Pro Se

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Parole Board Must Weigh Age at Time of Crime

In another decision recognizing that young people may not be as **culpable** (blameworthy) as adults are for the crimes that they commit, the Third Department, in Matter of Hawkins v. NYS DOCCS, 2016 WL 1689740 (April 28, 2016), reversed the Parole Board's denial of Petitioner's parole application. The Court held that where the Board had denied parole without considering the significance of the petitioner's youth and its "attendant circumstances" at the time of the commission of the crime, the petitioner, who was serving a sentence of 22 years to life for having, at the age of 16, killed his 14-year-old girlfriend, was entitled to a new parole hearing. In reaching this result, the court noted petitioner had served 36 years and that under these circumstances, the Board, in effect, was deciding whether a person who had committed a crime as a 16-year-old should spend his entire life in prison. In the decision, the court stated: "[A]s a person serving a sentence for a crime committed as a juvenile, the petitioner has a substantive constitutional right not to be punished with a life sentence if the crime reflects **transient** (temporary) immaturity." The court concluded that the petitioner had been denied his right to a meaningful opportunity for release when the Board failed to consider the significance of petitioner's youth and its attendant circumstances at the time of the commission of the crime. "That consideration is the minimal procedural requirement necessary to ensure the substantive Eighth Amendment protections," the court wrote, "set forth [by the United States Supreme Court] in Graham v. Florida, 560 U.S. 48 (2010), Miller v. Alabama, 132 S. Ct. 2455 (2012) and Montgomery v. Louisiana, 136 S. Ct. 718 (2016)."

These three U.S. Supreme Court cases establish that for the purposes of sentencing, children are "constitutionally different from adults;" they lack maturity and have an underdeveloped sense of responsibility that leads to recklessness, impulsivity, and heedless risk-taking. They are

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NATIONAL COMMISSION ON CORRECTIONAL HEALTH CARE ISSUES POSITION STATEMENT ON SOLITARY CONFINEMENT
A Message from the Executive Director – Karen L. Murtagh

On April 10, 2016, the National Commission on Correctional Health Care (NCCHC) issued a position statement on the use of solitary confinement. NCCHC, an independent, not-for-profit 501(c)(3) organization, was established by the American Medical Association in 1983 after an AMA study found inadequate, disorganized health services and a lack of national standards. The mission of NCCHC is to improve the quality of health care in our nations' jails, prisons and juvenile detention centers.

In support of its position statement, the NCCHC cited to a multitude of institutions and organizations that have determined that prolonged solitary confinement constitutes cruel, inhuman and degrading treatment. Federal courts have found that it is unconstitutional to subject those suffering from mental illness to solitary confinement. The American Psychiatric Association has adopted a policy opposing the "prolonged" segregation of prisoners with serious mental illness. The World Health Organization (WHO) had determined that solitary confinement "has clearly been shown to be injurious to health" and that doctors should never "certify a prisoner as being fit for disciplinary isolation or any other form of punishment." The United Nations, through Juan Mendez, its Special Rapporteur on torture and cruel, inhuman, and degrading treatment, has concluded that neither juveniles nor those with mental disabilities should ever be subjected to solitary confinement, that indefinite or prolonged solitary confinement should be banned and that no one should be subjected to solitary confinement for more than 15 days. The United Nations Standard Minimum Rules for the Treatment of Prisoners, commonly referred to as the Mandela Rules, also state that the solitary confinement of children and those suffering from mental illness should be prohibited.

In its position statement the NCCHC also noted that "the very nature of prolonged social isolation is antithetical to goals of rehabilitation and social integration."

In light of all of the above, the NCCHC adopted the following 17 principles to guide correctional health professionals when dealing with solitary confinement issues:

1. Prolonged (greater than 15 consecutive days) solitary confinement is cruel, inhumane, and degrading treatment, and harmful to an individual's health.

2. Juveniles, mentally ill individuals, and pregnant women should be excluded from solitary confinement of any duration.

3. Correctional health professionals should not condone or participate in cruel, inhumane, or degrading treatment of adults or juveniles in custody.

4. Prolonged solitary confinement should be eliminated as a means of punishment.

5. Solitary confinement as an administrative method of maintaining security should be used only as an exceptional measure when other, less restrictive options are not available, and then for the shortest time possible. Solitary confinement should never exceed 15 days. In those rare cases where longer isolation is required to protect the safety of staff and/or other inmates, more humane conditions of confinement need to be utilized.

6. Correctional health professionals' duty is the clinical care, physical safety, and psychological wellness of their patients.

