), was "whether the defendants' policy is reasonably related to legitimate penological interests." As to that issue, a court must consider:

- whether the challenged regulation has a valid, rational connection to a legitimate governmental objective;
- whether prisoners have an alternative means of exercising their burdened right;
- the impact on guards, inmates and prison resources of accommodating the right; and
- the existence of alternative means of facilitating exercise of the right that have only a de minimis adverse effect on valid penological interests.

The Court remanded the case to the District Court to address these issues. It affirmed the District Court's decision to dismiss the RLUIPA claims as that act authorizes only injunctive relief and the amendment to the urinalysis directive sufficiently protects the plaintiff's rights in the future.

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Pro Se Practice

Preserving Your Right to Judicial Review, Exhaustion of Administrative Remedies and the Effect of Pleading Guilty on Article 78 Challenges to Tier III Hearings

Introduction

Prisoners can use Article 78 of the New York Civil Practice Law and Rules (CPLR) to challenge determinations of guilt made at Tier III hearings.¹ Courts will dismiss Article 78 petitions unless the petitioners have preserved their rights to judicial review of the issues raised in the petition and exhausted their administrative remedies as to those issues. This article discusses what steps you must take during the **administrative process** (at the hearing and on appeal) to preserve your right to judicial review of violations of your regulatory and constitutional rights and to exhaust administrative remedies. The article also discusses how pleading guilty at a Tier III hearing affects a prisoner's right to judicial review of errors made at the hearing.

What is Preservation and Exhaustion?

The terms preservation and exhaustion relate to the State's interest in giving an administrative agency, such as the Department of Corrections and Community Supervision (DOCCS or the Department), the opportunity to correct its own errors. A prisoner **preserves** his right to challenge errors made at a Tier III hearing by **objecting at the hearing** (bringing

¹ For information about how to bring an Article 78 action, write to your local PLS office and request a copy of the memo, "How to File an Article 78 Proceeding On Your Own."

these errors to the attention of the hearing officer) and by **raising these issues in an appeal** to the Department's Office of Special Housing and Inmate Disciplinary Programs (Office of Special Housing). Only issues about which a prisoner could not have known at the time of the hearing, or which the hearing officer could not have corrected, can be raised for the first time in the administrative appeal.

A prisoner's administrative remedies are exhausted when in response to an appeal, the Director of Special Housing and Inmate Disciplinary Programs (Director of Special Housing) affirms, modifies or reverses the hearing determination.² This is the Department's final decision. The purpose of requiring that there be a final decision before a prisoner can file a court challenge to the hearing is to allow the Department to correct its errors by, for example, dismissing charges, holding a new hearing or reducing the penalty imposed at the hearing.

No matter how serious the violation of your rights, if you do not preserve your right to judicial review and exhaust your administrative remedies, it is unlikely that a court will review your claims.

The Effect of Pleading Guilty on Your Right to Judicial Review

The Effect of Guilty Pleas on Claims of Evidentiary Insufficiency

A guilty plea made at a Tier III hearing is substantial evidence of guilt. If you plead guilty to the charges, you cannot later argue that the determinations of guilt relating to those charges were not supported by substantial evidence. Matter of Robinson v. Prack, 989 N.Y.S.2d 707

² Where the Director of Special Housing fails to decide an appeal within 60 days, a court will consider the appeal to have been denied and will not dismiss for failure to exhaust administrative remedies a petition which is filed more than 60 days after the Director received the appeal.

(3d Dep't 2014). Pleading guilty "with an explanation" also **precludes** (bars) you from challenging the sufficiency of the evidence. Matter of Perez v. Bezio, 950 N.Y.S.2d 796 (3d Dep't 2012).

Where you plead guilty to some charges, and not guilty to others, you can challenge the sufficiency of the evidence which supports the charges to which you pleaded not guilty. Matter of Harvey v. Fischer, 942 N.Y.S.2d 680 (3d Dep't 2012) (reviewing the determinations of guilt relating to only one of the three charges because the petitioner pleaded guilty to the other two).

The Effect of Guilty Pleas on Procedural Claims

A guilty plea does *not* preclude a prisoner from challenging procedural violations, even those relating to the charge to which she pleaded guilty. See, Matter of Thorpe v. Fischer, 862 N.Y.S.2d 636 (3d Dep't 2008) (reviewing the petitioner's claim that the hearing officer had violated his right to production of evidence in spite of his plea of guilty to the charge of weapon possession). However, where the prisoner pleaded guilty, a court is likely to find that the procedural violations related to the charge are "harmless error." For example, if you pleaded guilty to assaulting another inmate and at your hearing asked that a bystander who witnessed the assault be called as a witness, a court might find that the hearing officer's denial of your request was a violation of your rights. It is likely though, that the court will find that even if the hearing officer had called the witness, his testimony could not have changed the outcome of the hearing. For this reason, the court is likely to find the error to be harmless.

