# Pro Se

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## Court Finds Top DOCCS Execs Liable for Unlawful Imposition of PRS

In 2011, several prisoners and formerly incarcerated individuals, seeking damages for the time that they spent in custody or under parole supervision due to DOCCS' and Parole's unlawful addition of post-release supervision to their sentences, filed suit against a number of members of the executive staff in the Department of Correctional Services (DOCS) and the Division of Parole (DOP). The name of the lawsuit is Betances v. Fischer. It was filed in the Southern District of New York. The defendants included then DOCS Counsel Anthony Annucci, then DOCS Commissioner Brian Fischer and DOP Counsel Terrance Tracey.

Most recently, the defendants in Betances, for the third time, moved the court for summary judgment on the basis of qualified immunity. They argued that even if what they did violated the plaintiffs' constitutional rights, they should not be held personally liable because when they took the actions about which the plaintiffs are now complaining, it was not clearly established that their conduct was unlawful. In making this argument the defendants did not admit that the conduct was unlawful. The plaintiffs opposed the motion for qualified immunity and moved for summary judgment imposing personal liability on Defendants Annucci, Fischer and Tracey.

In analyzing whether the law with respect to the administrative imposition of post-release supervision was clearly established at the time that the defendants took the actions with respect to which the plaintiffs now seek damages, the pivotal decision is Earley v. Murray, 451 F.3d 71 (2d Cir. 2006). In Earley, the Second Circuit held that the administrative imposition of post-release supervision violates the federal constitutional right to due process because a sentence is never anything other than the sentence imposed by the judge at sentencing and recorded in the order of commitment.

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# SOLITARY CONFINEMENT: AN UPDATE

## Is the Past Finally Prologue?

### A Message From the Executive Director – Karen L. Murtagh

History is the greatest teacher for those seeking to tackle the challenges we face today. It has been said, "those who cannot remember the past are condemned to repeat it." We've been taught this lesson in history and civics classes ad infinitum. This begs the question, have we finally arrived at the time when "what's past is prologue"? When it comes to the use of solitary confinement in our prisons, I truly hope the answer is a resounding "yes" and we are moved to reform a practice run amok.

I have written about the history of solitary confinement in these pages before. It started out as an attempt to instill "penitence" through isolation, but that theory was debunked over 200 years ago by scholars with first-hand knowledge of the Quaker experiment in Walnut Street Prison and its tragic consequences. Its reemergence as a prison management tool in the last 25 years has been similarly horrifying, particularly as the devastating impact on the human mind and body of isolated confinement has been scientifically proven and judicially recognized. The breadth of its return, and the sheer volume in terms of years of actual seclusion, has been unprecedented. "Box hits," for even minor infractions, are more often imposed in months and years than days.

The human condition cannot withstand such subjugation. The damage, both physical and psychological, and the irreversible harm resulting from such seclusion are predictable and consequential. Any hope for true rehabilitation and successful reintegration of individuals into the community following such treatment is significantly reduced and counter to the well-recognized goals of the penal and sentencing laws in NYS.

Human rights and health organizations worldwide are unified in condemning the deleterious mental and physical effects brought on by years of prolonged solitary confinement. The New York State Bar House of Delegates has joined the fight and resolved to ban the practice beyond 15 days (akin to the recommendation of Juan Mendez, the United Nations Special Rapporteur on Torture and Cruel, Inhuman and Degrading Treatment). And now Justices of the United States Supreme Court are speaking out, quite forcefully, on how "evolving standards of decency" mandate a change in the use of solitary confinement throughout this country.

For example, this past June 18, Justice Kennedy, in a strongly-worded five-page concurring opinion in *Davis v. Ayala*, 476 U.S. 79, (2015), noted that "[t]here are indications of a new and growing awareness in the broader public of the subject of

corrections and of solitary confinement in particular." In so finding, Justice Kennedy invoked the case of teenager Kalief Browder who spent three years incarcerated on Rikers Island without trial for allegedly stealing a backpack; two of those years were spent in solitary confinement. Upon release, Mr. Browder committed suicide.

Justice Kennedy went on to say that "[r]esearch still confirms what this Court suggested over a century ago: Years on end of near-total isolation exacts a terrible price" and he cited the 1890 case, *In re Medley*, 134 U.S.160 (1890), in which the High Court pointed out that solitary confinement can result in madness, hallucinations, self-mutilation and suicide.

Likewise, Justice Breyer, in his 41-page dissent in *Glossip v. Gross*, 135 S.Ct. 2726 (June 29, 2015), spoke forcefully about the terrible consequences of solitary confinement, noting that "it is well-documented that . . . prolonged solitary confinement produces numerous deleterious harms." While the *Glossip* case did not directly raise the issue of solitary confinement, (the case involved a challenge to the way in which the death penalty is carried out in Oklahoma), Justice Breyer used this case as yet another opportunity to raise awareness regarding our "evolving standards of decency" as they relate to the use of solitary confinement. Citing the ABA Standards for Criminal Justice, the United Nations Special Rapporteur on Torture and two of the world's leading experts on the effects of solitary confinement, Justice Breyer noted "that solitary confinement can cause prisoners to experience 'anxiety, panic, rage, loss of control, paranoia, hallucinations, and self-mutilations,' among many other symptoms," and that " 'even a few days of solitary confinement will predictably shift the [brain's] electroencephalogram (EEG) pattern toward an abnormal pattern characteristic of stupor and delirium.' "

To be clear, I harbor no illusions that separation from general population of incarcerated individuals may indeed be necessary for the sake of prison management, both to protect the individuals and others. But separation is a far cry from solitary confinement and the overuse of the latter must be curbed if we are to have any serious hope of rehabilitation and successful reintegration attending the ultimate release of those so confined.