7. Isolation for clinical or therapeutic purposes should be allowed only upon the order of a health care professional and for the shortest duration and under the least restrictive conditions possible, and should take place in a clinically designated and supervised area.

8. Individuals who are separated from the general population for their own protection should be housed in the least restrictive conditions possible.

9. Health staff must not be involved in determining whether adults or juveniles are physically or psychologically able to be placed in isolation.

10. Individuals in solitary confinement, like other inmates, are entitled to health care that is consistent with the community standard of care.

11. Health care staff should evaluate individuals in solitary confinement upon placement and thereafter, on at least a daily basis. They should provide them with prompt medical assistance and treatment as required.

12. Health care staff must advocate so that individuals are removed from solitary confinement if their medical or mental health deteriorates or if necessary services cannot be provided.

13. Principles of respect and medical confidentiality must be observed for patients who are in solitary confinement. Medical examinations should occur in clinical areas where privacy can be ensured. Patients should be examined without restraints and without the presence of custody staff unless there is a high risk of violence. In situations where this cannot occur, the patient's privacy, dignity, and confidentiality should be maintained as much as possible. If custody staff must be present, they should maintain visual contact, but remain at a distance that provides auditory privacy.

14. Health care staff should ensure that the hygiene and cleanliness of individuals in solitary confinement and their housing areas are maintained; that they are receiving sufficient food, water, clothing, and exercise; and that the heating, lighting, and ventilation are adequate.

15. Adults and juveniles in solitary confinement should have as much human contact as possible with people from outside the facility and with custodial, educational, religious, and medical staff.

16. Appropriate programs need to be available to individuals in confinement to assist them with the transition to other housing units or the community, if released from isolation to the community.

17. In systems that do not conform to international standards, health care staff should advocate with correctional officials to establish policies prohibiting the use of solitary confinement for juveniles and mentally ill individuals, and limiting its use to less than 15 days for all others.

Because the scope of the cruel and unusual punishment clause of the Constitution acquires meaning as public opinion becomes enlightened, the above standards are instrumental in helping move the civil rights ball forward. The 8th amendment draws its meaning from the evolving standards of decency that mark the progress of a maturing society. Trop v. Dulles, 356 U.S. 86, 101 (1958). Accordingly, every organizational statement about the horrors of solitary confinement, every editorial that calls the practice into question, every news story that recounts the tragic results of long-term solitary confinement, every movie, play or poem that bring to life the permanent harm caused by solitary confinement, help demonstrate how our standards of decency are evolving. In turn, our courts will be compelled to measure the use of solitary against those standards and, in due course, solitary confinement will go the route of the stock, whips and shackling to the wall. Until then, we must continue to be vigilant in our efforts to educate people about the harm caused by solitary confinement. Congratulations to the NCCHC for stepping on board that education train!

. . . .Continued from Page 1

more likely to be subject to negative influences and outside pressures, have less control over their environment and lack the skills to get out of crime-producing situations. In addition, their characters are not as well formed as the characters of adults are, their traits are less fixed and their actions less likely to be evidence of irretrievable depravity. For these reasons, the Supreme Court concluded, in imposing punishment, there is less of a need for **retribution** (pay back) and **incapacitation** (removal from society in order to prevent future unlawful conduct). Thus, the Court held in Miller v. Alabama, for juveniles who are convicted of homicide, a mandatory sentence of life without the possibility of parole is an excessive sentence where the crime reflects passing immaturity. In the Third Department's view, this means that a parole board is no more entitled to subject an offender to the penalty of life in prison than is a legislature or a court.

In applying this conclusion to the petitioner in Hawkins, the court focused on the Supreme Court's requirement that people who committed their crimes as juveniles must have a "meaningful opportunity of parole release." This means, the court wrote, that a defendant who committed a crime as a juvenile is entitled to a parole hearing where youth and its attendant characteristics are considered. This is necessary to separate those who can be punished by a life in prison from those who should not be so punished.

Here, the court found, the Parole Board's determination did not reflect that the Board had considered the petitioner's youth and its attendant circumstances in relation to the commission of the crime. As the petitioner was entitled to a meaningful opportunity for release in which his youth and the attendant circumstances were considered, the court affirmed the lower court's decision ordering a **de novo** (new) hearing.

News and Notes

Update on Peoples Settlement

In the February 2016 issue of ***Pro Se***, we announced that the parties had reached an agreement in Peoples v. Fischer, 11 CV 2694, S.D.N.Y., the lawsuit seeking reform of the Department's use of solitary confinement. At that time, the court had not approved the settlement agreement. On March 31, the court issued an opinion and order giving final approval to the settlement. The court stated that the settlement will greatly reduce the frequency, duration and severity of solitary confinement in New York State. The terms of the settlement were discussed in the February issue of ***Pro Se***. The reforms will go into effect as follows:

- 7/1/16 Where keeplock is being served in a SHU cell, begin crediting keeplock sanctions at the rate of three days for every two days served.