In the rare cases, the court may find the impact of the procedural violation outweighs or undercuts the significance normally given to a guilty plea. For example, in Matter of Edwards

v. Fischer, 930 N.Y.S.2d 358 (4th Dep't 2011), the petitioner pleaded guilty to drug possession only after the hearing officer had denied the petitioner's request to call a witness whose testimony, the court concluded, would have been relevant and material to the issue of whether what was found in the petitioner's cell was drugs. Under the circumstances, the court ordered the hearing reversed and the charges expunged in spite of the guilty plea. The likely explanation for the court's unusual holding is that there was a causal connection between the hearing officer's refusal to call the witness – which the court found to be a violation of a fundamental right – and the petitioner's decision to plead guilty.

Pressure to Plead Guilty

Prisoners sometimes report that hearing officers promise to impose lighter penalties if they plead guilty (or harsher penalties if they do not plead guilty). Each person has to decide for him or herself whether the promise of a lighter penalty is worth giving up the right to judicial review of the hearing. In making the decision of whether to plead guilty in exchange for a promise of a lighter sanction, keep in mind that the guilty plea **precludes** (bars) an Article 78 challenge to the **sufficiency of the evidence** (whether there is enough evidence) supporting the determination of guilt and is likely to result in a finding that any procedural errors made at the hearing were "harmless."

Preserving Your Rights to Judicial Review

To preserve your right to judicial review of errors made at a Tier III hearing, you must 1) plead not guilty to the charges, 2) object at the hearing to all errors that the hearing officer can correct, and 3) in your appeal to the Office of Special Housing, note all of the errors that occurred at your hearing. The process of objecting is simple:

- ▶ **Be specific.** Objections are made to specific acts, such as to the hearing officer's refusal to provide you with a requested document or to the failure of the misbehavior report to provide adequate notice of the charges. Objecting to the "entire hearing" does not preserve any errors for judicial review nor does it give the hearing officer the opportunity to correct her errors.
- ▶ **Do not over-object.** To preserve your right to judicial review of the hearing officer's errors, you must object to each issue individually. You do not, however, need to object to the error repeatedly.
- ▶ **Make your objections *before* the hearing officer adjourns to reach her disposition.** Because the purpose of making objections is to give the hearing officer the opportunity to correct an error, making objections close to the time that the hearing officer violates your rights is the preferred time for doing so. Usually the hearing officer will ask for any final procedural objections just before adjourning to determine the disposition, at which point you can raise or renew your objections.
- ▶ **Have a factual basis for your objection.** Don't object where the facts do not support your objection. Objecting that the hearing officer wrongfully denied a request to view a videotape can be a strong claim – but it has no value unless you requested the tape. See Matter of Jamison v. Fischer, 989 N.Y.S.2d 706 (3d Dep't 2014).

Preserving Your Right to Challenge the Sufficiency of the Evidence

Article 78 requires that a court reverse a hearing where the determination of guilt is not supported by substantial evidence.³ When a prisoner argues that the determination of guilt is not supported by substantial evidence, it means that there is **insufficient** (not enough) evidence to show that he is guilty of the charges, see Matter of Owens v. Fischer, 907 N.Y.S.2d 334 (3d Dep't 2010) (substantial evidence did not support the determination that inmate was guilty of attempted assault where there was no evidence that inmate, in turning toward officers during a pat frisk, acted in any manner that was aggressive or threatening), or that the conduct in which she allegedly engaged does not violate the rule that she is charged with having violated, see Matter of Fulton v. Chase, 981 N.Y.S.2d 840 (3d Dep't 2014) (substantial evidence did not support determination that prisoner was guilty of harassment based on sending a letter to a female officer where language in the letter was not personal in nature as is required by the rule).

The right to judicial review of the sufficiency of the evidence should be preserved by objecting at the hearing and by raising the issue in your appeal to the Office of Special Housing.⁴

³ A determination of guilt is supported by substantial evidence when there is "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact." 300 Gramatan Avenue Associates v. State Division of Human Rights, 408 N.Y.S.2d 54 (1978).

