Pro Se

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SOLITARY REFORM IN NY STATE PRISONS

On December 16, 2015, the New York Civil Liberties Union (NYCLU) announced a major change in the way that DOCCS uses solitary confinement. The agreement, which is awaiting court approval, comes as a result of the NYCLU's 2012 class action lawsuit, Peoples v. Fischer, 11 CV 2694 (S.D.N.Y.), challenge to DOCCS' use of solitary confinement. Under this historic set of reforms, the State of New York commits to reducing the number of people who are put in solitary confinement and reducing the amount of time that people spend in solitary confinement, and to altering the conditions of solitary confinement by abolishing some of its most dehumanizing aspects and introducing a rehabilitative component that will improve overall safety for prisoners and prison staff. Here is a summary of some of the major reforms.

Reducing the number of people placed in solitary

- The agreement will result in the end of traditional solitary confinement for over 1,100 people (one-quarter of the current solitary population). Three hundred eighty-eight people trapped in solitary with sentences longer than 180 days will be given common spaces and rehabilitative programming.

- Seven hundred thirty-eight people will be removed from solitary and placed in less isolating units, the majority of which will include tailored rehabilitative programming to reduce isolation and improve safety. This includes:

- One hundred seventy-five people who were placed in solitary for minor offenses;

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Also Inside. . .

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THE PENDULUM

A Message from the Executive Director – Karen L. Murtagh

My father used to tell me that, "if you wait long enough the pendulum will always swing back." He was referring to societal responses to socio-economic issues. When it comes to prisons and the way in which our society treats prisoners, I have been waiting for over three decades for the pendulum to swing back. Perhaps it is too soon to say, but the events of the last few months seem to indicate movement in the right direction.

In this issue of *Pro Se* you will read about the case of *Peoples v. Fischer*, which recently resulted in a historic settlement regarding the way in which solitary confinement is used in New York State prisons. The *Peoples* settlement also abolishes the use of the "restricted diet" or what is commonly referred to as the "loaf diet." Does it fix *everything*? Of course not, but it is a tremendous step in the right direction, a step that has been a long time in coming.

The voices speaking out against solitary confinement began as a whisper in the 1980's and have risen to a roar over the past several years. Those voices came initially from prisoners' rights advocates like PLS, Prisoners' Rights Project of the Legal Aid Society, Disability Advocates, the Urban Justice Center and the Correctional Association. Those organizations have spent the past three decades educating the public, the court and the legislature on the effects of solitary confinement. Because of this, people everywhere are now speaking out against it. We have known all along that solitary confinement is not the answer. It does not make our prisons safer and it does not rehabilitate. In fact, it does just the opposite, driving many to madness and enraging many more. But the pendulum was swinging in the wrong direction for years and for a long period of time, our efforts to stop its momentum, despite the strength of the arguments against it – concrete and valid arguments based on science, morality and humanity all of which screamed for reform – did not lead to its abolition. Deaf to the call, our criminal justice system continued to use and abuse solitary confinement.

As a result of the settlement in *Peoples*, and numerous other state and federal cases that sought to eliminate solitary confinement and paved the way for reform − *Cookhorne*, *DAI*, *Anderson*, *Huggins*, *Langley*, *Reed*, *Bathany*, *Eng*, etc. − we are now witnessing a major shift in thinking regarding criminal justice goals and how we attain them. The Penal Law has always included rehabilitation as one of our primary goals, but that goal was secondary to the drum beat of the need for solitary as a prison management tool. Strong advocacy and years of litigation on this issue has caused the pendulum to begin swinging back.

Other developments also indicate that the pendulum is swinging in the direction of morality and human rights. On December 12, 2015, Governor Cuomo signed into law A.836/S.633, legislation that expands mental health and suicide prevention training for corrections officers and staff. Specifically, the measure requires that any new DOCCS employee, as well as any current staff that work in security, program services, mental health or medical, receive at least eight hours of training on mental health, suicide prevention and crisis management. On December 22, 2015, Gov. Cuomo signed legislation into law that would prohibit pregnant inmates from being shackled during transportation. The bill, sponsored by Sen. Velmanette Montgomery and Assemblyman Nick Perry, also prohibits women within eight weeks of delivery from being restrained during transportation except in "extraordinary circumstances." The pendulum continues to swing back.

Also on December 22, 2015, Governor Cuomo signed Executive Order No. 150 which establishes one or more correctional facilities within DOCCS exclusively for youth. We have known for decades that incarcerating youth in adult prisons has a significant negative impact on this population, including higher rates of suicide and recidivism, but we failed to take appropriate remedial action. The statistics show that youth processed as adults have a 26% higher likelihood of re-incarceration than youth processed as juveniles, thus negatively impacting public safety; but, again, the 'tough on crime' mantra was so loud that it drowned out the voices of reason. But now, the pendulum is swinging back.

Two years ago, Governor Cuomo proposed a plan to restore state college classes for prisoners, but the political backlash was such that the plan went nowhere. He didn't give up. On January 10, 2016, Governor Cuomo spoke at the Mt. Nebo Baptist Church in New York City and announced his plan to pay for more college education for prisoners. The plan will be paid for through criminal forfeiture money. Again, we have known for decades that more education results in less recidivism, but we have ignored the facts. The pendulum is swinging back.