- Install shower curtains in all SHU 200s and at Upstate C.F.

- Issue memo about changes in double celling assignment policy similar to the policy used at Fishkill C.F. as of 12/15.

- Replace the Loaf with a meal composed of regular food items that can be safely delivered to and eaten by inmates.

- 10/1/16 Implement Progressive Inmate Discipline System (PIMS) in all SHUs allowing for progressive increases in privileges depending on the individual's PIMS level.

- Implement increased access to phone calls in SHU, based on PIMS level.

- Implement changes to library services to people in SHU allowing people who have finished their books or magazines in less than a week to request two new

books and a new magazine on an exchange basis and increasing library cart restocking and rotation.

- Implement new double celling criteria and update facility operations manuals to include new double celling assignment policy.

- 4/1/17 Implement automatic or presumptive time cuts based on length of SHU sanction, type of disciplinary infraction, good behavior, positive interactions with staff and progress in cell study (where applicable).

- 6/1/17 Open Step Down Unit at Mid-State C.F.

- 7/1/17 Begin pilot program for rolling cart telephone access at Mid-State C.F.

- Open separate keeplock units at Fishkill and Five Points C.F. for people serving more than 45 days keeplock.

- 4/1/18 Expand ASAT Program at Upstate C.F. to accommodate up to 24 participants a week.

- 4/1/19 Open Substance Abuse Program at Lakeview C.F.

- Open Step Down Program at Southport C.F.

- 4/1/20 Install wall jacks for headphones in all SHU cells/additional phones in all SHUs.

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Prisoners' Legal Services of New York Launches Pro Bono Clemency Project

In March 2016, PLS' Pro Bono Partnership Program launched a new Executive Clemency project, in collaboration with the DOCCS' Executive Clemency Bureau and the Governor's Office. As part of this initiative, PLS' Pro Bono Program will receive referrals from DOCCS' Executive Clemency Bureau and will then attempt to find counsel who will provide pro bono representation on the clemency application. DOCCS' Executive Clemency Bureau is also partnering with other agencies, including the New York State Bar Association, to encourage attorneys across the state to volunteer their services in clemency cases.

In New York, *clemency* refers to pardons and commutations. Pardons provide relief to those who have completed their sentences but who are disadvantaged due to their criminal history. A *commutation* reduces the recipient's current sentence. **PLS is only accepting referrals of commutation applications.**

To be considered for a commutation by DOCC'S Executive Clemency Bureau:

1. You must be serving a sentence of at least one (1) year;

2. You must have served at least 1/2 of the minimum term of an indeterminate sentence or 3/7 of a determinate sentence; and

3. You must not be eligible for parole within one (1) year of the date of the clemency application.

While you must meet these criteria to be *eligible* for a referral, even if you meet these criteria, it is possible that for other reasons your case may not be referred out to an attorney. To take advantage of this initiative, you must first apply for Executive Clemency. You can start this process by writing to: DOCCS' Executive Clemency Bureau, The Harriman State Campus – Building 2, 1220 Washington Ave., Albany, NY 12226-2050.

Please also note that it is DOCCS that decides whether an application for commutation will be referred to a pro bono attorney. In addition, because DOCCS has partnered with several agencies to make referrals to *pro bono* attorneys, if your application is selected by DOCCS for referral, you may be referred to a provider other than Prisoners' Legal Services.

New Project Helps Incarcerated Immigrants Who Are Subject To Deportation Orders

In March 2016, the PLS Pro Bono Partnership Program launched a new project to assist individuals seeking conditional parole for deportation only (CPDO) and early conditional parole for deportation only (ECPDO). In partnership with the Vera Institute for Justice, which has provided generous support for PLS's Immigration Initiative, and the Department of Corrections and Community Supervision, the new ECPDO/CPDO Pro Bono Project will refer cases to *pro bono* volunteers to assist applicants who have deportation orders and are seeking release for the purpose of deportation.

ECPDO and CPDO are the processes that DOCCS uses to determine whether prisoners who are not U.S. citizens may be released to their home countries on or before their parole eligibility dates (or their conditional release dates, if they are serving determinate sentences). Applications are submitted to the Parole Board, which ultimately decides whether parole for deportation will be granted.