⁴ There is a split in the Appellate Divisions as to whether courts have the inherent authority to review the evidentiary sufficiency of an administrative decision. Cases in the Third Department hold that the courts have this authority even where the issue was not raised on administrative appeal. See e.g., Matter of Rosado v. Coughlin, 550 N.Y.S.2d 168 (3d Dep't 1990). The Third Department has also held that it has the authority to review whether a determination of guilt is supported by substantial evidence even where the prisoner did not raise this issue in his Article 78 petition. Matter of Wanton

The Preservation of Claims Relating to Confidential Information

A hearing officer may rely on confidential information as support for a determination of guilt. Confidential information **constitutes** (amounts to) substantial evidence of guilt where it is credible and reliable. The hearing officer is required to make an independent assessment of the reliability and credibility of the confidential information.

It is unlikely that a prisoner or his attorney will learn the source of the confidential information or the details of the information. However, where the claim that the confidential information is not sufficiently reliable and credible is preserved for judicial review, the court will review the confidential information and determine whether it is reliable and credible. For this reason, it is particularly important to preserve this issue for judicial review. See Matter of Haigler v. Fischer, 989 N.Y.S.2d 698 (3d Dep't 2014) (finding that determination of guilt was not supported by substantial evidence where investigator did not provide sufficient detail to allow hearing officer to independently assess credibility of the confidential information). The issues of the sufficiency of the confidential information and the failure of the hearing officer to make an independent assessment of its reliability and

v. Coughlin, 503 N.Y.S.2d 186 (3d Dep't 1986); Matter of Alvarado v. LeFevre, 488 N.Y.S.2d 856 (3d Dep't 1985).

Fourth Department cases, however, hold that unless the issue of the sufficiency of the evidence is raised on administrative appeal, the issue has not been exhausted and the court lacks the authority to review the issue. See, Matter of Wearen v. Bish, 768 N.Y.S.2d 874 (4th Dep't 2003); Matter of White v. Goord, 749 N.Y.S.2d 451 (4th Dep't 2002); Matter of Moore v. Goord, 720 N.Y.S.2d 694 (4th Dep't 2001). See, Matter of McFadden v. Bezio, 937 N.Y.S.2d 702 (3d Dep't 2012) (finding that the issue of substantial evidence was unpreserved for judicial review because it was not raised in the petition); Matter of Alvarez v. Fischer, 942 N.Y.S.2d 711 (4th Dep't 2012) (substantial evidence was abandoned because it was not addressed in the brief).

credibility should be raised at the hearing and in your administrative appeal.

Preserving Your Right to Judicial Review of Procedural Errors

Generally speaking, to preserve objections for judicial review, a prisoner must object to procedural errors during the Tier III hearing. The one exception to this rule is where the procedural error “arises from a defect that appears on the face of the record,” and cannot be remedied by the hearing officer. Under those circumstances, it is sufficient to *raise the issue in your administrative appeal*. See, Matter of Morales v. Fischer, 934 N.Y.S.2d 526 (3d Dep't 2011). In Morales, the petitioner complained that he was impermissibly denied his right to observe part of a cell search that took place when he was removed from his cell partway through the search. Since the hearing officer could not go back in time and allow the petitioner to observe the search, the failure to object to this issue at the hearing was not fatal. The court found that the petitioner had adequately preserved the issue by raising it in his administrative appeal.

Objecting at the Hearing

To preserve an issue for review, you do not have to use the word “object” or “objection,” but using these words clarifies your intent and leaves no room for doubt as to whether the issue has been preserved. Whatever language you use to express your disagreement with the hearing officer’s conduct, the hearing record must show that you disagreed with the hearing officer’s rulings, decisions, actions or refusals to act and that you did not **acquiesce in** (accept) his actions.

Preservation of Specific Issues

Issues relating to the following claims must be preserved at the hearing.⁵

- **The Right to Notice of the Charges:** Issues relating to the right to notice of the charges must be preserved for judicial review at the hearing. Matter of McCollum v. Fischer, 876 N.Y.S.2d 766 (3d Dep't 2009).
- **The Right to Pre-Hearing Assistance:** Issues relating to employee assistance must be preserved for judicial review at the hearing. Matter of Krall v. Inmate Disciplinary Programs, 766 N.Y.S.2d 153 (3d Dep't 2003).