During his speech at Mr. Nebo Baptist Church, the Governor also stated that he wants to close prisons and increase alternatives to incarceration. "I want to go down in the history books as the governor who closed the most prisons," said Gov. Cuomo. And the pendulum swings back.

Over the past several months, efforts to keep the pendulum swinging in the right direction have increased. There have been dozens of articles in numerous newspapers detailing brutality, corruption and abuses of power that have been occurring behind our prison walls. In response, in December 2015, Assemblyman Daniel O'Donnell held a legislative hearing seeking testimony on the need for oversight of our prisons. Advocates and experts in the field of prison management testified regarding the need for transparency and accountability, noting that robust external oversight is necessary if we are to increase the safety and security of our prisons.

A recent Op-Ed piece in the New York Times by Michele Deitch and Michael Mushlin captured it best: "While we are witnessing a movement for increased police accountability, the need for transparency and accountability is even more urgent in the nation's jails and prisons, given their closed environments and lack of cellphones and body cameras to capture abusive encounters. These institutions primarily confine the most powerless and vulnerable, including poor people who are disproportionally African-American and Latino, as well as people with mental illness. . . . External oversight will likely result in safer prisons for inmates and employees alike, more effective rehabilitation programs, a healthier prison culture that supports positive outcomes and taxpayer savings from fewer lawsuits and lessened recidivism. . . .Without independent oversight, we will not have a prison system worthy of our values." Ahhh, the pendulum.

. . . Continued from Page 1

- Two hundred seventy-five people with longer-term sentences in need of more intensive behavioral therapy (a "step-down" program);

- One hundred sixty-three people in need of drug treatment;

- Sixty-four people who are developmentally disabled;

- Thirty-nine people who would otherwise be released directly from solitary to the streets; and

- Twenty-two juveniles.

New policies will restrict the circumstances that solitary can be imposed as punishment. Under those policies, nearly half (42) of the 87 rule violations that are currently punishable by solitary no longer allow solitary sentences for first-time violations. Petty violations -- 23 out of the 87 violations -- are no longer eligible for solitary confinement sanctions at all.

- Solitary confinement sanctions will no longer be imposed for a one-time violation of rules regarding drug use or drug possession (drug-related violations have historically accounted for as many as one-fifth of the solitary population).

- Over 20,000 of Department of Corrections and Community Supervision (DOCCS) personnel will be trained on how to de-escalate situations before solitary becomes a consideration. All new corrections officers will also receive this training. Furthermore, staff working in solitary or in the new rehabilitative units will also receive training on how the stresses of solitary impact people's behavior. DOCCS will reach out to the U.S. Department of Justice for technical assistance with the training.

- All officers who give out disciplinary sentences will be required to consider intervention (e.g., counseling) or less severe forms of punishment (e.g., denying privileges) before issuing a sentence to solitary. When they do issue a solitary sentence, they must report in writing why it was necessary.

Reducing the time spent in solitary

- All people in solitary will now be eligible for automatic early release for good behavior and participation in rehabilitative programming. An individual's mental health status must be considered when evaluating whether to grant early release.

- Before the lawsuit, there were no maximum limits on solitary for any type of misbehavior. The settlement imposes a maximum sentence for solitary confinement of three months for all but a handful of violations such as assault and escape and a maximum sentence of 30 days for almost all first-time non-violent violations.

- Commonly-invoked violations that once gave correction officers wide discretion to impose long solitary sentences (e.g., disobeying orders) now carry a maximum of 30 days of solitary confinement for first-time violations.

Altering the conditions of solitary

All people in solitary will be provided access to telephone calls for the first time. This is critically important for the incarcerated and their families, who often live great distances apart, making visits difficult. All people in solitary will also be given the opportunity for more visits.

- For people expected to be in solitary longer than 180 days, the settlement establishes first-ever universal access to rehabilitative counselors and educational instructors, including substance abuse therapy and cognitive behavioral therapy.

  People will never again be deprived of basic necessities, including food, as a form of punishment. The notorious food-as-

punishment known as "the loaf" will be abolished.

- Every person being admitted to solitary will be given clear written notice of their ability to confidentially access mental health services.

- Policies will provide more safeguards when "double-celling," or putting two people into a solitary confinement cell, which has historically led to tension and distress.

There will be increased access to reading materials, radio and a shower curtain in shared cells.

- DOCCS will conduct pilot projects providing offline tablet computers to people in solitary and "rolling phone carts," which could dramatically expand telephone access.

News & Notes

Youth to Be Housed in a Separate Prison

On December 22, 2015, Governor Cuomo signed Executive Order No. 150 which establishes that New York state will house all female offenders ages 16 and 17, and 16 and 17 year old male offenders with minimum or medium security classifications, in correctional facilities in which no adult offenders are housed. The Governor anticipates that this group of young offenders will be housed in Hudson C.F. beginning in August 2016, after that prison has been renovated. Sixteen and seventeen year old male offenders with maximum security classifications will continue to be housed in a separate juvenile unit at Coxsackie C.F.