As Justice Kennedy concluded in *Ayala*, "Over 150 years ago, Dostoyevsky wrote, 'The degree of civilization in a society can be judged by entering its prisons . . . ' There is truth to this in our own time." As a society, we can and must do better for those in our charge. Based on recent developments and trends, I remain hopeful that the time is finally at hand for true reform in the area of solitary confinement.

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**Defendants' Motions for Qualified Immunity**

In 2012, the district court ruled on the defendants' first motion to find that they were entitled to qualified immunity. In that motion, the defendants argued that because, for at least two years after the Earley decision was issued, there was confusion in the state courts about whether the decision was binding on the state and what remedies the decision required, the law was not clearly established until 2008 when the New York State Court of Appeals issued its decisions in People v. Sparber, 10 NY3d 457 (2008), and Matter of Garner v. NYS DOCS, 10 NY3d 358 (2008), both holding that DOCS does not have the authority to impose post-release supervision. The district court rejected this argument, concluding that there was never any disagreement or confusion about the core constitutional holding announced in 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 before a judge. See Bentley v. Dennison, 852 F.Supp.2d 379 (S.D.N.Y. Feb. 10, 2012). In 2013, the Second Circuit affirmed the district court's decision. Betances v. Fischer, 519 Fed. App'x 39 (2d Cir. 2013).

In affirming the decision denying qualified immunity to the defendants, the Second Circuit suggested that the defendants might be able to produce evidence that could establish that Defendant Annucci made reasonable efforts either to seek re-sentencing of individuals upon whom DOCCS had imposed post-release supervision, or to end their unconstitutional imprisonment and remove post-release supervision from their prison records. This is the issue addressed in the court's most recent decision, reported in Betances v. Fischer, 2015 WL 4692441 (S.D.N.Y. Aug. 6, 2015).

After reviewing the evidence and arguments submitted in support of the defendants' latest motion, the court found that the only action taken by any of the defendants following the Earley decision was that Defendant Annucci sent an email to the NYS Office of Court Administration, recommending that a notification be sent to judges so that *going forward*, defendants should be properly sentenced to terms of post-release supervision. Rather than remedy their past unconstitutional conduct, however, the court found, the defendants actively opposed the mandate of the Earley decision by taking the following actions:

- DOCS continued to administratively impose post-release supervision;
- Defendant Annucci instructed DOCS to inform inmates who questioned the administrative imposition of post-release supervision that DOCS was not following the Earley decision;
- When prisoners went to court seeking relief from the administrative imposition of post-release supervision, DOCS opposed their efforts, arguing that the imposition of post-release supervision was automatic;
- DOCS created a database identifying people upon whom they had imposed post-release supervision, but took no steps to have these individuals re-sentenced or to remove administratively imposed post-release supervision; and
- DOP took no steps to identify individuals serving illegally imposed periods of post-release supervision until two years after the Earley decision.

Based on this evidence, the court concluded that the defendants had failed to show that they made reasonable efforts to comply with Earley and held that they were not entitled to qualified immunity.

**Plaintiffs' Motion for Summary Judgment**

The court then addressed the plaintiffs' motion for summary judgment. In their motion, the plaintiffs sought an order finding that Defendants Fischer, Annucci and Tracey were held personally liable for the violation of the plaintiffs' rights to due

process of law caused by the unlawful imposition of post-release supervision.

The court found that Defendant Annucci was responsible for implementing judicial decisions that impact on the calculation of sentences, that he knew about the Earley decision and understood its holding, but that he disagreed with the decision and decided not to follow it. Beyond the identification of prisoners on whom DOCS had administratively imposed post-release supervision, for over a year after the Earley decision, Defendant Annucci took no steps to have them re-sentenced or to remove post-release supervision from their records, and then only took action in response to the Sparber and Garner decisions. The court found that Defendant Annucci's failure to even attempt to cease administrative and custodial operations that had been found to violate the law exhibited deliberate indifference to the rights of inmates. Finally, the court found, because Defendant Annucci took no actions to comply with Earley, and, the court found, continues to assert that Earley is not binding, Defendant Annucci is liable as a matter of law and the plaintiffs are entitled to summary judgment against him.

Examining the same facts as were presented in support of Defendant Annucci's liability, and finding that Defendant Fischer was involved in the decision-making that led to the court's judgment against Defendant Annucci, the court found that Defendant Fischer was also liable as a matter of law.

