

Pro Se

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Class Certified in Case Seeking Damages for Unlawful Imposition of Post-Release Supervision

Introduction

The plaintiffs in a lawsuit against the DOCCS officials who administratively imposed post-release supervision on thousands of prisoners, including the plaintiffs, recently achieved a significant victory for the victims of the Department's practice: the judge in Betances, Barnes, Velez, et al. v. Fischer, Annucci, Leclair, et al., 2015 WL 363174 (S.D.N.Y. Jan. 28, 2015), granted the plaintiffs' motion to represent the class of plaintiffs upon whom the defendants administratively imposed post-release supervision. This means that if the plaintiffs are successful in **proving liability** (that the defendants are legally responsible for violating the plaintiffs' rights), all the members of the class will be eligible for damages. A review of the history of this case and the issues addressed in the most recent decision should persuade even the most cynical in the prisoners' rights movement that it is possible to achieve justice through the courts.

History

Betances v. Fischer, Index No. 11 CV 3200, S.D.N.Y., was filed in 2011. It was styled as a class action lawsuit seeking damages for the likely thousands of individuals who were injured by DOCCS administrative imposition of post-release supervision. The challenged practice began in 1998, when the legislature imposed a requirement that all defendants sentenced to determinate terms

of imprisonment had to serve a period of post-release supervision when they are released from prison. As noted by the judge in Betances, the law did not require the sentencing courts to announce the term of post-release supervision. In thousands of cases where the courts did not impose post-release supervision at sentencing, DOCCS did so when the individuals were released.

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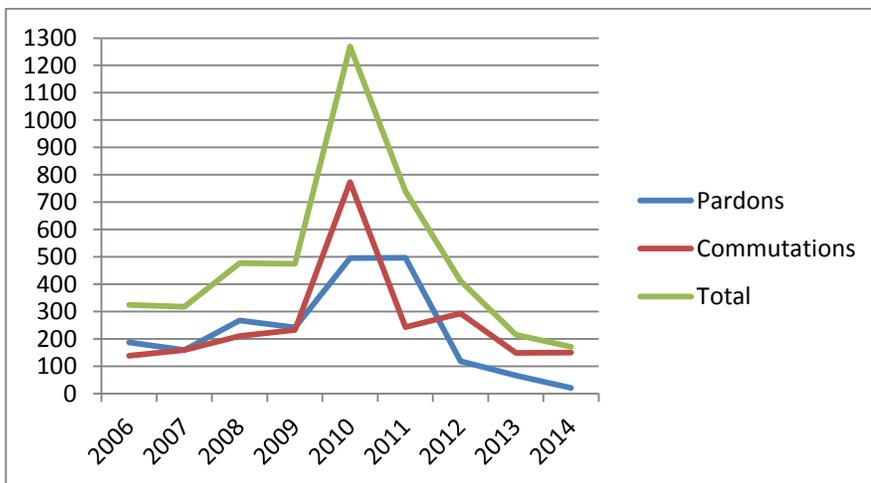
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PARDON ME, CAN YOU COMMUTE MY SENTENCE?

A Message from the Executive Director – Karen L. Murtagh

Over the past several months we have received a number of questions about executive clemency. These requests may be due in part to Governor Cuomo's press release on December 31, 2014, wherein he announced a new clemency website to serve as a central resource for anyone wishing to apply for executive clemency. The website, <http://www.ny.gov/services/apply-clemency>, explains that an application for clemency typically comes as either a request for a sentence commutation or a pardon and that the Governor has the power to grant a clemency request. "A commutation is a sentence reduction and a pardon provides unique relief for individuals who have completed their sentences but remain disadvantaged by their criminal history."

As shown in the chart below, between 2006 and 2010 the requests for executive clemency slowly increased, reaching a high of 1,269 applications in 2010. Since that time, however, requests for pardons and sentence commutations have declined dramatically.



Regardless of the number of requests, very few requests are granted: out of 4,401 requests over an eight year period, a total of 42 pardons and 5 sentence commutations were granted or 0.9 percent. On the other hand, there appears to be somewhat of a relationship between the number of requests received and the number granted. In 2008 there were 477 total requests made for either pardons or commutations and in response the Governor granted a total of three applications (2 commutations and 1 pardon) or 0.6 percent. In 2010, 1,269 requests were made and 36 applications were granted (34 pardons and 2 commutations) or 2.8 percent. Although a number of different factors affect a Governor's decision to grant executive clemency, including the fact that the 2010 pardons were granted during Governor Paterson's last year as Governor, if you are eligible, it certainly does not hurt to submit the application.

We reprint below the information on the clemency website regarding the process for submission of both pardon and sentence commutation applications and urge you and/or your loved ones to submit such an application if you believe you are eligible.

Information from DOCCS Website on the Process of Applying for Clemency

The Executive Clemency Bureau is a unit within the [New York State Department of Corrections and Community Supervision](#) that assists the Governor's Office with clemency applications. The Executive Clemency Bureau receives applications and begins a review process, which includes compiling past criminal and/or inmate records. The Bureau then sends completed applications to the Governor's Office for review.

PARDONS

Pardons provide unique relief for *individuals who have completed their sentences* but remain disadvantaged by their criminal history.