To be eligible for ECPDO, a person must be subject to a final order of deportation and cannot be serving a sentence for an A-1 felony or an offense listed in either Penal Law §220 (drug offenses) or Penal Law §70.02 (violent felony offenses). If the person seeking parole for deportation has a qualifying conviction, s/he can seek early conditional parole for deportation only after serving 1/2 of the minimum of an indeterminate sentence or

3/7 of his or her determinate term. For example, a person serving a sentence of 3 to 9 years would be eligible for ECPDO after serving 1½ years. A person serving a sentence of 7 years would be eligible for ECPDO after serving 3 years.

To be eligible for CPDO, a person must have served the minimum of an indeterminate sentence or 6/7 of a determinate sentence *and* be subject to a final order for removal. The felony offense provision that bars some otherwise eligible individuals from seeking ECPDO does not apply to CPDO applications.

An additional requirement for PLS's ECPDO/CPDO Program is that the person seeking release for deportation must be within one (1) year of his/her date of eligibility for ECPDO or CPDO.

If you think that you qualify for ECPDO or CPDO relief and would like our assistance, please send a letter to: Director of Pro Bono & Outreach, Prisoners' Legal Services, 41 State Street, Suite M112, Albany, NY 12207.

Please Note: We cannot guarantee that an attorney will be available to take your case.

STATE COURT DECISIONS

Disciplinary and Administrative Segregation

Disciplinary and Administrative Segregation Drug Test Not Necessary When Nurse Identifies Suspected Drug

When a search of petitioner Rivera's cube led to the recovery of an orange piece of paper with N8 imprinted on it, he was charged with drug possession. At his hearing, a nurse testified that she had reviewed a drug identification manual, and based on that review, she had identified the item recovered from the petitioner's cell as suboxone. Having been found guilty of drug possession based on the nurse's testimony, in Matter of Rivera v. Prack, 28 N.Y.S.3d 351 (3d Dep't. 2016), the petitioner challenged the substantiality of the evidence against him, arguing that in the absence of a drug test, the evidence was insufficient to support a determination of guilt. The court rejected this argument, finding that the testimony of the officer who found the item and that of the nurse who identified the item as suboxone was substantial evidence of guilt. The absence of drug testing, the court wrote, was not fatal to the sufficiency of the evidence. Rather, citing 7 N.Y.C.R.R. §1010.4(d) (authorizing inspection and identification by a member of the nursing staff when facility pharmacy staff are not available), and Matter of Campbell v. Prack, 986 N.Y.S.2d 896 (3d Dep't 2014), the court found that visual identification of a drug did not need to be confirmed with a drug test.

Martin Rivera represented himself in this Article 78 proceeding.

No Evidence of Possession Needed to Support Charge of Conspiracy to Smuggle Drugs

Eric Moore was found guilty of conspiring to smuggle marijuana, synthetic marijuana and suboxone into a correctional facility. The evidence against him was confidential. In an Article 78 challenge to the determination of guilt, petitioner Moore argued that where there was no evidence that he had possessed any of the drugs, the determination was not supported by substantial evidence. In Matter of Moore v. Venettozzi, 2016 WL 1452826 (3d Dep't April 14, 2016), the court rejected his argument, holding that a violation of the rule occurred when the petitioner *conspired* to bring these drugs into the prison, even if he was not found to be in possession of the drugs. In addition, the court ruled that where the misconduct was

continuing it was not improper for the officer who wrote the misbehavior report to use the date that the investigation ended as the date of the incident.

Eric Moore represented himself in this Article 78 proceeding.

HO Remedied Hearing that Was Commenced Too Soon

In Matter of Ramirez v. Annucci, 2016 WL 1452914 (3d Dep't April 14, 2016), the court addressed the issue of whether the required 24 hours had passed between when the petitioner met with his assistant and the commencement of the hearing. In this case, the hearing began 20 hours after the petitioner met with his assistant. After the hearing commenced, the hearing officer read the misbehavior report, took the petitioner's plea and then adjourned the hearing for a week, during which time petitioner received the item that he had requested his assistant to provide. Accordingly, the court found, as the petitioner had an adequate amount of time to review the relevant document, he was not **prejudiced** (hurt in a legal sense) by the early commencement of the hearing.