The court found that Defendant Tracey was aware of the Earley decision, understood its holding and understood the impact that the decision had on the DOCCS population. He knew of DOCS' policy of administratively imposing post-release supervision and knew that there were people subject to parole supervision who had not been judicially sentenced to post-release supervision. In spite of this knowledge, until June 2008, Defendant Tracey did not direct the DOP to review records to determine which parolees with administratively imposed post-release supervision were under parole supervision. At a minimum, the court found, Defendant Tracey was aware that DOP was supervising parolees who had not been judicially sentenced to post-release supervision, knew this was a violation of federal law, and took no action to address the violation. For these reasons, the court found, Defendant Tracey was deliberately indifferent to the continuing violations caused by DOP's enforcement of administratively imposed post-release supervision.

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The plaintiffs in Betances v. Fischer are represented by Emery Celli Brinckerhoff & Abady

## LETTERS TO THE EDITOR

First, I would like to thank those who donated and the Publisher, Supporters and Friends. I am also thankful for your assistance. You have been extremely helpful to me. You showed me that it isn't just about right or wrong, guilt or innocence. It's about what PLS and a little work can do. The column "Pro Se Victories" shows how you have helped us help ourselves. To be more precise, ***Pro Se*** has filled me with joy and high hopes and dreams that are still there to reach for.

Thank you,

Alberto Ramirez

Letters to the editor should be addressed to:

***Pro Se***, 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!

**William Steele v. State of New York, Claim No. 122020 (Ct. Clms. Jul. 27, 2015). Court awards damages for time spent in SHU, finding that claimant was not guilty of assaulting an inmate.** After William Steele's disciplinary hearing was reversed by the Appellate Division due to the hearing officer's failure to determine the reason that an inmate witness had refused to testify, Mr. Steele filed a claim against the state seeking damages for 152 days of wrongful SHU confinement. Before deciding the claim, the court of claims judge made two observations worth noting: First, the notice of intent for a claim of wrongful SHU confinement must be served within 90 days of when the prisoner is released from SHU. Second, the claim for unwarranted SHU confinement is not proven by the fact that a court reversed and expunged the hearing. To prevail on such a claim, the prisoner must show that he was not guilty of the charges.

At the trial on the issue of whether Mr. Steele was guilty of the charges, the court heard testimony from the hearing officer who conducted the hearing. The court characterized Lieutenant Gerald Gardner as the most disrespectful witness that the court had ever experienced. At the trial, hearing officer Gardner testified that the testimony of the alleged victim – the witness with respect to whom the hearing officer had failed to inquire about the reason he had refused to testify – would have made no difference and that he would have convicted the claimant anyway. The court found that Lt. Gardner would have convicted the claimant regardless of whether the victim or anyone else had testified. His demeanor in court, the judge wrote, sufficiently demonstrated the lack of respect that he had for the trial in which he was testifying, and, the court wrote, one could hardly conclude that he brings a more unbiased open-minded judicial temperament to the prison disciplinary hearings that he conducts. Finally, the court held, the State's defense − that the failure to find out the reason that the victim refused to testify made no difference to the outcome of the hearing − is not established by contending, in effect, "we convict everyone." Rather, the court held, the defense is established (or not) based on the court's finding on the question of whether the claimant was guilty of the charges for which he was convicted at a proceeding during which his constitutional rights were violated. With respect to that issue, the court found that the defendant did not introduce any probative evidence to rebut the claimant's contention that the charges were fabricated. For that reason, the court wrote, the probative evidence before the court supports no conclusion other than the claimant was not guilty of the underlying charges.

**Matter of William Grant v. Anthony Annucci, Index No. 6959-13 (Albany Co. Oct. 10, 2014). Court found petitioner's constitutional rights to pre-hearing assistance and to call witnesses were violated and ordered the hearing reversed and the charges expunged.** In relation to hearings on charges of smuggling, altering state property, striking another inmate, fighting, violent conduct, spitting and assault on staff, the petitioner asked his assistant for the rule book, the unusual incident report, the use of force report. The assistant did not produce any of these documents. At the hearing, the petitioner requested the same records and also asked that the IG investigator who investigated his complaint of excessive force be called as a witness. His defense was that the charging officer had set up a fight between petitioner and another inmate in order to justify the use of force.

At some point during the hearing, the petitioner was permitted to review a large stack of documents for at most 20 minutes. The petitioner said he needed more time but the hearing officer refused. The hearing officer also refused to call the IG investigator because his testimony would not be relevant.

The court found that the employee assistant had violated the petitioner's right to pre-hearing assistance and that the hearing officer's efforts during the hearing failed to remedy that violation. The court also found that the hearing officer's finding that the IG investigator's testimony was not relevant was **disingenuous** (not reached in good faith), since an investigation into whether excessive force was used would be relevant to the charges of fighting, violent conduct, creating a disturbance, and assault on staff. Therefore, the court found that

the hearing officer had not stated a good faith basis for denying the petitioner's request for the witness and had violated the petitioner's constitutional right to call the witness.

**Matter of Jermaine L. Fann v. Division of Parole, Index No. 6148-14 (Sup. Ct. Albany Co. April 15, 2015). In spite of the statutory rules for sentence computation, the court orders DOCCS to run a sentence which was imposed roughly one year after the Division of Parole imposed a time assessment for petitioner's post-release supervision violation, concurrently with the time assessment.** Jermaine Fann had completely served his determinate term when he was released to post-release supervision. After violating, he was given a time assessment which required him to serve the remainder of his post-release supervision in prison. A year later, he was convicted of another crime and sentenced to 2 to 4 years, to run concurrently with the parole violation sentence. In spite of this order, DOCCS stopped crediting time to the time assessment, i.e., the remainder of Mr. Fann's term of post-release supervision, and began reducing only the newly imposed sentence. When Mr. Fann challenged the Department's actions in an Article 78, the court held the law requires DOCCS to run the sentences as directed by the sentence and commitment order; if DOCCS thought the sentence was unlawful, its recourse is to notify the sentencing court and ask that the defendant be re-sentenced.