No Shackles for Pregnant Prisoners

A law prohibiting the shackling of pregnant prisoners has been passed by the New York State Legislature and signed by Governor Cuomo. Effective immediately, the new law applies when the woman is in a prison and, if she is more than 7 months pregnant, when she is being transported out of prison. Shackling of pregnant prisoners can only occur in extraordinary circumstances, and then only with the approval of the prison Superintendent. In these circumstances, restraints will be limited to handcuffs in front. The law also bars correctional staff from delivery rooms unless requested by the prisoner or medical staff.

Our Buffalo Office Has Moved!

Our Buffalo office has moved and their new address is:

14 Lafayette Square, Suite 510
Buffalo, NY 14203

PRO SE VICTORIES!

Jessie J. Barnes v. Brian Fischer, 9:13-CV-164 (N.D.N.Y. 7/28/15, 8/21/15, 10/30/15, 12/8/2015). Using a series of motions, Jessie Barnes was able to convince a judge that what Mr. Barnes believes to be a key piece of evidence in this excessive use of force case – the feed up slot mechanism to the cell he was in when a defendant closed the slot on his finger, cutting off his finger tip – had been destroyed in spite of assurances made under oath that the mechanism had not been destroyed and would be preserved. The issue of how the court would handle the destruction of evidence was reserved for trial.

Matter of Eduardo Carrasquillo v. Brian Fischer, Index No. 170-14 (Sup. Ct. Albany Co. Nov. 12, 2014). In this case, the court had to decide whether the Food Services Operations Manual (DOCCS Directive 4310) setting wages for inmates according to their level of education trumped a more general DOCCS Directive 4802 requiring the pay rate of prisoners who refuse RSAT and ART to be cut. The court ruled that the more specific policy applied to the petitioner and ordered DOCCS to credit him with the wages that he had lost as a result of the application of Directive 4802.

Matter of Anthony Foster v. P.Chappius, Index No. 2014-1989 (Sup. Ct. Chemung Co. Sept. 3, 2015). In this Article 78 challenge to a Tier II hearing, the petitioner argued that he had been denied his right to attend the hearing when the escort officer went to another inmate's cell and that inmate refused to go to the hearing. The inmate who refused to attend did not sign the refusal form nor was a reason for the refusal written on the form. Noting that an inmate has a right to attend a hearing unless he or she unambiguously refuses to attend, the court looked at whether the refusal was "unambiguous." In this case, the hearing officer did not question the officer who allegedly witnessed the refusal and made no attempt to go to the cell himself to ask the petitioner whether he was willing to attend the hearing. Rather, the hearing officer simply relied on the unsigned piece of paper which gave no reason for refusing to attend. Where there was no description of the inmate who refused, no verification that the officer spoke to the petitioner, as opposed to another inmate, or record of the words that the officer and the inmate spoke, the court wrote, "it is obvious that there is insufficient evidence that [the petitioner, as opposed to another inmate] unambiguously refused to appear at his own hearing.

Congratulations to the following individuals whose Tier III hearings were administratively reversed and expunged following the filing of Article 78 proceedings:

Christopher Shapard, Tony McGee, Edward Bain, Darryl Shelton, Richard Tevault, Nathanial Jay, Brad McCaskell, Robert Logan Jonathan Russo, Sergio Ponder, Robert Haigler (2 cases), Daniel Williams, Andre Lewis, Geoffrey Holgate, Vincent Moreno, Lee Woods, George Melendez, Patrick Proctor, Robert McLee, Warren Streeter, Eric J. Shields, Jason Smith, Craig Jackson, Robert Rivera, Eon Sheperd, James Adams, Carolyn Warmus, Darrell Gunn, Alfonso Rizzuto, Joseph Dexter, Ronald Burgess, Demetrius Loving, Eddie Tarafa, Percy C. West, Bryon K. Russ, Sr., Kevin Moore, Donald Kagan and Willie Singleton.

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

Court of Appeals Revisits When Remittal For a New Tier Hearing May Be Warranted

When a state court finds that a prisoner's rights were violated during the course of a prison disciplinary proceeding, it has two choices of remedy. The court may reverse the disposition and direct that the charges be expunged (all records related to the hearing removed from the prisoner's record), or the court may reverse and remit the matter for a new disciplinary hearing. The difference between these choices of remedies is significant: expungement puts an end to the proceeding once and for all, whereas remittal means the accused prisoner must once again face the charges and be exposed to imposition of the same penalty.

Over the years, New York courts have developed a body of case law to help guide this choice of remedies, although the choice of remedy framework has not always been clearly stated or consistently or uniformly applied. The Court of Appeals, the state's highest court, recently was afforded an opportunity to bring more clarity to this issue. Unfortunately, the Court's decision proved to be very fact-specific to the case before it, leaving for another day and another case the opportunity to develop and clarify this area of the law.

As a general matter, our courts hold that where a disposition is reversed because of a lack of substantial evidence, a new hearing is never permitted. Matter of Hartje v. Coughlin, 70 N.Y.2d 866 (1987). In effect, if prison officials fail to produce enough evidence to establish guilt at the original hearing, the courts will not allow them a second bite at the apple.