The right to challenge employee assistance as ineffective is forfeited where the prisoner refuses to attend his hearing, even where the objection to employee assistance is made before the prisoner refuses to attend. Matter of Jihad v. Mann, 553 N.Y.S.2d 235 (3d Dep't 1990).
- **The Right to a Timely Beginning and End of the Hearing:** Issues involving whether the hearing was commenced (started) and ended within the regulatory time frame must be preserved for judicial review by raising them at the hearing. Matter of Coleman v. Fischer, 928 N.Y.S.2d 153 (3d Dep't 2011).
- **The Right to the Production of Documentary Evidence:** Issues involving requests for documents, photographs or other records, must be preserved for judicial review by raising such requests at the hearing. Matter of Knight v. Bezio, 919 N.Y.S.2d 220 (3d Dep't 2011).

- **The Right to Call Witnesses:** All issues involving requests for witnesses must be preserved for judicial review at the hearing. Matter of Terrence v. Fischer, 884 N.Y.S.2d 277 (3d Dep't 2009); Matter of Amato v. Fischer, 982 N.Y.S.2d 196 (3d Dep't 2014) (finding that where the petitioner did not object to the hearing officer's decision to call only 2 of 8 requested witnesses, the petitioner had failed to preserve his right to judicial review of his claim that the hearing officer had violated his right to call witnesses).

Where witnesses are listed on the employee assistant form, but the prisoner fails to request the witnesses at the hearing, courts will find that he failed to preserve the claim that his right to call witnesses was violated. Matter of Frazier v. Artus, 836 N.Y.S.2d 352 (3d Dep't 2007).

Where an officer reports that an inmate witness refuses to testify but there is no explanation in the record as to why your witness refused to testify, or the explanation provided is inadequate, the hearing officer is required to inquire about the witness's reason for refusing. See, generally, Matter of Hill v. Selsky, 795 N.Y.S.2d 794 (3d Dep't 2005). Where the reason for a witness's refusal to testify is not in the record, to preserve his right to judicial review of this issue, the prisoner must ask the hearing officer to find out the reason that the witness refused to testify. Matter of Samuel v. Fischer, 861 N.Y.S.2d 523 (3d Dep't 2008). Where the hearing officer does not find out the reason that the witness refused to testify, to preserve the right to judicial review of the adequacy of the hearing officer's efforts, the prisoner must object to the hearing officer's investigation during the hearing. Matter of Taylor v. Fischer, 932 N.Y.S.2d 591 (3d Dep't 2011).

⁵ For an explanation of each of the rights discussed below, you can contact your regional PLS office and request a copy of the memo, *Your Rights at a Tier III (Superintendent's) Hearing*.

If a witness completes the witness refusal form, but the accused prisoner asserts that the hearing officer did not make sufficient inquiry into the reason for the refusal, the prisoner must place his objections on the hearing record. Matter of Hill v. Fischer, 893 N.Y.S.2d 339 (3d Dep't 2010); Matter of Tafari v. Brown, 849 N.Y.S.2d 327 (3d Dep't 2008) (where petitioner failed to question at the hearing the genuineness of witnesses' statements that they did not want to testify, the issue was not preserved for judicial review).

- **The Right to an Impartial and Unbiased Hearing Officer:** The case law is inconsistent with respect to how to preserve for judicial review issues relating to hearing officer bias or partiality. There are decisions holding that raising hearing officer bias for the first time on administrative appeal sufficiently preserves the issue. See, e.g., Matter of Harvey v. Fischer, 942 N.Y.S.2d 680 (3d Dep't 2012); Matter of White v. Goord, 749 N.Y.S.2d 451 (4th Dep't 2002). Other decisions, however, suggest that the issue of hearing officer bias must be raised during the hearing. See, e.g., Matter of Washington v. Fischer, 926 N.Y.S.2d 208 (3d Dep't 2011); Matter of Cepeda v. Goord, 834 N.Y.S.2d 265 (2d Dep't 2007). Given this inconsistency, we recommend that you raise the issue at your first opportunity. If you are aware of hearing officer bias or partiality at the hearing, you should object at the hearing and also raise the issue in your administrative appeal.
- **The Right to Be Present:** A prisoner has a fundamental (federal constitutional) right to be present at a Tier III hearing. Wolff v. McDonnell, 418 U.S. 539 (1974); Matter of Jihad v. Mann, 553 N.Y.S.2d 235 (1990). A prisoner will be found to have waived this right where he willfully refuses to attend the hearing after being informed that if he does not attend, the hearing will proceed in his

absence. Matter of Abbas v. Selsky, 802 N.Y.S.2d 798 (3d Dep't 2005). A prisoner's failure to attend the hearing may be found not to be a willful refusal where he has good cause not to attend and informs the hearing officer about the reason that he is not attending. Matter of Alicea v. Coughlin, 819 N.Y.S.2d 202 (3d Dep't 2006).