A pardon is most often granted to:

- Set aside a conviction when overwhelming evidence and convincing proof of innocence becomes available;
- Relieve a disability that is imposed because of a conviction (such as ineligibility to receive State occupational licenses for first-time felons); or
- Prevent deportation from or permit re-entry into the United States.

Pardon applicants must demonstrate a specific and compelling need for relief and a substantial period of good citizenship.

Unless there are exceptional and compelling circumstances, a pardon is not considered if the applicant has other administrative remedies available to them, such as a certificate of good conduct or a certificate of relief from disabilities, pursuant to provisions of Article 23 of the Corrections Law.

For information concerning certificates of relief and certificates of good conduct, write to: New York State Department of Corrections and Community Supervision, Executive Clemency Bureau, The Harriman State Campus – Building 2, 1220 Washington Ave, Albany, NY 12226-2050, or email PardonsAndCommutations@doccs.ny.gov.

COMMUTATIONS

A commutation reduces an inmate's current sentence. The Governor may commute a sentence in any way that he considers appropriate. Most commonly, an inmate's sentence is reduced to allow the inmate to appear before the Board of Parole to be considered for release on an earlier date than he or she is normally scheduled to appear. A sentence may also be reduced to allow an inmate to be released immediately or on a specific date.

Except for extraordinary circumstances, a commutation of sentence will be considered only if:

- The inmate's minimum period of imprisonment is more than one year;
- The inmate has served at least one-half of his or her minimum prison term; and
- The inmate is not eligible for parole within one year of the date of his or her application for clemency.

Commutation Eligibility

An inmate will *not* be considered for a commutation merely as a reward for good conduct. There must be a reasonable probability that if the inmate is released, he or she will live and remain at liberty without violating the law, and that his or her release is not a threat to the public and will not denounce the seriousness of his or her crime as to undermine respect for the legal system.

A commutation of sentence is extraordinary relief. Accordingly, the applicant has the burden of demonstrating that she or he:

- Has made exceptional strides in self-development and improvement; has made responsible use of available rehabilitative programs; has addressed identified treatment needs and the commutation is in the interest of justice, consistent with public safety and the rehabilitation of the applicant; or

- He or she is suffering from a terminal illness or has a severe and chronic disability that would be substantially mitigated by release from prison, and the release is in the interest of justice and consistent with public safety; or
- Further incarceration would constitute gross unfairness because of the basic inequities involved.

If an eligible applicant has been notified that his or her application has been denied, the applicant may reapply one year after the date of notification unless authorized to do so sooner.

How to Apply

Interested applicants should apply for either a pardon or commutation and submit their entire completed packet to the New York State Department of Corrections and Community Supervision Executive Clemency Bureau as outlined below.

For Pardons

- Fill out a pardon request form available at:
http://www.ny.gov/sites/ny.gov/files/atoms/files/pardon_request_form.pdf
- Write a letter describing the applicant's need for a pardon and examples of rehabilitation and provide positive accomplishments since his or her conviction (for example: program completion, community involvement, education achievements, employment history and volunteer service).
- Provide proof of such accomplishments (for example: certificates of completion, commendation letters, proof of degrees attained, etc.).
- Optional: Provide letters of support from family, friends or community members.

For Commutations

- No request form is necessary.
- Write a letter describing the applicant's need for a commutation and examples of rehabilitation and provide positive accomplishments since his or her conviction (for example: program completion, community involvement, education achievements, employment history and volunteer service).
- Provide proof of such accomplishments (for example: certificates of completion, commendation letters, proof of degrees attained, etc.).
- Include the applicant's Social Security number, Departmental Identification Number (DIN) if available, NYSID Number, FBI Number, or Alien Registration Number for immigration cases.
- Optional: Provide letters of support from family, friends or community members.

Send your application letter and supporting documents to:

**New York State Department of Corrections and Community Supervision
Executive Clemency Bureau**
The Harriman State Campus – Building 2
1220 Washington Ave
Albany, NY 12226-2050

OR

Scan and email your application package to the following address:
PardonsAndCommutations@doccs.ny.gov

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On June 9, 2006, in Earley v. Murray, 451 F.3d 71 (2d Cir. 2006), the Second Circuit held that the administrative imposition of post-release supervision violates the federal constitutional right to due process of law. The court expressly said: the additional provision for post-release supervision added by DOCCS is a nullity.

The Betances complaint alleges that in the years following the Earley decision, the defendants subjected the plaintiffs to various unlawful conditions and custody by continuing to impose terms of post-release supervision on them in violation of their rights to due process of law.

The defendants asked the court to dismiss the action, asserting that the plaintiffs' rights were not clearly established at the time those rights were allegedly violated. This fact, the defendants argued, gave them qualified immunity for their actions. (Qualified immunity protects prison officials from liability for damages when reasonable prison officials would not have known that their conduct was unlawful). In February 2012, the court denied the defendants' motion, finding that though some New York state courts disagreed about the reach of the Earley decision, there was never any disagreement or confusion about the core constitutional holding announced by Earley: terms of post-release supervision imposed by DOCCS were nullified and if the State wished to re-impose them, it could seek re-sentencing. This ruling was affirmed by the Second Circuit on June 4, 2013.