The courts have also held that where a fundamental constitutional right is violated, expungement is required. Conversely, when a court concludes that there is a violation of only DOCCS's regulations ("Chapter 5" of Title 7 of New York Code of Rules and Regulations), as opposed to a violation of the due process clause of the Fourteenth Amendment, it is generally found that remittal for a new hearing is permissible. An exception will be made, however, where the court also finds that while the violation is only of a regulatory right, equitable considerations support and weigh in favor of expungement instead of remittal. Equitable factors are essentially matters of fundamental fairness; would it be fundamentally unfair to try to conduct a new hearing. For example, even where only a regulatory procedural violation is found to have occurred, the court may choose to order expungement where, due to an extended passage of time since the original hearing, a fair hearing could no longer be afforded. This may be because of unavailable witnesses, loss of other evidence, or the fading memories of those with knowledge of the events. Equity may also be invoked to support expungement where the individual has already served all, or nearly all, of the penalty imposed by the time of the court's decision. Matter of Allah v. LeFevre, 132 A.D.2d 293 (3d Dep't. 1987).

Much controversy has centered upon whether or not a particular procedural violation is to be characterized as "constitutional" or merely "regulatory," and thus which remedy is warranted. The line between what is deemed constitutional versus regulatory has not always been clear in court decisions. This is precisely the issue that was recently before the Court of Appeals in Matter of Texeira v. Fischer, 26 N.Y.3d 230 (2015).

The basic constitutional procedural rights at prison disciplinary hearings were first identified and established by the United States Supreme Court in Wolff v. McDonnell, 418 U.S. 539 (1974). These rights include advance written notice of the charges, an opportunity to be present at the hearing, to call relevant witnesses and to present relevant documentary evidence, prehearing assistance when the inmate is confined, and if found guilty, a written statement of evidence relied upon and reasons for the disposition. These rights are considered "conditional," in that they may be modified or limited in various ways so as to safeguard legitimate concerns about safety and security in particular situations. For instance, access to confidential witnesses and evidence from confidential informants may be withheld when necessary to protect their safety. Matter of Abdur-Raheem v. Mann, 85 N.Y.2d 113 (1995).

DOCCS enacted regulations (commonly referred to as "Chapter 5") following the decision in Wolff. These regulations incorporate and largely mirror the basic due process rights set forth in Wolff. However, in a few respects the regulations go above and beyond the minimum basic rights in Wolff. For instance, the regulations specify time-frames for commencing and concluding the hearing and require that the proceeding be tape-recorded. These differences are easily identified as solely regulatory. However, a regulatory provision that requires a hearing officer to provide a written statement of the reason for the denial of any witness has proved to be a cause for some confusion concerning the purported source of witness-related violations under various factual situations.

In the recent Court of Appeals case, Matter of Texeira v. Fischer, 26 N.Y.3d 230 (2015), the petitioner faced a variety of disciplinary charges for

an alleged incident at Attica in 2012. Following petitioner's transfer, the hearing was held at Upstate. Petitioner requested several prisoners as witnesses, who were also named in the misbehavior report. One of these individuals had since been moved to Elmira. This individual signed an inmate witness refusal to testify form, giving as a reason for his refusal that he had "never been at Upstate, [he] came directly to Elmira from Attica." Petitioner argued, and even the hearing officer agreed, that this purported refusal did not make sense on its face. The hearing officer agreed that he would follow-up with the witness and seek clarification; in effect, to make sure he understood that the hearing concerned events at Attica not Upstate. The hearing officer, however, never did follow-up with the witness before finding petitioner guilty.

Petitioner, represented by PLS, brought an Article 78 challenge in Clinton County Supreme Court. That court readily agreed that the purported witness refusal was "illogical on its face" and that the hearing officer failed to make a proper meaningful effort to follow-up on the refusal, thereby violating petitioner's right to request a witness. However, the court held that the violation was only regulatory and not constitutional, and that therefore remittal for a new hearing was the appropriate remedy. The court reasoned that a witness violation is of a constitutional dimension only where there is no reason at all for the denial, and that the purported refusal form here was "some reason" even though that reason made no sense and gave rise to the violation.

Petitioner appealed the issue of the remedy to the Appellate Division, Third Department. That court affirmed the decision to remit for a new hearing. Matter of Texeira v. Fischer, 115 A.D.3d 1137 (3d Dep't 2014). Like the trial court, the Third Department did so by relying upon its choice of remedy framework which turns upon whether a witness violation is deemed to be of a constitutional or regulatory dimension. The court concluded that the violation in Texeira was only a regulatory violation because there was some reason for the denial of the witness (i.e. the nonsensical reason given on the refusal form), even though that reason 1) was deemed inadequate, 2) was the basis for the conclusion that the hearing officer was required to make further inquiry, and 3) required the reversal of the disposition.