**Matter of Vernon Jones v. Anthony Annucci, Index No. 1492-14 (Sup. Ct. Albany Co. June 11, 2015). Court finds petitioner, who was not permitted to return to his cell to get his hearing aids before being required to participate in a disciplinary hearing, was "effectively prohibited from fully participating in the hearing," thus implicating a right of constitutional dimension.** The court ordered the hearing reversed and the charges expunged from the petitioner's records.

**Matter of Guillermo Torres v. Anthony Annucci, Index No. 91-15 (Sup Ct. Albany Co. August 17, 2015). Assistant Attorney General agrees that hearing must be reversed and expunged due to the inadequate factual foundation for the drug test results.** Guillermo Torres was found guilty of possession of a controlled substance, suboxone. When Mr. Torres challenged the determination of guilt in an Article 78 proceeding, the Assistant Attorney General, after discovering that the chain of custody for the substance discovered in petitioner's cell could not be located, advised the Office of Special Housing to reverse the hearing and expunge the charges. When that was done, the AAG advised the court that the petitioner had received all of the relief to which he was entitled and asked the court to dismiss the Article 78 as moot.

**Guillermo Torres v. Office of Counsel, NYS DOCCS, Index No. 4312-14 (Sup. Ct. Albany Co. May 12, 2015). Filing of Article 78 petition leads to production of Directive which the Petitioner had sought through the Freedom of Information Law (FOIL).** Guillermo Torres made a FOIL request for Directive 4036, "Notification to Victim of Inmate Release or Damage Award." When the Department failed to produce the Directive, Mr. Torres filed an Article 78 proceeding seeking an order that the respondent produce the directive. Even before answering, DOCCS produced the Directive and asked that the court dismiss the petition as moot.

***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

## Disciplinary and Administrative Segregation

## Identification of Pills Leads to Reversal

During an inspection of the trailer in which Mark Cross and his wife had stayed, officers recovered white tablets which were later identified as acetaminophen and hydrocodone. Mr. Cross was found guilty of possessing contraband, unauthorized medication, and a controlled substance; smuggling and violating family reunion program procedures. When Mr. Cross challenged the determination of guilt in an Article 78, in Matter of Cross v. Annucci, 14 N.Y.S.3d 240 (3d Dep't 2015), the court found that the determination was not supported by substantial evidence. The basis for this finding was the officer's failure to follow the DOCCS rule, set forth at 7 N.Y.C.R.R. 1010.4(d), requiring that when a substance is in tablet or capsule form, it shall be inspected at the facility pharmacy for possible identification. Here, the employee who identified the pills was a pharmacy nurse who based her conclusions on photographs of the tablets found in the trailer. Seven NYCRR §101.4(d), the court found, requires an inspection of the pills themselves; it does not authorize an inspection of a photograph of the pills. In the absence of an identification of the pills that was made pursuant to the procedures in the rules, substantial evidence does not support the identification of the pills and therefore, the court held, the hearing must be reversed and the charges expunged from petitioner's prison records.

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Mark Cross represented himself in this Article 78 proceeding.

## Substantial Evidence Did Not Support Charge that Petitioner Used Drugs

When an officer observed Ramion Burt smoking, he confiscated the cigarette and asked Mr. Burt what he was smoking. Mr. Burt allegedly replied, "synthetic marijuana." However, the drug test was negative for marijuana and produced a false positive for amphetamines. Nonetheless, the hearing officer found Mr. Burt guilty of possessing an intoxicant. Mr. Burt challenged the determination of guilt and in Matter of Burt v. Annucci, 2015 WL 4643716 (3d Dep't Aug. 6, 2015), the court found that the determination of guilt was not supported by substantial evidence. To reach this result, the court first examined the rule that Mr. Burt was charged with having violated: "[A]n inmate shall not make, use, possess, sell, exchange, provide or be under the influence of any alcoholic beverage or intoxicant" and "possession, sale or exchange of yeast or any other fermenting agent is prohibited." See 7 NYCRR §270.2(B)(14)(iii). The court noted that Mr. Burt was not found to have possessed alcohol or ingredients used to make alcohol and the urinalysis test had not been positive for alcohol or any other controlled substance. As no testing confirmed that the substance that Mr. Burt was smoking was a controlled substance, the court found that there was no evidence in the record to establish that the substance was an intoxicant within the meaning of the rule. For this reason, the court ordered the determination of guilt reversed and remanded the case for a new decision as to the proper penalty for the determination of guilt with respect to the charges that were not affected by the decision.

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Ramion Burt represented himself in this Article 78 proceeding.