Motion for Class Certification

After the Second Circuit's decision affirming the district court's conclusion that the defendants were not entitled to qualified immunity, the plaintiffs moved to have a class of plaintiffs certified by the district court. A lawsuit that is certified as a class action allows the court to order relief for all the members of the class. This includes people who are not named as plaintiffs.

The plaintiffs defined the class as individuals:

- who were convicted of various crimes in NYS courts on or after 9/1/98;
- who were sentenced to terms of incarceration but not to terms of post-release supervision;

- who were, after June 9, 2006, subjected to enforcement by defendants of post-release supervision terms after the maximum expiration dates of their determinate sentences.

Please note that the class does not include individuals who were only hurt by the administrative imposition of post-release supervision before June 9, 2006.

Rule 23 of the Federal Rules of Civil Procedure sets the requirements for class certification. To **prevail in** (win) a motion for class certification, the moving party must meet four criteria known as numerosity, commonality, typicality, and adequacy. In addition, some courts have added an implied requirement of "ascertainability" to the requirements of Rule 23. If the plaintiffs meet these criteria, Rule 23 requires that they must also meet two other criteria, in this case, whether questions of law or fact common to the members of the class predominate over any questions affecting only individual members and whether class litigation is superior to other available methods for the fair and efficient adjudication of the controversy.

Numerosity

The number of people in the class must be so great that joining all the members as plaintiffs is impracticable. In this case, the defendants' records show that 8,100 individuals entered DOCCS custody with sentence and commitment orders that were silent as to post-release supervision. Of this number, 1,800 had been released from custody and 546 were incarcerated on the basis of administratively imposed post-release supervision. The defendants conceded that the proposed class met the numerosity requirement.

Commonality

There must be questions of law or fact that are common to the class. Claims must depend on a common contention of such a nature that it is capable of classwide resolution, that is, determination of the truth or falsity of the claim will resolve an issue that is central to the validity of each one of the claims in one stroke. The court found that the plaintiffs' injuries all stemmed from a single practice: the enforcement of administratively imposed post-release supervision after the Second Circuit clearly established that the

practice was unconstitutional. Based on the definition of the class, the court wrote, all class members have suffered injuries from the enforcement of the policy of administratively imposing post-release supervision. Thus, the court found the plaintiffs had demonstrated commonality.

Typicality

Typicality requires that the claims of the class representatives be typical of those of the class. This requirement is satisfied when each class member's claim arises from the same course of events and class members make similar legal arguments to prove the defendants' liability. Here, pursuant to the defendants' policy, terms of post-release supervision were imposed on proposed class members after the date of the Second Circuit's decision in Earley. The named plaintiffs (Betances, Barnes and Velez) all suffered injuries based on defendants' policy of imposing and enforcing post-release supervision on persons whose sentences did not include a term of post-release supervision. Therefore, the court wrote, as the lead plaintiffs allege claims based on a unitary course of conduct by the defendants, typicality is satisfied.

Adequacy

Adequacy requires the plaintiffs to show that 1) the plaintiffs' interests are not antagonistic to the interests of the other members of the class, and that 2) the plaintiffs' attorneys are qualified, experienced and able to conduct the litigation. With respect to the first prong, the court held that class representatives fairly and adequately protect the interests of the class because they have suffered injuries from the same course of conduct as all of the other class members. As to the second prong, the defendants did not challenge that the plaintiffs' attorneys, Emery Celli Brinckerhoff and Abady, is a preeminent civil rights law firm. Based on these two findings, the court concluded that the class representatives would fairly and adequately protect the interests of the class.

Ascertainability

To meet this implied requirement, the class description must be sufficiently definite so that it is administratively **feasible** (possible and practicable)

for the court to determine whether a particular individual is a member. The court found that the defendants' computer system was capable of identifying all individuals who were subjected to administratively imposed post-release supervision. Thus, the court held, the class is sufficiently ascertainable and definite.

Common Questions of Law Predominate

The court found that the common question of defendants' liability for the enforcement of administratively imposed post-release supervision **predominates** (are of greater significance) over individual issues. It noted that two central questions in this case have already been previously asked and answered. First, in Earley, the Second Circuit held that administratively imposing post-release supervision is unconstitutional. Second, the Second Circuit affirmed the court's finding that Earley clearly established the plaintiffs' constitutional rights such that the defendants are not entitled to qualified immunity. The common question that remains, the court held, is whether the individual defendants should be held liable for these violations.

Resolution By Means of a Class Action Is Superior to Other Available Methods

The court found that resolution by means of a class action is superior to other methods of **adjudication** (making a determination). The class includes thousands of members, and class certification will allow their claims to be resolved in a single forum. The court also found that because the class is composed of individuals who have been convicted of felonies, it is appropriate for the court to consider the inability of the poor or uninformed to enforce their rights, and the improbability that large numbers of the class would take the initiative to litigate their claims.

Based on the above, the court granted the plaintiffs' motion for class certification. It appears that the next step will be that the parties will file motions for summary judgment on the issue of whether the defendants should be held liable for the violations of the plaintiffs' constitutional rights.

Emery Celli Brinckerhoff and Abady represent the plaintiffs in this Section 1983 action.