Petitioner sought and was granted leave (permission) to appeal to the Court of Appeals, in order to present his argument that the remedy for a witness violation should not depend upon the purported *source* of the right to request a witness, and indeed that there is only one underlying right to request witnesses and that right derives from the constitution and Wolff. That is, petitioner argued, there is no separate regulatory right to request witnesses because the regulations merely adopt and incorporate Wolff into state law. The only exception to this, as noted above, is the separate requirement in the regulation for a written statement by the hearing officer whenever a witness is denied. As petitioner noted in his appeal, the regulatory requirement of a written reason for the denial was never raised and never an issue in this case. Neither the supreme court nor the Third Department held that a lack of a written statement was the basis for their conclusion that the hearing must be reversed. Indeed, even prison officials never argued that the absence of a written statement was an issue in this case.

Petitioner argued to the Court of Appeals that the rule in these cases should be that *all* actual witness violations warrant expungement. Indeed, as petitioner noted, the Court long ago appeared to have agreed with this position; over the years, however, the Third Department and other lower courts had misapplied the law and developed this choice of remedy framework that was based on a false distinction between a "constitutional" and "regulatory" right to witnesses. Specifically, in Matter of Barnes v. LeFevre, 69 N.Y.2d 649, 650 (1986), the Court of Appeals reversed and directed expungement of a disposition where there was no inquiry into a purported refusal of a requested witness to testify. The Court did so even though it expressly characterized such error in that case as a "regulatory" violation.

DOCCS argued in the Court of Appeals that the Court should instead adopt a new rule that remittal for a new hearing should be the default (automatic) remedy for all procedural violations regardless of

whether they are constitutional or regulatory, except where the equities favor expungement. Fortunately, the Court did not agree to adopt DOCCS' proposed default remittal rule.

Unfortunately, however, the Court also did not agree to adopt a bright-line rule that witness violations are always constitutional and always require expungement. The Court held that the particular record in this case was unclear as to whether prison officials violated petitioner's constitutionally protected due process right or not. The Court found instead that it was clear that prison officials at least failed to comply with the regulatory requirement that a hearing officer provide a written statement explaining why a witness was denied. Thus, the Court concluded, "We are mindful that in this case there is a possible convergence [coming together] of the constitutional and regulatory commands, as well as the proper remedy, but under these circumstances, where respondent clearly violated the regulation, but where the court cannot determine if respondent violated the due process requirements of Wolff, we are unpersuaded that any interplay between section 254.5 and the federal constitution mandates expungement."

The Court's decision in Texeira leaves open the question of whether the constitutional right to request a witness and the regulatory right to request a witness are one and the same, and thus whether expungement for all actual witness violations is required. This issue may one day be decided in a case where the facts are clearer. That is, in a case where the legal issue is not in the Court's view clouded by any confusion over whether the regulatory requirement of a written statement for the reason for the witness's denial may also have been violated.

Until then, it may be useful to keep these issues in mind as you litigate disciplinary challenges related to witness denials. Expressly arguing in favor of expungement instead of remittal is important to include in your Article 78 legal arguments. As well, this issue demonstrates the importance of raising constitutional due process claims whenever possible.

Prisoners' Legal Services of NY represented George Texeira in this Article 78 proceeding.

Drug Test Adequately Supports Determination of Using Intoxicants

After the petitioner's urine twice tested positive for synthetic marijuana, the petitioner in Matter of Roman v. Prack, 18 N.Y.S.3d 568 (3d Dep't 2015) was charged with and found guilty of using an intoxicant. In an Article 78 challenge, the petitioner argued that the determination of guilt was not supported by substantial evidence. Citing Matter of Ralands v. Prack, 16 N.Y.S.3d 788 (3d Dep't 2015), the Court held that positive test results, the misbehavior report and the testimony at the hearing were sufficient to establish guilt.

Jose H. Roman represented himself in this Article 78 proceeding.

Court Upholds Determination of Guilt for Smuggling Via a Kiss

Petitioner was found guilty of smuggling and violating visiting room procedures after a correction officer testified that he had observed the petitioner's wife transferring contraband to him during a good-bye kiss. In reviewing whether the determination of guilt was supported by substantial evidence, the court found that the misbehavior report, testimony and videotape were substantial evidence of guilt. The court commented that petitioner's testimony denying any wrong-doing was a credibility issue for the hearing officer to resolve.

Judson Watkins represented himself in this Article 78 proceeding.

Court Finds Prisoner Waived His Right to Attend Hearing

In Matter of Douglas v. Bedard, 134 A.D.3d 1317 (3d Dep't 2015), the underlying facts of the case were that following a confidential investigation, the petitioner was charged with soliciting others to smuggle contraband, violating package room procedures and violating telephone program procedures. He was found guilty and the determination of guilt was affirmed. Challenging the determination in an Article 78 proceeding, the

petitioner argued that the respondent had violated his right to attend the hearing. The Supreme Court dismissed the petition.

On appeal, the Appellate Division found that the record supported the Supreme Court's decision. The record showed that after an officer informed the hearing officer that the petitioner had refused to leave his cell or provide a reason for not going to the hearing and that the officer had informed the petitioner that the hearing would be held in his absence, the hearing officer and the correction officer went to the petitioner's cell. There, they executed a form documenting the petitioner's refusal which the petitioner refused to sign. Based on this sequence of events, the Appellate Division found that the petitioner had not been improperly denied his right to attend.