Johnathan Ramirez represented himself in this Article 78 proceeding

Sentencing

NY Top Court Wrestles with Laws Governing Mandatory Surcharge

In People v. Jones, 27 N.Y.S.3d 431 (2016), the defendant argued that his rights to due process of law were violated by the sentencing court when the court refused to consider his request to defer payment of the $300.00 mandatory surcharge imposed pursuant to Penal Law (PL) §60.35. The Appellate Division affirmed the sentencing court's decision, holding that because the defendant was sentenced to a term of incarceration that was longer than 60 days, he could seek deferral of the surcharge only through a Criminal Procedure Law (CPL) §440.10 resentencing procedure. Before addressing the issue raised by the defendant, the Court of Appeals reviewed the statutory provisions governing the imposition and deferral of mandatory surcharges.

Penal Law §60.35 provides that the sentencing court must impose a mandatory surcharge on anyone convicted of a felony, misdemeanor or violation. As relevant to our readers, the law goes on to state that when such a person fails to pay the mandatory surcharge, the clerk of the court shall notify the superintendent and he or she shall collect any amount owing from the individual's inmate account and his or her earnings.

When a person is sentenced to under 60 days, PL §60.35 requires the court to issue a summons directing the defendant to appear before the court if the surcharge remains unpaid after sixty days. The statute prohibits the issuance of a summons to a person who is sentenced to over 60 days of confinement and directs that the mandatory surcharge imposed on people who are sentenced to more than 60 days shall be governed by Penal Law §60.30, which provides that Article 60 – Authorized Disposition of Offenders – does not deprive the court of any authority to impose any other civil penalty and any appropriate order exercising such authority may be included as part of the judgment of conviction.

In 1995, in Criminal Procedure Law §490.35, the Legislature did away with the court's authority to waive the mandatory surcharge. This law states: Under no circumstances shall the mandatory surcharge be waived [except for certain sex trafficking and prostitution convictions]. The language of this statute includes the following: "In no event shall a mandatory surcharge . . . be remitted." With respect to this provision, the Court wrote, "The Legislature could not be clearer in communicating its intent to restrain the judiciary from discharging a person's obligation to the pay the statutory amount."

As a part of the same package of laws, the legislature enacted CPL §420.40, titled "deferral of mandatory surcharge; financial hardship hearings." Criminal Procedure Law §420.40 includes specific language that, when a court assesses a request to defer payment, the court "shall be mindful of the mandatory nature of the surcharge . . . and the

important criminal justice and victim services sustained by such fees." Further, the statute (CPL §420.40), provides that where a court decides to defer payment of the surcharge, the court's finding and the facts upon which it is based shall be made a part of the record and that the order shall not excuse the person from the obligation to pay the surcharge and that the order shall be filed and entered in the same manner as a civil judgment. This section of the law does not provide a time frame within which a person may apply for a deferral of the charge. However, the Court wrote, pursuant to CPL §420.10(5), a person who is unable to pay the surcharge may at any time apply to the court for resentencing and if the court is convinced that the defendant is unable to pay, the court may adjust the terms of the payment.

With respect to deferring payment of the surcharge, the Court wrote, CPL §420.10(5) limits judicial discretion with respect to people who are incarcerated. Thus, a court shall not determine that the defendant is unable to pay solely because of his incarceration but shall consider all of the defendant's sources of income.

In summary, the Court concluded, CPL §§420.40 and 420.10, read together, permit any incarcerated person with an obligation to pay a mandatory surcharge to move at any time for resentencing pursuant to CPL §420.10(5). If the court is satisfied that the defendant has shown that he is unable to pay and the court determines that it is appropriate to defer all or part of the surcharge, the court may grant the request.

In reaching this result, the Court rejected the People's argument that the deferral offered by CPL §420.40 is only available to people whose sentences are 60 days or less. The Court found that the People's argument was inconsistent with the statutory language which, without limitation, states that CPL §420.40 governs deferrals of mandatory surcharges imposed pursuant to PL §60.35. While paragraph 2 of CPL §420.40 applies to people whose sentences were 60 days or less, the Court wrote, rather than excluding people who are incarcerated and whose sentences exceed 60 days from the coverage of CPL §420.40, this paragraph offered an additional procedure to people who were at liberty so that they could avoid further penalties, possible incarceration for nonpayment and civil liability.

Having thus interpreted the law, the Court affirmed the lower courts' decisions denying a deferral of the mandatory surcharge imposed on the defendant.

Parole

Parole Rescinded After Board Receives Victim Statements

In Matter of Spataro v. NYS DOCCS, 27 N.Y.S.3d 743 (4th Dep't 2016), the court considered whether a parole rescission decision, made after the Board received victim impact statements in response to its decision to release the petitioner, was supported by substantial evidence.