Letters to the Editor

Dear Editors:

Salutations to all of the staff at PLS and *Pro Se*. I have been a grateful recipient of *Pro Se* for quite some time and appreciate your efforts to empower those in search of legal knowledge. I need to learn all that I can not only to improve my own work for justice and equality but also to help others who are impacted by legal obstacles.

On behalf of myself and the many prisoners, family, friends in prison and on the street, thank you to all who staff *Pro Se* and PLS.

Yours Truly,

Malik Robinson

Letters to the editor should be addressed to:

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114 Prospect Street

Ithaca, NY 14850

ATTN: Letters to the Editor.

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.

Pro Se Victories!

Shane Hyatt v. State of New York, Claim No. 118516 (Ct. Clms. Dec. 22, 2014). Shane Hyatt successfully sued the State of New York for damages relating to injuries resulting from a poorly constructed shower stall at Upstate C.F.

Although there was a 4 inch lip limiting the flow of water from the shower to the floor of Shane Hyatt's cell, there was no shower curtain and no drain in the cell itself. As a result, water pooled on the cell floor. Following a shower, the puddle on the cell floor caused Mr. Hyatt to slip and injure his

back. The court found that by showing that in addition to the normal amount of water encountered from such a shower cell, the lack of a shower curtain, mats or towels to soak up the water, combined with the absence of a drain in the cell floor, Mr. Hyatt had **demonstrated** (proved) that the defendant's conduct had created an unreasonably dangerous condition above and beyond that typically encountered in such an area. However, the court also held that Mr. Hyatt was 50% responsible for the fall; that is, he had actual notice of the dangerous condition and therefore the State should not be held more than 50% responsible for his injuries.

Victor Keven Thomas v. State of NY, Claim No. 120087(Ct. Clms. Jan. 13, 2015). Court finds in Shaka 2X's (a.k.a. Victor Keven Thomas) favor with respect to lost property claim.

When Shaka 2X was taken from general population to SHU, he was not allowed to inventory his property and when he was released from SHU and reunited with his property, items were missing. At trial, to prove that he had possessed the missing radio, headphones and a clip-on lamp, Shaka 2X introduced permits to possess these items. The court awarded him the depreciated value of the items, plus interest, and ordered that the clerk refund the filing fee that he had paid.

Matter of Michel Toliver v. NYS DOCCS, Index No. 47587, (Sup. Ct. Seneca Co. Dec. 27, 2013). Court holds that the hearing officer's decision to exclude Michel Toliver from the hearing because he would not get out of his wheelchair to sit on a stool in a caged area of the hearing room violated Mr. Toliver's right to be present.

The court found that where the hearing officer failed to seek testimony from the medical staff as to whether Mr. Toliver was in fact capable of standing up, walking to the stool and sitting on the stool for the length of the hearing, and where there was a wheelchair accessible hearing room in the prison, excluding Mr. Toliver from the hearing violated his right to be present.

Matter of Michel Toliver v. NYS DOCCS, Index No. 13-4029 (Sup. Ct. Ulster Co. Jan. 5, 2015). Court orders rehearing where Michel Toliver was not present at his TAC hearing.

In his Article 78 petition, Michel Toliver alleged that his TAC hearing was procedurally defective because he was not provided with documents and information that he had requested be given to him before the scheduled hearing and because he was denied the opportunity to have and participate in a timely hearing. The respondent countered by claiming Mr. Toliver had been provided with the documents and had refused to attend the hearing. The court noted a letter sent to the respondents the day before the hearing advising them that Mr. Toliver had not yet received the requested documents was a basis for vacating the determination and remanding the matter for a re-scheduled TAC hearing at which the respondents can show that Mr. Toliver received proper documentation prior to the hearing.

Matter of Derrick Omaro v. Albert Prack, Index No. 6967-13 (Sup. Ct. Albany Co. Oct. 2, 2014). Court reverses Tier III hearing due to hearing officer's failure to call an I.G. investigator as a witness.

Derrick Omaro was charged with violating package room procedures. One of the packages at issue contained a cell phone concealed in rice. The packages were sent by a vendor approved by DOCCS. There was no paperwork showing that Mr. Omaro had ordered the items. The court found that the hearing officer's refusal to call the IG investigator as a witness, because "no such person was involved in the incident" (in spite of the fact that the package with the cell phone had been given to an IG investigator), was **disingenuous** (not candid or sincere). Finding that the hearing officer had not stated a good faith basis for the denial, the court ordered the hearing reversed and the charges expunged.

People ex rel. Ralph Kazmirski v. Anthony Annucci, Index No. 48752-14 (Sup. Ct. Seneca Co. Jan. 22, 2015). Court rejects the Department's argument that because he did not have two years credit as a Program Aid II, petitioner was not entitled to a Limited Credit Time Allowance (LCTA).

The Department's records showed that Ralph Kazmirski worked as a Program Aide II for over 5 years. Yet, when he applied for LCTA, his application was denied because he did not have two years as an Inmate Program Associate (IPA). After the determination was affirmed on appeal, Mr. Kazmirski filed an Article 78 asserting that the denial was arbitrary and capricious. The Department argued that Program Aide II is an IPA position, but as of the fall of 2010, a library clerk is not. However, shortly after this change went into effect, in response to Mr. Kazmirski's inquiries, Superintendent Zenzen and Program Services Acting Deputy Commission advised petitioner that the time that he had spent working as a Program Aid II would count for LCTA consideration. In the litigation, the Deputy Commissioner acknowledged that she had mis-advised Mr. Kazmirski. Further, the respondents argued that for some of the relevant period, Mr. Kazmirski's title was changed from Program Aid II to Special Assignment.