Further, the court ruled, petitioner's failure to attend the hearing rendered any procedural objections unpreserved.

Camillo Douglas represented himself in this Article 78 proceeding.

Court of Claims

In Tolliver v. State, 20 N.Y.S.3d 204 (3d Dep't 2015), the court examined whether the State should pay damages relating to injuries that occurred when the claimant, who suffered from an injury that made climbing stairs difficult, fell on the stairs at Clinton C.F.

When the claimant was transferred to Clinton, he filed a grievance seeking a transfer to a different prison as, due to a pre-existing leg injury, he had difficulty climbing stairs. His grievance was denied, and he was advised to raise the issue with a doctor and his counselor. When he did so, he was examined by an orthopedist who recommended that he be assigned to a flat area without stairs. Prison officials then housed him in the prison infirmary. The claimant responded by filing grievances objecting to the placement and seeking a transfer to another facility. In response, prison officials released him to general population. The claimant requested and was given a porter job. After several weeks of working as a porter without complaint, he fell on a stairway and injured his leg while he was working.

The trial court dismissed his claim after a trial on the issue of liability. The court found that the Department was not at fault when it denied him a transfer and assigned him a job as a porter. On appeal the court affirmed the dismissal, holding that the release from the infirmary and the job assignment were based on the claimant's requests. In addition, the court found, the claimant had failed to introduce any medical evidence that the complained of actions were improper or that they were the proximate cause of the injuries.

Eric Tolliver represented himself in this Court of Claims action.

Reversal of Tier III Not Sufficient to Prove Liability for Time in SHU

In Moustakos v. State of New York, 21 N.Y.S.3d 502 (4th Dep't 2015), the Appellate Division considered whether the Court of Claims had properly granted judgment for the State with respect to a complaint for damages for time wrongfully spent in SHU. The basis of the claim was the Third Department's reversal of a Tier III hearing on the basis that the petitioner had been denied his right to present documentary evidence when the respondent failed to produce a memorandum containing allegedly exculpatory evidence. See, Matter of Moustakos v. Venettozzi, 937 N.Y.S.2d 638 (3d Dep't 2012). Because the respondent in that case did not appeal the Third Department's decision, in the Court of Claims action, the State was collaterally estopped from challenging the court's determination that the Department violated its own rules.

The Appellate Court rejected the claimant's argument that the Third Department's decision entitles him to partial summary judgment on the liability for unlawful confinement. Noting that while it is well settled that where the DOCCS

employees have violated the due process requirements found in 7 N.Y.C.R.R., Parts 252 through 254, their actions will not receive immunity, the court went on to state, however, that the absence of an immunity defense does not entitle a claimant to partial summary judgment on liability. Rather, the court wrote, where a prisoner contends that he was wrongfully confined as a result of a flawed proceeding, once absolute immunity is removed by showing that the governing rules and regulations were not followed, the claimant may recover damages only if he or she is able to prove the following:

1) the confinement was intentional;

2) the claimant was conscious of the confinement;

3) the claimant did not consent to the confinement; and

4) the confinement was not otherwise privileged.

Here, the court found that the claimant had successfully proven the first three elements. However, as to the fourth, the court found that the claimant had not shown that the confinement was not otherwise privileged. With respect to this element, the court held "absent any evidence that the exculpatory evidence would have changed the outcome of the hearing, the Court of Claims properly denied claimant's motion for partial summary judgment."

Christopher Moustakos represented himself in this Court of Claims action.

Miscellaneous

Court Upholds Denial of Family Reunion Program Application

In Matter of Mays v. Morris, 21 N.Y.S.3d 728 (3d Dep't 2015), the petitioner, who is serving a 25 years to life sentence for robbery in the first and second degree, applied to the Family Reunion Program for a visit with his wife and two step-children. Because he is a central monitoring case (CMC), the application had to be reviewed specially. Following this review, the application was denied based on the seriousness of the petitioner's prior crimes and his poor disciplinary history and on his "lack of commitment to his marriage." Petitioner appealed the denial but the appeal was denied.

Beginning its analysis, the court noted that participation in the FRP is a privilege not a right. Corrections officials have a lot of discretion in determining whether any prisoner who applies will be allowed to participate. A denial of participation will be upheld if it has a rational basis.

Here, the court wrote, the respondent properly considered the brutal nature of the crime for which the petitioner is now serving a sentence, as well as his prior crimes which were also gun-point robberies. The respondent also properly considered the petitioner's numerous disciplinary violations, many of which involved violent and disruptive conduct. These factors, the court found, provide a rational basis for denying the petitioner's request. While the court went on to find that there was no evidence showing that the petitioner lacked a commitment to his marriage, the court decided that it was not necessary to remit the matter for additional fact finding, as it was not invoking different grounds for upholding the determination but was instead using the grounds relied upon by the respondent for which there was factual support.

Kevin R. Mays represented himself in this Article 78 proceeding.