Nine NYCRR §8002.5(b)(2)(i) provides that a parole release date may be rescinded when, among other things there is significant information which existed prior to the rendition of the parole release decision, where such information was not known by the Board. See also, Matter of Ortiz v. NYS Board of Parole, 668 N.Y.S.2d 823 (4th Dep't 1998). In rescinding an inmate's parole release date, 9 N.Y.C.R.R. §8002.5(d)(1) provides that a majority of the board must be satisfied that substantial evidence was presented at the hearing to form a basis for rescinding the grant of release.

In assessing whether there was substantial evidence supporting the decision to rescind the petitioner's parole release date, the court looked to the facts of the crime. In this case the petitioner was convicted of murder in the second degree when he conspired with the victim's wife to collect on an insurance policy, and then, in accordance with the plan, shot the victim. After the Board granted the parole, the victim's family submitted statements detailing their grief and the pain experienced by the victim during the weeks between when he was shot and when he died. The court found that while the Board knew those facts when it made its decision to release the petitioner, with their statements family members submitted detailed eyewitness accounts of

the victim's suffering while he was in the hospital and his unsuccessful attempts to communicate before he died. Based on the new information in the submissions, the court concluded that the statement provided significant information that was not previously known by the Board and constituted substantial evidence to support its decision to rescind petitioner's parole release date.

Court of Claims

Liability Found in Two Slip and Fall Claims

In Doan Nguyen v. State of NY, Claim No. 123027 (Ct. Clms. March 3, 2016), the claimant sought to recover damages for a slip and fall that occurred while he was involved in a floor stripping project at Mid-State C.F. When the claimant was told that he was going to be involved in the floor stripping project, he asked the officer if he could go back and change into boots; the officer refused the request. According to the claimant, he was operating the buffer and fell when, in response to an order from an officer, he walked across a floor on which stripping solution had been applied, the point during the process when the floor is most slippery. The claimant testified that although he was walking cautiously, he slipped in the stripping solution, fell violently forward and landed face down on the floor, unconscious. As a result of the fall, the claimant had facial injuries. The claimant further testified that had he worn boots, he would have been safer and probably would not have fallen.

The officer who was supervising the stripping project disputed the claimant's version of the events. He testified that the claimant was mopping up excess stripper (as opposed to operating the buffer) and was wearing boots (not sneakers) and that he did not order the claimant to come to him and did not see him fall but came upon him after the fall. Several memos submitted by the officer about the accident contained statements that were inconsistent with statements in other memos and with his testimony. For example, one said that the officer had observed the fall and another said that at the time of the fall, the claimant was applying water to the floor.

Claimant's grievance was denied based on the responses of officers saying that he was responsible for coming to work in proper footwear and that he was wearing boots that day.

At trial, the claimant argued that the defendant was negligent because the officer refused to allow him to return to his dormitory to change into his boots and for ordering the claimant to participate in the floor stripping project knowing that he was not wearing proper footwear. The State argued that the claimant was responsible for his injuries because he failed to use due care and fell even though he was wearing boots.

In deciding on liability, the court first noted that while the State is not the insurer of inmate safety, it is well settled law that when the State directs inmates to participate in a work program, it has a duty to provide safe equipment, adequate training and supervision and a safe place to work. Based on its assessment of the relative credibility of the claimant and the officer, the court concluded that the claimant's testimony that he was wearing sneakers and the officer refused his request to change into boots was more believable than the officer's testimony that the claimant was wearing boots. The court reached this conclusion based on its observation that the claimant presented as an earnest, willing and truthful witness.

The court found that the officer's **demeanor** (the way he looked) combined with the inconsistencies within and between his testimony and the documentary evidence, undermined the truthfulness of his version of the events. The court was particularly struck by the inconsistencies with respect to whether the officer had observed the fall and the fact that the memo that he wrote on the day of the accident did not mention that the claimant was wearing boots. In sum, the court wrote, the preponderance of **credible** (believable) evidence established that the claimant was wearing sneakers at the time that he fell and that the officer had refused his request to return to his dorm to change his footwear. For this reason, the court found that the officer's direction requiring the claimant to strip floors while wearing sneakers breached defendant's

duty to provide claimant with a reasonably safe work environment.

In Cabassa v. State of New York, Claim No. 119018 (Ct. Clms. February 11, 2016), the court considered whether the State should be liable for injuries that the claimant suffered when, following the orders of an officer, he pushed a wheelbarrow filled with debris across an area that was icy and covered by snow.

The testimony at trial showed that the officer who instructed the claimant to cross the icy area knew that area became icy under the conditions existing at the time but that he failed to determine whether the conditions were icy or to request that the area be treated for ice before requiring the claimant to cross it.