Where a prisoner fails to communicate to the hearing officer the reason for not attending the hearing, it is less likely that a court will find either that the prisoner preserved his right to judicial review of the violation of his right to be present or that his right to attend was violated. To maximize the chance that the court will reach the issue of whether your right to be present was violated where you are unable to go to the hearing, we advise that on the form entitled Waiver of Right to Attend Hearing, which the escort officer will give you to sign, you to draw a line through the words "Waiver of Right to Attend Hearing" at the top of the form and on the form write the reason that you did not leave your cell to attend the hearing.

Preserving Procedural Challenges in Your Administrative Appeal

Your right to an electronic recording of your hearing is one procedural right that is most likely to be raised for the first time on appeal. A second right that can be preserved by raising it for the first time in your administrative appeal is the right not to be excluded from your hearing unless your conduct threatens prison safety or security.⁶

⁶ The right to not be wrongfully excluded is an aspect of the right to be present at a Tier III hearing. As noted above, where you are unable to attend the hearing, you should document the reason that you could not attend on the Waiver of Right to Attend Hearing form and should address this issue in your administrative appeal.

The Right to an Electronically Recorded Hearing

The Department's regulations provide that a Tier III hearing should be electronically recorded. 7 N.Y.C.R.R. §254.6(a)(2). The purpose of this requirement is to provide a basis for administrative and judicial review of the hearing. An inaudible or incomplete hearing tape may result in a transcript that does not allow for meaningful review of the hearing. See, e.g., Matter of Douglas v. Goord, 806 N.Y.S.2d 270 (3d Dep't 2005) (finding that where the parties disagreed about the substance of a witness's testimony upon which the hearing officer relied, the failure to record the witness's testimony precluded meaningful review of the hearing); but see, Matter of Smythe v. Fischer, 955 N.Y.S.2d 461 (3d Dep't 2012) (finding that the transcript of the hearing was sufficiently complete so as to allow meaningful review); Matter of Machicote v. Bezio, 928 N.Y.S.2d 382 (3d Dep't 2011) (holding that where the hearing transcript had only "minor gaps," the failure to record the entire hearing was harmless error).

The case law does not address what actions the prisoner must take to preserve this issue. Nonetheless, where, during the hearing, the accused prisoner knows that portions of the hearing were not recorded, before the hearing ends, he should make an objection that the hearing was not completely recorded, and if he knows, state on the record what occurred while the tape recorder was off.

The Right to Be Present at the Hearing: Wrongful Exclusion from the Hearing

A prisoner may forfeit his right to attend a hearing by engaging in disruptive conduct at the hearing or on the way to the hearing. Matter of Holmes v. Drown, 804 N.Y.S.2d 823, 824 (3d Dep't 2005); Matter of Berrian v. Selsky, 763 N.Y.S.2d 111 (3d Dep't 2003). Prior to excluding a prisoner from a Tier III hearing, the

hearing officer must warn him that if he continues to engage in the conduct which the hearing officer has decided is disruptive, the hearing officer will exclude the prisoner and conduct the hearing in his absence. Matter of Rupnarine v. Prack, 986 N.Y.S.2d 716 (3d Dep't 2014). If you were wrongfully excluded from your hearing, to preserve your right to judicial review of the hearing officer's decision to exclude you, you should raise the issue of wrongful exclusion in your administrative appeal to the Director of Special Housing.

Conclusion

Knowing how to preserve claims for judicial review and how to exhaust administrative remedies are necessary parts of successful Article 78 challenges to Tier III hearings. Part of representing yourself at a Tier III hearing includes preparing for an appeal in the event that you are found guilty. If you face charges of misbehavior in the future, the principles and decisions discussed in this article should help you prepare to defend yourself and, if necessary, to challenge your hearing in an Article 78 proceeding.

This *Pro Se Practice* article was written by Sophia Heller, a staff attorney in the Albany Office of PLS.

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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:

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

Prisons served: Bedford Hills, CNYPC, Cossackie, Downstate, Eastern, Edgecombe, Fishkill, Great Meadow, Greene, Greenhaven, Hale Creek, Hudson, Lincoln, Marcy, Midstate, Mohawk, 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.

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Prisons served: Auburn, Butler, Cape Vincent, Cayuga, Elmira, Five Points, Monterey Shock, Southport, Watertown, Willard.

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