The court rejected these arguments. The court noted that in DOCCS records, Mr. Kazmirski's status was always Program Aid II; he was never listed as Library Clerk or Special Assignment. He was denied LCTA for insufficient Program Aid II experience. The Directive 4792 states that Program Aid II is an IPA position. The DOCCS computer printout shows that Mr. Kazmirski worked as a Program Aid II for over two years. In addition, Mr. Kazmirski was told that his work experience in various Program Aid II positions qualified him for LCTA consideration. Based on these circumstances, the court found the Department's determination to be arbitrary and capricious.

Matter of Nelson Angarita v. Anthony Annucci, Index No. 1449-14 (Sup. Ct. Albany Co. Mar. 4, 2015). Court finds Nelson Angarita did not waive his right to employee assistance and that the hearing officer (HO) violated his right to call witnesses.

When his hearing convened, Nelson Angarita told the hearing officer (HO) that he had not received either the misbehavior report or employee assistance. The HO adjourned so Mr. Angarita could be served and be offered assistance. When the hearing was reconvened, Mr. Angarita again complained that he had not been offered assistance or the misbehavior report. There was conflicting testimony from a guard who submitted a form,

unsigned by Mr. Angarita, saying that assistance had been offered but that Mr. Angarita, who was admittedly in the shower at the time, made no response, which the guard interpreted as a refusal. The Court held that since there was no indication that Mr. Angarita had heard the offer, the respondent had not demonstrated a knowing and voluntary waiver of his right to assistance. The court also found that the HO had violated Mr. Angarita's right to a witness whose testimony, Mr. Angarita had shown, was relevant and material. Based on these violations of Mr. Angarita's rights, the court ordered the hearing reversed and all references to the charges expunged from Mr. Angarita's records.

Matter of Hector Lopez v. Anthony Annucci, Index No. 2725-14 (Sup. Ct. Albany Co. Jan. 7, 2015). Court reverses hearing and orders expungement of charges due to hearing officer's failure to produce a letter requested by the prisoner at the hearing. The court finds that the letter might have resolved the issue of whether the prisoner had violated the inmate correspondence rules, a charge that the prisoner denied.

Hector Lopez was charged with sending money to a parolee. He asserted that he sent money to the parolee's father, who had the same name and same address as the parolee. He further testified that the letter in the envelope attached to the disbursement request would have shown that he was not writing to the parolee but to his father. The hearing officer failed to produce the letter. The court found Mr. Lopez's right to the production of relevant and material evidence had been violated and that his defense had been prejudiced by the violation. Based on these findings, the court ordered the hearing reversed and the charges expunged.

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 decisions 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

Court of Claims

Court Awards \$35,000 for Three Weeks of Excessive Confinement

After spending more than a year and a half in pre-trial confinement, Robert Miller was sentenced to a determinate term of 1½ years and 1½ years of post-release supervision. He was then committed to DOCCS custody for what he believed would be a day of "processing" but remained in prison for three weeks. Upon his release, Mr. Miller filed a claim seeking damages for wrongful confinement. In *Miller v. State*, 124 A.D.3d 997 (3d Dep't 2015), the court affirmed a court of claims decision finding the State liable for negligent and unauthorized imprisonment and awarding the claimant \$35,000.00 in damages.

To succeed in a claim for false imprisonment or unlawful confinement, the claimant must show that:

1. The defendant intended to confine him;
2. He was conscious of the confinement;
3. He did not consent to the confinement;
4. The confinement was not otherwise privileged;

The defendant argued that the confinement was privileged. The appellate court agreed with the lower court: the confinement was not privileged because the sentence and commitment order authorized confinement only for 1½ years. "DOCCS was conclusively bound by the terms of the sentence and commitment order which unambiguously directed that claimant be released after 1½ years of confinement," wrote the court. The court also rejected the argument that additional time was needed to finalize the terms of the claimant's post-release supervision, stating, "Claimant was not confined after the maximum expiration date of his sentence because of 'any

conflicting mandates' in the commitment order, but rather because DOCCS chose to hold him while they belatedly finalized the terms of his post-release supervision." Finally, the court noted that the argument that DOCCS acted within its discretion by confining the claimant until those terms had been finalized is also without merit as it is well settled that DOCCS has no jurisdiction to extend or modify a prison sentence. Thus, the court concluded, the State was properly found liable for the excessive confinement.

With respect to the issue of the amount of damages that the lower court ordered, the court first noted that the measure of damages for false imprisonment is "such a sum as will fairly and reasonably compensate the injured person for injuries caused by the defendant's wrongful act, including damages for physical and mental suffering." Here the claimant knew that his sentence had expired but DOCCS officials refused to tell him why he was being confined. In addition, because of interference from other inmates, he was unable to tell his family about his problem. And, he lived in self-imposed isolation because he feared other inmates and his PTSD symptoms were **exacerbated** (made worse) by his confinement. While the defendant argued that \$35,000 was disproportionately high, the court disagreed, finding that the award does not deviate materially from what is reasonable compensation.