## Testimony From Drug Testing Manufacturer Rebuts Claim that Ibuprofen Caused False Positive

As a result of urinalysis testing, Tony Williams was charged with having used marijuana. He argued that the ibuprofen that he had been given following dental surgery had produced a false positive. A representative from the manufacturer of the drug testing equipment testified that no amount of ibuprofen could cause a false positive result for cannabinoids. In Matter of Williams v. Prack, 11 N.Y.S.3d 750 (3d Dep't 2015), the court found that the misbehavior report, urinalysis test results and related documentation, and the testimony of the manufacturer's representative were substantial evidence of guilty and confirmed the determination.

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Tony Williams represented himself in this Article 78 proceeding.

## Petitioner Not Entitled to Evidence Showing that Superintendent Appointed Lieutenant as Hearing Officer

The DOCCS regulations state that officers with the following status may conduct disciplinary hearings, "the superintendent, a deputy superintendent, captain or commissioner's hearing officer . . .," but that the superintendent may designate "some other employee" to conduct a hearing. In Matter of Tevault v. Prack, 14 N.Y.S.3d 823 (3d Dep't 2015), the petitioner, who had been guilty of drug use, argued that where the regulation does not permit someone of the rank of lieutenant to conduct a hearing, the hearing officer must produce evidence that he was appointed by the Superintendent. The court ruled that it was not necessary to document the appointment and that the court below had properly dismissed the petition.

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Richard Tevault represented himself in this Article 78 proceeding.

# Jail Time and Sentencing

## Court Rejects Request for Jail Time Credit

In Matter of Parker v. Annucci, 12 N.Y.S.3d 650 (3d Dep't 2015), the petitioner was serving a determinate term of 2 years and 3 years post-release supervision (2006 sentence). Following his release to post-release supervision, he twice violated the terms of release. After he was jailed following his second release, no final parole revocation was held, and his term of post-release supervision continued to run until it expired on June 14, 2011. A week later, the court sentenced the petitioner to a determinate term of 5 years and 5 years post-release supervision (2011 sentence). When he returned to prison, the petitioner was first credited with 331 days of jail time toward the 2011 sentence. However, the credit was later reduced to 20 days when the Erie County Sheriff learned that 311 days had already been credited toward his 2006 sentence. Petitioner's Article 78 challenged the failure to credit the 311 days as jail time toward his 2011 sentence. The Supreme Court, Sullivan County, dismissed the petition.

On appeal, the appellate court first noted that Penal Law §70.30(3) controls the crediting of jail time. This section of the law provides that jail time credit "shall be calculated from the date custody under the charge commenced to the date that the sentence commences and shall not include any time that is credited against the term or maximum term of any previously imposed sentence or period of post-release supervision." Here, the court found, the time period that the petitioner was seeking to have credited to his 2011 sentence was credited toward the post-release supervision portion of his 2006 sentence. Because he had already received credit for this time, the court wrote, the time cannot also be credited toward his 2011 sentence. The court expressly rejected the argument that the decision in Matter of Sparago v. NYS Board of Parole, 518 N.Y.S.2d 75 (1987), mod. 528 N.Y.S.2d 817 (1988), compelled a different result. That case, the

court wrote, was factually distinguishable from the petitioner's case.

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Demetrius Parker represented himself in this Article 78 proceeding.

## Court of Claims

### Claimant Adequately Set Forth the Nature of His Claim

In the course of obeying a corrections officer's order to arrange the weights and other heavy equipment in the prison yard, Terry Demonstoy was injured and had to have his finger amputated. He brought a claim against the state seeking damages. The defendant moved to dismiss the claim for failing to give adequate notice of the claim. In Demonstoy v. State, 14 N.Y.S.3d 220 (3d Dep't 2015), the court considered the issue of what information the Court of Claims Act requires a claimant to include in his or her claim.

The court first looked at Section 11(b) of the Court of Claims Act. This section provides that a claim must state the time and place the claim arose, the nature of the claim, and the injuries alleged to have been sustained. The court then noted, citing Heisler v. State, 433 N.Y.S.2d 646 (4th Dep't 1980), "What is required is not absolute exactness, but simply a statement made with sufficient definiteness to enable [defendant] to investigate the claim promptly and to ascertain its liability."

Here, the claim stated that at approximately 9:00 p.m. on August 25, 2012, at Mt. McGregor Correctional Facility, corrections officers directed the claimant to arrange weights and handle other heavy and dangerous equipment in the yard and that in the course of complying with the order, the claimant suffered a fracture and amputating injury to the middle finger of his left hand. The claim further alleges that the injuries were caused by inadequate lighting, the unsafe condition of the yard and the officer's failure to provide him with sufficient equipment such as gloves and lights, to perform the work requested of him.

The court held that the facts alleged were sufficient to **apprise** (describe) the State of the general nature of the claim and to enable it to investigate the matter. The court therefore affirmed the lower court's finding that the claim satisfied the pleading requirements of the Court of Claims Act, § 11(b).

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The Beynenson Law Firm represented Terry Demonstoy in this Court of Claims action.