In addressing the issue, the court laid out the elements of a slip and fall claim against the State. Here as in Nguyen, the court noted that while the state is not an insurer of those who enter upon its premises, it does have a duty to maintain its facilities in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk. Foreseeability is the measure of liability.

To establish liability in a slip and fall case, the claimant must establish that:

1. The defendant owed the claimant a duty of care;

2. A dangerous condition existed that breached that duty;

3. Defendant either created the dangerous condition or had actual or constructive knowledge of the condition and failed to remedy it within a reasonable period of time; and

4. The condition was a substantial factor in the events that caused the injury suffered by the claimant.

Here, the court found that the officer had constructive notice that the area was icy – he knew that it was an area where ice formed and failed to take steps to lower the risk of falling. For this reason, the court found that the preponderance of the evidence showed that the Defendant was negligent in failing to determine whether an area where a known recurring dangerous condition existed was safe before directing Claimant to push a wheelbarrow full of debris across the area.

Brian Dratch and Ekaterina Vyrkin of Franzblau Dratch represented Jose Cabassa and Doan Nguyen, respectively, in these Court of Claims actions.

Statute of Limitations for Property Claims

In Scott v. State, 2016 WL 1690030 (3d Dep't 2016), the Third Department considered whether the claimant had timely filed his claim that DOCCS had negligently lost or destroyed his property during a transfer. Following his transfer, the claimant filed an administrative property claim. He received a final decision denying the claim on June 17, 2013. He then served a claim by priority mail which was received by the Attorney General on July 23, 2013. The defendant moved to dismiss the claim on the basis that it was not timely filed. The lower court agreed and dismissed the petition, following which the claimant appealed.

The court first noted that the time requirements for filing a claim are jurisdictional. This means that only if the claim is timely filed does the court have the authority to consider it. Court of Claims Act §10(9) provides that inmates must file lost property claims within 120 days of when their administrative remedies are exhausted. In addition, Court of Claims Act §11(a)(1) requires that claims be served on the Attorney General either personally or by certified mail, return receipt requested, and states that service is complete when the Attorney General receives the claim.

The court found that the 120 days limitations period expired on October 15 but that the claim was not received by the Attorney General until October 23. Further, the claim was neither served personally or by certified mail, return receipt requested. Finally, the court ruled in response to the claimant's request that he be given the opportunity to file a late

claim, the Court of Claims Act §10(9) does authorize motions to file claims with respect to inmate property claims.

For these reasons, the appellate court affirmed the lower court decision dismissing the claim.

Scott Young represented himself in this Court of Claims action.

Claim Survives Failure to Serve In Accordance with Court Order

In Canales v. State, 26 N.Y.S.3d 413 (Ct. Clms. Oct. 30, 2015), the court considered the issue of whether it should allow the filing of a claim with respect to which the claimant had failed to file and serve in accordance with a court order allowing the filing of a late claim. Here, the claimant made a motion to file a late claim. The claim was related to injuries the claimant suffered as a result of an assault on him by another inmate.

In June 2012, due to improper service, the Court dismissed a prior claim relating to the same incident and granted the claimant's motion for leave to serve and file a late claim. The decision on the motion directed the claimant to file and serve the claim within 45 days of the date upon which the decision was filed. The decision was filed on August 3 and served on the defendant on September 12. Thus, the filing was timely but the service was not; the date for filing and service expired on August 13.

As in the decision in the preceding article, the court here noted that compliance with statutory filing and service requirements set forth in the Court of Claims Act are jurisdictional; if the claims are not properly filed and served, the court lacks the authority to decide the claim. However, the court noted, the issue in this case is not compliance with the **statutory** filing and service requirements; but rather service of a claim beyond the time directed by the court. Citing Gardner v. City University of NY, 972 N.Y.S.2d 430 (Ct. Clms. 2013), the court noted that a failure to abide by a court-imposed deadline, as distinct from the time limitations of the Court of Claims Act §10, is not a jurisdictional defect. Rather, the Civil Practice Law and Rules (CPLR) §2004 authorizes a court *to extend the time fixed by any order* "upon such terms as may be just and upon good cause shown," whether the application for the extension was made before or after the deadline fixed by the court. In this context, the court noted, citing Matter of Yackle v. State of New York, 801 N.Y.S.2d 172 (4th Dep't 2005), it has been found that denying a motion for an extension of time to file the claim where the claim had been timely served on the defendant, was an abuse of discretion. In part, this is because the defendant, having been timely served, cannot argue that it was prejudiced by the claimant's failure to comply with the court's order regarding timely filing.