Robert Miller was represented by Stoll, Glickman & Bellina in this Court of Claims action.

Court Reverses Finding of Liability

In Williams v. State of New York, 125 A.D.3d 1472 (4th Dep't 2015), the Third Department considered an appeal filed by the State from a judgment against it. After Daniel Williams was assaulted by several inmates, he filed a claim asserting that the State had negligently failed to protect him. At trial, the judge found that DOCCS officers had **breached** (violated) their duty to protect Mr. Williams and awarded damages. Applying the principle that the occurrence of an inmate assault – without credible evidence that the assault was reasonably foreseeable –

cannot establish the negligence of the State, the court reversed the finding of liability. Here, although Mr. Williams had been the victim of an assault by a gang member, the Third Department held that a second assault by members of the same gang was not reasonably foreseeable.

Daniel Williams represented himself in this Court of Claims action.

Court Upholds Finding of Deviation from Accepted Standards of Medical Practice

On November 20, 2006, while playing basketball, Sergio Black collided with another prisoner, causing his neck to bend backwards. Believing the injury to be minor, prison medical staff did not order an MRI for a week. A week later, after receiving the results, the doctor learned that Mr. Black's condition was serious and warranted a consultation with a specialist. A month later, before the consultation had even been approved, Mr. Black fell and further injured his spine, rendering him a paraplegic, with limited use of his hands.

At trial, Mr. Black's expert testified that the prison doctor had **deviated from** (did not follow) standards of care by failing to obtain prompt and adequate medical treatment for Mr. Black and by prescribing Neurontin, because its side effects include **ataxia** (a lack of muscle control while walking or picking up things) and dizziness. He testified that Neurontin was not an appropriate medication because Mr. Black's spinal condition, without medication, made him prone to falling. The trial court found the State 100% liable as a result of its failure to promptly refer Mr. Black for a neurological consultation, evaluation and treatment on November 20. The State appealed the judgment.

In Black v. State of New York, 999 N.Y.S.2d 921 (4th Dep't 2015), the court stated that it has the authority to set aside a trial court's findings if they are contrary to the weight of the evidence. The power may only be exercised after giving due deference to the trial court's evaluation of the credibility of the witnesses and the quality of the proof. After a bench trial, the decision of a fact finding court should not be disturbed unless it is obvious that the court's conclusions could not be

reached under any fair interpretation of the evidence.

In this case, the Fourth Department concluded that a fair interpretation of the evidence supports the trial court's conclusion that the defendant breached its duty to provide Mr. Black with adequate medical care and that this breach of its duty caused Mr. Black's catastrophic injuries (severe injury to the spine or brain).

Stephen Dratch of Franzblau Dratch, PC, represented Mr. Black and his family in this Court of Claims action.

Fourth Department Reverses Finding of Liability in Failure to Protect Case

In Anderson v. State of New York, 125 A.D.3d 1273 (4th Dep't 2015), after trial, the court concluded that the state was negligent in failing to provide adequate staffing for the mess hall where the claimant had been assaulted by other prisoners. On appeal, the court may independently consider the probative weight of the evidence and the inferences that may be drawn therefrom and grant the judgment that it deems the facts warrant.

In this case, the evidence showed that there was no history of violence between the claimant and the prisoner who attacked him and no indication that the other prisoner posed a threat to the claimant. There were 30 prisoners and one guard in the mess hall at the time of the attack. The State introduced evidence showing that inmates were required to empty their pockets and go through a metal detector before entering the yard. It also introduced evidence showing that it was appropriate to have one guard supervising up to 40 inmates and that the guard's response to the assault – summoning other guards – was appropriate.

The State's duty to protect prisoners "is limited to risks of harm that are reasonably foreseeable."

Based on its assessment of the evidence in this case, the Fourth Department concluded that the lower court's verdict was not based on a fair interpretation of the evidence. In this case, the court held, the claimant failed to show that the State did

not provide adequate supervision to prevent a risk of harm that was foreseeable. Based on this analysis, the reviewing court reversed the judgment and dismissed the claim.

Eric Anderson represented himself in this Court of Claims action.

Court Finds Testimony of Witness Denied by HO Was Redundant and Dismisses Claim

Following the administrative reversal of a Tier III hearing, Charles Watson filed a claim seeking damages for the time that he spent in SHU prior to the reversal. He asserted that the confinement was unlawful because the hearing officer had improperly denied his request to call as a witness the chaperone who was leading a tour group of visitors at the time that the incident took place. Mr. Watson believed that she would testify that she did not see him do what he was accused of doing. The HO denied the request on the ground that the witness was not a DOCCS employee. The court denied claimant's motion for summary judgement. On appeal, in Watson v. State of New York, 125 A.D.3d 1064 (3d Dep't 2015), the court affirmed the denial.

In reaching its decision, the court noted that prisoners have no right to call witnesses whose testimony would be **redundant to** (the same as) the testimony of a witness or witnesses who testified at the hearing. While the HO's refusal to call the witness may have been erroneous, the court wrote, the claimant did not establish prejudice because two correction officers testified that they did not see the claimant engage in the conduct with which he was charged. In the absence of evidence that the chaperone's testimony would have differed in any meaningful respect from that of the officers or otherwise could have changed the outcome of the hearing, the court found that the Court of Claims properly denied the claimant's motion for summary judgment.