## Miscellaneous

### Court Reverses Dismissal of Visitation Petition

William Davis filed a petition for visitation in the Family Court of Dutchess County. A hearing was scheduled, but DOCCS did not produce Mr. Davis. Due to Mr. Davis' non-appearance, the court found that Mr. Davis had abandoned the petition and dismissed it. In Matter of Davis v. Koch, 12 N.Y.S.3d 914 (2d Dep't 2015), the appellate court found that the Family Court erred in dismissing the petition. Here, the court wrote, the record shows only that the correctional facility did not produce the petitioner and that the "correctional facility was not responding." This, the court concluded, was no basis for dismissing the petition for failure to prosecute. In reaching this result, the court rejected the respondent's argument that the family court had enough information to make a decision about what would be in the children's best interest.

### Inmates Can Renounce Inheritance to Avoid Son of Sam Law

The Son of Sam laws require that DOCCS notify the Office of Victims' Services, and that the Office of Victims' Services notify a crime victim, if the inmate account of the person who committed a crime in which a victim was physically injured exceeds $10,000. There are a few exceptions for funds that are exempt from this provision, but proceeds from a will or estate are not. When John Greenleaf realized that if he accepted a **bequest**

(gift given by means of a will) that his mother had provided for him, the Office of Victims' Services would use the provisions of the Son of Sam Law to place the bequest in escrow in order to allow the victim time to sue, he decided to renounce the bequest so that the funds could be used for a purpose that was in accord with his mother's wishes.

The Estates, Powers and Trust Law (EPTL) permits a beneficiary to renounce his or her inheritance and provides a process for doing so. Mr. Greenleaf followed the instructions, but submitted an unsworn affidavit of service with respect to service on the executor of the estate. A subsequent filing three months later clarified and remedied the problem. However, in the meantime, the Surrogate's Court had notified the Office of Victims' Services that Mr. Greenleaf was the beneficiary of an estate and the Office of Victims' Services had notified the victim's estate that Mr. Greenleaf was the recipient of a bequest. The Office of Victim Services then sought to have the funds placed in escrow for three years in order to give the victim's estate the period of time provided by the Son of Sam law for filing suit against the person who was convicted of harming the victim.

In Matter of the Estate of Deborah A. Grochocki, Index No. 2014-605 (Surrogate's Ct. Broome Co. July 21, 2015), the surrogate's court granted the renunciation. The court found that although Mr. Greenleaf's initial renunciation papers were deficient in that he had not sworn that he had served the executor, he in fact had properly served the executor of the estate. Thus, before the Office of Victims' Services had moved to place the bequest in escrow, Mr. Greenleaf's application for renunciation was complete. As there was no suggestion that the renunciation was based on "any consideration" being paid to the person renouncing the bequest by the person who benefits from the renunciation, there was no basis for denying the renunciation as fraudulent. As a result, the bequest that Mr. Greenleaf's mother had intended for him was given to the executor of the estate, as was provided in the mother's will should a beneficiary renounce a bequest.

# FEDERAL COURT DECISIONS

## Second Circuit Clarifies 8th Amendment Standard Relating to Sexual Abuse by Guards

Since 1997, the Second Circuit's application of 8th Amendment analysis to the facts in Boddie v. Schnieder, 105 F.3d 857 (2d Cir. 1997), has been controlling precedent for prisoner claims of sexual abuse and harassment by guards. In August, the Second Circuit decided Crawford v. Cuomo, 2015 WL 4728170 (2d Cir. Aug. 11, 2015), a case asserting that due to evolving standards of decency, the district court had wrongfully dismissed the claims of the plaintiffs that they had been sexually assaulted. The Court agreed, ruling that the result reached by the Court in Boddie – that the conduct alleged did not violate the plaintiff's 8th Amendment right to be free from cruel and unusual punishment − was no longer correct, and reversing the district court's dismissal of the Crawford plaintiffs' claim. The process that the Court used to reach the result should be of interest to anyone who is curious about what causes a court to reconsider a prior decision upon which it has relied for over a decade.

**The Allegations**

**Allegations are what the plaintiffs say the defendants did. When considering a motion to dismiss, the court must accept the plaintiffs' allegations as true. This is because in making a motion to dismiss, the defendants argue that even if what the plaintiffs say is true, what the plaintiffs allege the defendants did would not violate the law that the plaintiffs assert the defendants violated.**

In Boddie, the plaintiff alleged that a female guard may have made a pass at him; that the next day the same officer squeezed his hand, touched his penis and said, "You know you're a sexy black devil and I like you."; that two weeks later the same officer gave him an order to take off his sweatshirt (because it was a color which prisoners were not permitted to wear) and when he said that he would do so in his cell, she twice chest-bumped him and

pinned him to the door. The first bump was with sufficient force that he could feel the officer's nipples. The second time, the officer bumped into him with her whole body, vagina against penis.

There were two plaintiffs in Crawford. Thaddeus Corely alleged that during a visit with his wife, Defendant, Officer Simon Prindle, ordered him to leave the visiting room and to stand against the wall with his feet spread apart. The defendant then squeezed and fondled Corley's penis for the purpose of determining whether he had an erection. When Corley "jumped off the wall," Prindle threatened him.

James Crawford alleged that as he was leaving the mess hall, Prindle ordered him to comply with a search and during the search, paused around Crawford's crotch, grabbed his penis and asked, "What's that?" Prindle then pinned Crawford to the wall with his knee, tightened his grip around Crawford's neck, told him to stay on the wall and threatened to jam his head into the concrete if he did not comply. While Crawford was in this position, Prindle continued to squeeze and fondle the area around Crawford's penis and roam his hands down Crawford's thigh while threatening that Crawford would go to the box if he resisted. When Crawford protested, Prindle said that he had no rights and Prindle would run his hands up the crack of Crawford's ass if he wanted to.