Court Rules Pat Frisk Policy Does Not Violate the 8th Amendment

In Matter of Morrow III v. Annucci, 20 N.Y.S.3d 521 (Sup. Ct. Cayuga Co. Nov. 5, 2015), the petitioner challenged as unconstitutional certain sections of the Department's Pat Frisk Policy, set forth in Directive 4910(III)(B)(1), and sought, among other things, to have pat frisking cameras record such frisks and to maintain the videos for two years. The Department moved to dismiss the petition on the grounds that the petitioner was not entitled to a writ of mandamus, that the petition failed to state a cause of action and that the petitioner did not have standing to bring the proceeding.

Background

The petitioner filed a grievance that he had been inappropriately pat frisked. The superintendent denied the grievance, finding that there was no evidence of staff misconduct. The Central Office Review Committee (CORC) agreed with the superintendent. A year later, the petitioner filed a second grievance alleging inappropriate sexual contact during a pat frisk and requesting that the pat frisk policy be **rescinded** (withdrawn). Again, the Superintendent denied the grievance and CORC affirmed the denial.

The petition at issue does not challenge the denial of the grievances or staff misconduct. Instead, it asserts that the policy is unconstitutional and should be abolished to remove the sexually invasive aspect of the policy. It also alleges that the policy violates prisoners' Eighth Amendment rights to be free from cruel and unusual punishment and violates equal protection because visitors are not pat frisked when they enter prisons. The petitioner states that he has suffered nightmares as a result of the pat frisks that he has experienced.

Directive 4910(III)B)(2) provides that a pat frisk is "a search by hand of an inmate's person, and his or her clothes, while the inmate is clothed except that the inmate shall be required to remove coat, hat, and shoes." The directive permits contact through clothing "with the genitalia, groin, breast, inner thigh and buttocks." The directive expressly states that such contact is a necessary part of a thorough pat frisk. The directive cautions that "staff must avoid any penetration of the anal or genital opening during a pat frisk" and prohibits lifting or otherwise manipulating the genitalia.

The Court's Decision

The court found that the Directive does not "create inhumane prison conditions or inflict pain or injury and held there is no Eighth Amendment violation. It found that the pat frisk authorized by the Directive, even with through the clothing contact with genitalia, groin, breast, inner thigh and buttocks, is minimally intrusive and necessary to maintain institutional security and safety. Further, the court held, citing Florence v. Board of Chosen Freeholders of the County of Burlington, 132 S.Ct. 1510 (2012), under the Fourth Amendment, which prohibits unreasonable searches and seizures, a prisoner's rights are limited by the needs of corrections officials to enact reasonable search policies to detect and deter the possession of contraband. And finally, the court noted, courts have upheld more intrusive searches of prisoners, including strip searches and rectal cavity searches as are necessary to maintain safety and security.

The court also analyzed this claim under the traditional prisoners' rights analysis as applied to corrections policies: Is the regulation related to legitimate penological interests? The court found that the policy, on its face, is not unreasonable and is necessary to allow corrections officials to secure the prisons against escape, prevent the transfer or possession of contraband and protect the safety of prisoners and staff. Therefore, the court held, it is reasonably related to legitimate penological interests.

The court found that the fact that visitors were not subjected to pat frisks did not violate the equal protection clause of the Fourteenth Amendment. In this instance, visitors and prisoners are not similarly situated. Visitors are entitled to certain freedoms rights and privileges, the court wrote, that prisoners, because they are in custody, are not. Being a prisoner, without more, the court held, is not enough to support the equal protection claim.

Finally, the court held that a petition for mandamus can only be used to compel a state agency to take a ministerial action. A ministerial action is one that is required and involves no exercise of judgment or discretion. Here the petitioner has no clear legal right to the relief he is seeking and therefore is not entitled to a writ of mandamus.

Neb Morrow III represented himself in this Article 78 proceeding.

Challenge to Removal from SOCTP Denied on Appeal

After challenging his termination from the sex offender counseling and treatment program (SOCTP) by means of a grievance, the denial of which he appealed to the Central Office Review Committee (CORC), the petitioner in Matter of Horowitz v. Fischer, 20 N.Y.S.3d 202 (3d Dep't 2015), filed an Article 78 petition challenging the denial of the grievances. After he filed the petition, he was restored to SOCTP and the Supreme Court dismissed the petition as moot. On appeal, the Third Department disagreed that the petition was moot. The court held that the issue of the petitioner's termination from SOCTP was not moot because it remained a part of his institutional record and could be considered in an Article 10 petition seeking civil confinement or strict and intensive supervision. The appellate court therefore reinstated the petition and remanded it to the Supreme Court to consider the petition on its merits. The Supreme Court again dismissed the petition.

In reviewing the Supreme Court's decision, the Appellate Division first noted that "judicial review of an inmate grievance is limited to whether such determination was arbitrary and capricious, irrational or affected by an error of law." A court cannot substitute its own opinion for a grievance decision which is supported by the record.

Here, petitioner received satisfactory monthly evaluations in SOCTP and was rated as motivated or highly motivated to change his behavior. However, several subjective evaluations were contradicted by clinical observations, e.g., his pervasive denial, justification, rationalizations and minimization of his sexual behavior. He also made numerous other statements about his conduct that were in contrast to his ratings. Accordingly, the court found, the record before it contained enough evidence that provided a rational basis for denying petitioner's grievances regarding his termination from SOCTP. For this reason, the Appellate Division affirmed the decision of the Supreme Court dismissing the petition.