Charles Watson represented himself in this Court of Claims action.

Miscellaneous

Court Finds Attica C.F. Policy re: Television Channels Not to be Arbitrary and Capricious

Attica C.F. is a “TV” prison. This means that at some point in the past, prisoners housed at Attica voted to have limited package privileges in order to have the option of owning personal televisions. The prison population is permitted access to premium channels if the Inmate Liaison Committee (ILC) determines that the population is in favor of that additional service.

In Matter of Bottom v. Annucci, 125 A.D.3d 1070 (3d Dep’t 2015), the petitioner filed a grievance about the lack of access to premium TV channels. The Superintendent denied the grievance, advising petitioner to take up the issue with the ILC. The CORC (Central Office Review Committed) affirmed the Superintendent’s decision. Petitioner then sought an order from the court directing the respondent to establish access to the channels. The court ruled that the grievance determination – advising petitioner to address his request to the ILC – was neither arbitrary nor capricious.

Jalil Muntaqim, also known as Anthony Bottom, represented himself in this Article 78 proceeding.

Fourth Department Reverses Family Court Order Requiring Visitation with Incarcerated Father

In Carroll v. Carroll, 125 A.D.3d 1485 (4th Dep’t 2015), the court reviewed an order from the Oswego County Family Court directing that the mother of Mr. Carroll’s daughter bring the child to visit him in prison. The appellate court noted the following facts as being relevant to its review that:

- The child’s parents had married while Mr. Carroll was in prison;
- Mr. Carroll was in prison when the child was born;

- Mr. Carroll did not establish paternity until his daughter was five years old;
- The child had only once visited Mr. Carroll in prison;
- While the father argued he had established a relationship with his daughter when he was on parole for three months in 2010, when he was on parole in 2011, he saw her only once;
- While in prison, he twice wrote to his daughter and never talked to her on the phone;
- While Mr. Carroll’s relatives can drive his daughter to see him – a 3 hour round trip – the child does not know these relatives.

The court noted that a history of domestic violence is also a factor to consider in deciding whether visitation is appropriate. Here, Mr. Carroll had admitted to having fist fights with his daughter’s mother and the mother testified that he had choked her when she was pregnant.

The court wrote that the **propriety** (correctness) of visitation is generally left to the discretion of the family court. Here, however, the court found the family court’s determination that there was no evidence that visitation would be harmful to the child and that therefore visitation was necessary and appropriate lacked a sound and substantial basis in the record. For this reason, the court found that the family court had abused its discretion when it granted the father’s petition for visitation and reversed the decision and dismissed the petition.

Michael Carroll represented himself in this appeal from a Family Court order.

FEDERAL COURT DECISIONS

Court Rules Use of Jumpsuit in Lewd Conduct Program Does Not Violate Constitution

The plaintiff in Barrow v. Van Buren, 2015 WL 417084 (N.D.N.Y. Jan. 30, 2015), was assigned to the Lewd Conduct Program (LCP) at the Marcy RMHU. Prisoners assigned to the LCP can be required to wear a “control suit,” a neon green jumpsuit that laces up the back – its only opening – with heavy string and which is secured with a

padlock at the neck and to have a sign that says “Exposer” placed above their cell doors. The plaintiff claimed that the LCP is imposed not for security purposes but to humiliate inmates and deter exhibitionist conduct. Proof of this, the plaintiff alleged, is that he is required to wear the suit even when no females are present. The plaintiff further alleged that the suit was extremely uncomfortable to wear and caused other prisoners and prison staff to ridicule him. The use of the suit and the sign, the plaintiff alleged, violates the 8th Amendment and the Americans with Disabilities Act.

The defendants moved to dismiss this claim on the ground that it did not state a claim upon which relief may be granted. In considering such a motion, the court must accept all factual allegations in the complaint as true and draw all reasonable inferences in the plaintiff’s favor.

The Eighth Amendment prohibition against cruel and unusual punishment includes the right to be free from conditions of confinement that impose an excessive risk to a prisoner’s health and safety. A viable Eighth Amendment claim has two **components** (parts). The first component is objective: Is the deprivation of which the prisoner complains sufficiently serious? This requires the court to assess whether society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency to expose anyone unwilling to such a risk.

The second component is subjective: Has the prisoner shown that the defendant demonstrated deliberate indifference by having knowledge of the risk and failing to take measures to avoid the harm? A defendant is deliberately indifferent when he knows of and disregards an excessive risk to inmate health or safety. The defendant must both know of and disregard the facts from which an inference could be drawn that a substantial risk of harm exists and he must also draw the inference.

Here, the court wrote, the alleged deprivation about which the plaintiff complains is the denial of his right to be free from humiliation, shaming and verbal harassment from other prisoners and prison staff resulting from the requirement that he wear the control suit and have the exposer sign posted above his cell door and his right to be free from physical pain that is imposed by wearing the control suit.