Both plaintiffs alleged that Prindle engaged in a pattern of similar sexual abuse with other inmates.

**The Court's Analysis in Boddie**

In Boddie, the Court wrote that to state a claim that the defendant's conduct violated the 8th Amendment, the plaintiff must first show that the "punishment was **objectively** sufficiently serious." Only conditions that are cruel and unusual under contemporary standards are unconstitutional. Second, the plaintiff must also show that the corrections officer had a "sufficiently culpable state of mind." In the context of a claim of sexual harassment or abuse, where no legitimate penological purpose can be inferred from the defendant's conduct, the abuse itself may, in some circumstances, be sufficient evidence of a culpable state of mind.

The Court also stated that sexual abuse of a prisoner by a corrections officer may violate contemporary standards of decency and can cause severe physical and psychological harm. For this reason, the court stated, **severe or repetitive sexual abuse** of an inmate by a corrections officer can be objectively sufficiently serious to be an 8th Amendment violation.

**The Court's Conclusion in Boddie**

The Court found that Plaintiff Boddie had failed to state an 8th Amendment claim under section 1983. The Court noted that Boddie had asserted a small number of incidents in which he was verbally harassed, touched and pressed against without his consent. No single incident that he described was severe enough to be objectively sufficiently serious. Nor were the incidents taken as a whole, **egregious** (shocking) in the harm inflicted. The isolated episodes of harassment and touching alleged by Boddie, the Court wrote, were despicable and if true, may be the basis of a state tort action. But they did not involve a harm of federal constitutional proportions as defined by the Supreme Court.

**The Court's Conclusion in Crawford**

The Court recognized that the sexual abuse of prisoners, once passively accepted by society, deeply offends today's standards of decency. The proper *application* of the rule in Boddie must therefore reflect these standards.

The Court noted that a correction officer's intentional contact with an inmate's genitalia or other intimate area which serves no penological purpose and is undertaken with the intent to gratify the officer's sexual desire or to humiliate the inmate violates the 8th Amendment.

**The Court Looks Back on the Boddie Decision**

The Court noted that in Boddie, it had held that a single act of sexual abuse may violate the 8th Amendment if it is entirely **gratuitous** (unjustified) and **devoid** (completely lacking) of a **penological** (correctional) purpose. Thus, Boddie's allegations satisfied the subjective portion of the 8th Amendment standard. However, the court found that the conduct alleged in Boddie was not

sufficiently serious (the objective portion of the 8th Amendment standard) to violate the 8th Amendment.

The Court found that in the nearly 20 years since it decided Boddie, societal standards of decency regarding sexual abuse and its harmful consequence have evolved.

Without suggesting that Boddie was wrongfully decided in 1997, the court concluded that if the same rule of law was applied in Boddie today, the result would likely be different.

**How is the Crawford Decision Similar to the Boddie Decision?**

The Court applied the same rule of law in both cases: to establish an 8th Amendment violation, the plaintiff must allege that 1) the defendant acted with a sufficiently culpable state of mind (that is, the defendant's conduct served no legitimate penological purpose or was wanton and malicious and solely for the purpose of causing harm), and 2) the conduct was objectively harmful enough (or sufficiently serious) to **constitute** (add up to) a constitutional violation.

Both decisions note that while every malevolent touch by a prison guard does not give rise to a federal cause of action, the 8th Amendment is offended by conduct that is repugnant to the conscience of mankind.

Both decisions discuss sexual abuse of prisoners by guards in terms of contemporary standards of decency and both conclude that sexual abuse by a corrections officer has no legitimate penological purpose. In Boddie, the Court wrote, sexual abuse may violate contemporary **standards** of **decency** and can cause severe physical and psychological harm. For this reason, the court continued, there can be no doubt that severe or repetitive sexual abuse of an inmate by a prison officer can be "objectively, sufficiently serious" enough to constitute an 8th Amendment violation. Moreover, like the rape of an inmate by another inmate, sexual abuse of a prisoner by a corrections officer has no legitimate penological purpose and is "simply not part of the penalty that criminal offenders pay for their offenses against society."

In Crawford, the Court wrote, the 8th Amendment is offended by conduct that is "repugnant to the conscience of mankind." Actions are repugnant to the conscience of mankind if they are incompatible with evolving standards of decency or involve the unnecessary and wanton infliction of pain.

**What Changed Between When the Court Decided Boddie and When It Decided Crawford?**

In investigating whether standards of decency had evolved since the Boddie decision, the Crawford Court first looked to "objective **indicia** [signs] of consensus found in acts of state and federal legislation addressing sexual abuse in prisons. In 1997, eighteen states and the District of Columbia had outlawed corrections officers' sexual contact with prisoners. By 2015, all but two states had outlawed such conduct and some states among the eighteen that had outlawed this conduct in 1997 adopted additional laws and policies to prevent sexual abuse in prison.