Alan J. Horowitz represented himself in this Article 78 proceeding.

Court Affirms Denial of Grievance Relating to Work Evaluations

The petitioner in Matter of Nunez v. White, 20 N.Y.S.3d 672 (3d Dep't 2015), submitted a grievance about conditions in the tailor shop at Clinton C.F., asserting that there was an unwritten policy with respect to work evaluations that no tailor shop supervisor was to rate an inmate worker as excellent in every category. He also noted that there were no safety guards on the sewing machine needles and that the seat cushions had been removed from the chairs so that workers had to sit on hard chairs all day. After a hearing, the IGRC concluded that there was no unwritten policy regarding evaluations, the safety guards were in place on all sewing machines, and that a new procedure had been adopted so that workers could use seat cushions. Petitioner appealed some issues to the Central Office Review Committee (CORC) and then filed an Article 78 challenge. The Supreme Court held that the petitioner had failed to exhaust his administrative remedies as to the seat cushion issue and that CORC's decision was rational as to the unwritten policy and the sewing needle guards as there was nothing in the record to substantiate his claims.

On appeal, the Appellate Division modified the decision. First, the court noted, judicial review of a grievance is limited to deciding whether the determination was arbitrary or capricious, without a rational basis or affected by an error of law. Here, the court found, there was no basis in the record for finding CORC's decision to be irrational as there

was no policy, unwritten or otherwise, to deny accurate performance evaluations and there was no evidence that the sewing machines lacked needle guards.

However, with respect to the Supreme Court's determination that petitioner had failed to exhaust his administrative remedies on the issue of seat cushions, the court noted that the respondents had joined the petitioner's request that this matter be remitted to CORC to adjudicate this portion of his grievance. This was necessary, the court wrote, because although the new policy was implemented after petitioner filed the grievance, he raised the issue at the hearing in front of the IGRC which agreed with him that the new procedure was, in certain respects, vague. Petitioner raised this objection in his appeal to the Superintendent and to CORC, however neither responded. As neither addressed the issue, the court ruled, it agreed with the parties that the matter must be remitted to CORC so that it can rule on whether the policy is sufficiently clear.

Manual Nunez represented himself in this Article 78 proceeding.

FEDERAL COURT DECISIONS

Court Refuses to Dismiss Suit Brought by Prisoner's Sister Over Harassment by Officers

Wanda Sealey (Ms. Sealey) filed a §1983 complaint against officers at Wyoming C.F. alleging that the pre-visit screening to which the officers subjected her violated, among other rights, her First Amendment right of association and her Fourteenth Amendment right to equal protection. The complaint in Sealey v. D. Olszewski, Index No. 14 CV 3 (W.D.N.Y. Dec. 28, 2015), alleges the following facts.

When Ms. Sealey arrived with her sister Mildred Sealey (Mildred) to visit their brother, the officers told her she could not enter the prison in spandex pants. She changed into another pair of pants, which set off the metal detector. One of the officers told her that she could not enter the prison unless she removed the pants. Ms. Sealey then donned Mildred's long overcoat, and placed the offending pants into a paper bag. Although Mildred had already worn the coat through the metal detector, when Ms. Sealey went through wearing only the coat over her underwear, the metal detector alerted. Knowing that Ms. Sealey had no pants on, one of the officers told her to take off the coat or she would not be permitted to enter the visiting area. He said this after having using the hand held metal detector to clear the coat when Mildred was wearing it; it was the buckle on the coat that had caused the detector to alert. Ms. Sealey refused to take off the coat and left the prison. As she departed, the officers "were laughing and treating her with disrespect, ridicule and appeared intent on gaining sexual gratification in abusing her."

The defendant officers moved to dismiss all of Ms. Sealey's claims. The court granted the motion except with respect to the freedom of association claim and the equal protection claim. This article discusses the court's resolution of the Freedom of Association claim.

Freedom of Association

Wanda Sealey alleges that the defendant officers violated her right to freedom of association by unreasonably refusing to allow her to visit her brother. With respect to this claim, the court first noted that prisoners retain a limited right of association that cannot be restricted unless the restriction bears a rational relationship to legitimate penological interests. Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119 (1977). Further, in the prison visitation context, the visitor's rights are necessarily tied to the inmate's. See, Hernandez v. McGinnis, 272 F.Supp.2d 223 (W.D.N.Y. 2003). Thus, whether the plaintiff is the visitor or the prisoner, in determining whether the defendants have violated the constitution, the court will apply the rational relationship standard. Further, in the context of a motion to dismiss, the court looks at whether the facts alleged by the plaintiff, if proven, would violate the constitution.

The court interpreted the complaint to argue that the defendants violated the plaintiff's right to freedom of association by refusing to screen the

plaintiff properly and not allowing her to visit her brother -- not for a legitimate penological purpose -- but because she is African American and would not reveal her unclothed self to the defendants or participate in their effort to seek sexual gratification from her. The court found that this allegation states a sufficient First Amendment freedom of association claim.

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Wanda Sealey represented herself in this Section 1983 action.

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