With respect to the verbal taunts, the court found that there is no constitutional right to be free from verbal harassment. And, although the

infliction of mental anguish may sometimes rise to the level of an Eighth Amendment violation, here what the court **characterized as** (to describe the qualities of) racially fueled harassment from fellow prisoners and some staff while wearing the jumpsuit – even if it impacts on his psychological state and lowers his self-esteem – did not amount to a disregard of an excessive risk to his safety and health.

The court also found that the physical discomfort of the lock on the collar of the jumpsuit was no more than an annoyance and could easily be **alleviated** (made less severe) by adjusting the collar. Any discomfort, the court found, did not pose an excessive risk of serious injury.

Based on this analysis, the court granted the defendant’s motion to dismiss the Eighth Amendment claims relating to the use of the exposer suit and sign.

Plaintiff Barrow represented himself in this Section 1983 action.

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HELP PRISONERS’ LEGAL SERVICES CELEBRATE NATIONAL PRO BONO WEEK

Restoring Justice to the Justice System

It’s that time again ... time to contribute to PLS’ National Pro Bono Week event! National Pro Bono Week is a time to celebrate and recognize the dedicated work of *pro bono* volunteers as well as educate the community about the legal issues our clients face.

This year, we want to focus on restorative justice. “Restorative Justice” refers to a theory of justice that highlights repairing the harm caused by one’s actions, rather than just punishing the wrongdoer. It requires honesty, openness and forgiveness. Examples of restorative justice include victim-offender mediation, sentencing circles, and circles of support and accountability.

For this year’s event, we are seeking letters written – in the spirit of restorative justice – to someone you have hurt or someone who has hurt you. This may be a letter to your child(ren), a parent, a loved one, or the victim(s) of your crime.

Submissions should be no more than twenty (20) pages in length and mailed, with the below release, to: Director of Pro Bono & Outreach, Prisoners’ Legal Services, 41 State Street, Suite M112, Albany, New York 12207, **no later than JULY 1st, 2015**. If you speak/write in a language other than English, please feel free to submit your story in your native language.

We hope this process helps you know peace and forgiveness.

Please note that contributing your story 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 must write separately to the appropriate PLS office.

PLEASE INITIAL ON THE APPROPRIATE LINE(S) AND SIGN BELOW:

_____ PLS may use my real name.

_____ I authorize PLS to use my submission at their event.

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

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

Signature

Date

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. PLS reserves the right to make editorial changes to submissions.

AYUDA SERVICIOS JURÍDICOS DE LOS PRESOS CELEBRE NACIONAL PRO BONO SEMANA

Restablecer la Justicia en el Sistema de Justicia

En esa época otra vez ... tiempo para contribuir al evento de la semana nacional de Pro Bono de PLS! La semana nacional de Pro Bono es un momento para celebrar y reconocer la dedicada labor de voluntaries pro bono asi como educar a la comunidad sobre la legal temas a nuestros clientas cara.

Esta año queremos centrarnos sobre justicia restaurativa. “Justicia restaurativa” se refiere a una teoría de la justicia que reparar el daño causado por las acciones, en lugar de simplemente castigar al malhechor. Se requiere honestidad, franqueza y perdón. Ejemplos de justicia restaurativa mediación victim-delincuente, sentencia circulos y circulos de apoyo y rendición de cuentas.

Para el evento de este año, estamos buscando cartas escritas – en el espíritu de justicia restaurativa – a alguien que has hecho daño o que te ha hecho daño. Esto puede ser una carta a su hijo, un padre, un ser querido o las víctimas por su crimen.

Esperamos que este proceso le ayuda a saber que la paz y perdón.

Las propuestas deben ser no más de veitne (20) páginas de extensión y enviado por correo con el lanzamiento de abajo a: Director of Pro Bono & Outreach, Prisoners’ Legal Services, 41 State Street, Suite M112, Albany, New York 12207, no más tardar **el 01 de Julio, 2015**.

Tenga en cuenta que contribuye para el evento de Pro Bono descript arriba no es lo mismo que buscar la asistencia juridical/representación de PLS. Si usted está buscando ayuda legal, se debe escribir por separado a la oficina de PLS apropiado.

POR FAVOR ESCRIBA SUS INICIALES EN LA LÍNEA(S) APROPRIADA Y FIRME ABAJO:

_____ PLS puede usar mi nombre real.

_____ Autorizo PLS usar mi presentatción en su evento.

_____ Autorizo PLS usar mi presentación en su página web, en *Pro Se*, y/o para otros fines informativos.

Doy mi consentimiento para PLS incluyendo esta presentación como parte de su evento Nacional Pro Bono Week. Yo entiendo que mi aporte será retenido por PLS después del evento.

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Fecha

Aunque no podemos garantizar que cada pieza sera leído o muestra, animamos a todas las presentaciones y haremos nuestro mayor esfuerzo para inegrar a cada uno en el evento. PLS reserva el derecho de hacer editorial.

**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: Bedford Hills, CNYPC, Coxsackie, 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.

ITHACA, 114 Prospect Street, Ithaca, NY 14850

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

PLATTSBURGH, 121 Bridge Street, Suite 202, Plattsburgh, NY 12901

Prisons served: Adirondack, Altona, Bare Hill, Clinton, Franklin, Gouverneur, Moriah Shock, Ogdensburg, Riverview, Upstate.

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