In addition, in 2003, Congress passed the Prison Rape Elimination Act, the first federal law to address the sexual abuse of prisoners. The Crawford Court found these legislative enactments to be the clearest and most reliable objective evidence of contemporary values; noting that the number of state's enacting such legislation and the consistency of the direction of change in the law were of significance. The laws and policies, the Court wrote, reflect the deep moral indignation that has replaced what had been society's passive acceptance of sexual abuse in prison.

Thus, the Court found, due to evolving standards of decency, conduct which 20 years ago was not sufficiently serious to constitute a constitutional violation now rises to the level of severe sexual abuse, including the conduct at issue in Boddie.

The Court clarified that to show that an incident or series of incidents was serious enough to violate the Constitution; a prisoner need not allege penetration, physical injury, or direct contact with the prisoner's uncovered genitals. Rather, an officer's intentional contact with an inmate's

genitalia or other intimate areas, which serves no penological purpose and is undertaken with the intent to gratify the officer's sexual desire or to humiliate the prisoner, violates the 8th Amendment.

**Did the Court Find that the Crawford Defendant Was Liable?**

The Court did not address the issue of whether the plaintiffs had proven their case. The only issue before the case was whether the plaintiffs had stated a claim for which relief might be granted. The Court said that the facts alleged were sufficient to state a claim that the defendant's conduct violated the 8th Amendment.

The Court also did not address the issue of whether the defendant was entitled to qualified immunity. A New York State corrections officer cannot be held liable for conduct unless at the time that he engaged in the challenged conduct, it was clearly established by the Second Circuit or the United States Supreme Court that the conduct violated the 8th Amendment. The Court said that the district court could address the issue of qualified immunity on remand.

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Adam Perlmutter and Zachary Margulis-Ohnuma represented James Crawford and Thaddeus Corley in this Section 1983 action. PLS and others submitted an Amicus Brief.

## PRO SE PRACTICE

# Right to Special Education Under the IDEA for Disabled Prisoners Under 22 Years Old

In 2004, the United States Congress passed the Individuals with Disabilities Education Improvement Act known as the "IDEA" to aid disabled youth in getting their educational needs met. The IDEA is federal legislation which requires eligible, disabled youth from ages 3 through 21 to be given a free, appropriate public education (FAPE). This article will describe what should happen when a youth under 22 years old enters DOCCS custody and is assessed for his or her educational needs.

Upon incarceration, prisoners should be assessed at Reception Centers for Special Educational needs. If an inmate meets one of the following prerequisites, he or she will be given a "Code 40" designation. These include:

(1) a TABE score below 5.0 in reading or math;

(2) a scoring of below 70 on the BETA II test (IQ test); or

(3) a history of Special Education services.

Code 40 inmates should be transferred to one of 14 designated Special Education facilities where a Committee on Special Education (CSE) will further evaluate the youth for eligibility.

In addition to being identified at Reception Centers, prisoners may be referred by a[n]: (1) CSE chair person, (2) education supervisor, (3) parent, (4) professional security staff member, (5) judicial officer, or (6) an eligible inmate all using the "Referral Form to the Committee on Special Education (CSE)." The person making the referral should state the reason for the referral and include test results or reports if available. There should also be a mention of any attempts made to improve the student's performance prior to the referral.

The CSE is chaired by a psychologist and includes administrators, teachers, and other professional staff. The CSE reviews prisoners who are identified as having one or more educational handicapping conditions that can interfere with the learning process. The 13 IDEA categories under which youth may be eligible for services include: autism, deaf-blindness, deafness, emotional disturbance, hearing impairment, intellectual disability, multiple disabilities, orthopedic impairment, other health impairment, specific learning disability, speech or language impairment, traumatic brain injury, or visual impairment (including blindness).

If a youth is classified as "learning disabled," a psychologist should develop an Individualized Education Plan (IEP). An IEP must include: (1) present levels of performance, (2) annual goals and short term objectives, (3) special education and related services, (4) program modifications and supports, and (5) a plan for transition from secondary to post-secondary school.

Students with an IEP are required to be placed in the Least Restrictive Environment (LRE) in a class to the extent that it is possible with students who do not have disabilities. Those qualified should be provided with reasonable accommodations including:

(1) making the program areas more accessible,

(2) relocating programs to accessible areas,

(3) providing readers or interpreters, and

(4) acquisition or modification of equipment or devices.

Once an IEP is in place, the Team may not remove the youth without documentation in the form of a Request for Waiver form, unless the State has demonstrated a bona fide security or compelling penological interest that cannot otherwise be accommodated. Lastly, the state may choose not to provide special education services to inmates when prior to incarceration in an adult correctional facility they were either: (1) not identified as being a child with a disability under IDEA, or (2) they did not have an existing IEP.

If you qualify under the IDEA, a free appropriate public education must be provided to you under federal law while you are in prison. Your IEP will stay with you until you achieve high school equivalency or are declassified by the Committee on Special Education. If you, or another person you know, is under the age of 22 years old and you think that either you or the other person has a disability that interferes with learning or special education needs, you should write to PLS for possible assistance.

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This article was written by Maria Pagano, Managing Attorney of the Buffalo Office of PLS.

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

**PLATTSBURGH, 24 Margaret Street, Suite 9, Plattsburgh, NY 12901**

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

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