Here, the defendant acknowledged that it had not been prejudiced by the late service; indeed it could not argue that it had, as it had notice of the claim that was previously dismissed for improper service. Instead, the State argued that the court lacked authority to extend the deadline for serving the claim because the statute of limitations for filing the claim had expired. To this the court responded that both filing and service were completed before the 3 year statute of limitations had run. Thus, the court held, there was no jurisdictional obstacle to extending the court imposed deadline, **nunc pro tunc**, to the date that it was served. ("Nunc pro tunc" imposition of an order allows a court to impose an order as though it had been imposed on a date that has already passed).

Applying this reasoning, the court denied the defendant's motion to dismiss and ordered that the claim filed in August 2012 and served on September 12 be deemed timely.

Luis Canales represented himself in this Court of Claims action.

Miscellaneous

CORC Decision Is Arbitrary and Capricious and Lacks a Rational Basis

In Matter of Oliveira v. Graham, 17 N.Y.S.3d 789 (3d Dep't 2015), the petitioner was removed for security reasons from his job as an occupational industry clerk after condoms were found in an office near his work station. In response, the petitioner filed a grievance, asserting that he was being harassed and discriminated against due to his perceived sexual orientation. Dissatisfied with the results of the grievance, the petitioner filed an Article 78 action seeking to get his job back. After the action was filed, the Inspector General's Office issued a report on the grievance, which had been transferred to that office for investigation. The report was not made public; rather it was given to the court, in camera (for the court's eyes only). Because the Central Office Review Committee (CORC) had not had the IG report when it ruled on the petitioner's grievance, the court remanded (sent back) the grievance to DOCCS so that CORC could issue a decision based on the information in the IG report. In response, CORC again denied the grievance. Petitioner appealed this decision to the Supreme Court, which denied the relief sought. Petitioner then appealed to the Appellate Division.

The appellate court found that DOCCS had improperly handled the grievance. The Department's policies require that grievances raising allegations of discrimination based on sexual orientation must be referred to the Office of Diversity Management; this regulation, the respondents admitted, had not been followed.

Equally significant, the court found, the respondents conceded that the IG's investigation did not address the grievance or the allegations of discrimination based on sexual orientation; rather the investigation was solely concerned with identifying the owner of the condoms and concluded that there was no evidence to substantiate the finding that they belonged to the petitioner.

Based on the respondents' failure to follow their own procedures and the absence of evidence establishing that petitioner's removal from his job was necessary for security, the court concluded that CORC's decision denying the petitioner's grievance was arbitrary and capricious and without a rational basis. Accordingly, the court ordered the final determination annulled and granted the petition, including the request that DOCCS reinstate the petitioner to his prison job assignment.

Daniel Oliveira represented himself in this Article 78 proceeding.

FOIL Request for Info on Visitors Properly Denied

In Matter of Johnson v. Annucci, 27 N.Y.S.3d 922 (3d Dep't 2016), the court addressed the issue of whether the respondent had properly denied the petitioner's FOIL request for information on visitors at a correctional facility on a particular date. In response, the petitioner received a redacted record showing only the name of his visitor. The petitioner filed an administrative appeal, clarifying that he was seeking the name of another inmate's visitor and asking the facility to see whether she would allow the release of her name. Not having received a response, the petitioner filed an Article 78 challenge to the redactions. The lower court found that the petitioner's request was an unwarranted invasion of privacy and that the release of the information would potentially endanger the visitor's life or safety and that DOCCS had no obligation to contact the visitor.

On appeal, the Third Department noted that while under FOIL, agency records are presumptively available without regard to the need or purpose of the requestor, where the records fall within one of the exemptions in Public Officers Law §87(2), the agency is justified in refusing to produce the records. Public Officers Law §87(2) provides that materials that would constitute an unwarranted invasion of personal privacy or could endanger the life or safety of any person are exempt from disclosure. Further, the court wrote, citing Matter of Williamson v. Fischer, 984 N.Y.S.2d 184 (3d Dep't 2014), the agency invoking the "danger to

life or safety" exemption need only demonstrate a possibility of endangerment.

Applying the law to the facts of this case, the appellate court ruled that the lower court had properly concluded that providing an inmate with personal information about another inmate's visitor – which could be shared with associates in the community – could expose the visitor to harassment or harm and endanger his or her life or safety. The court also held that the Public Officers Law does not **mandate** (require) that DOCCS seek an authorization from the visitor to release his or her personal information.

Johnathan Johnson represented himself in this Article 78 proceeding.

FEDERAL COURT DECISIONS

Genuine Issues of Material Fact Exist as to Whether Search Violated the 4th Amendment

In 2011, Audra Lynn Harris, who had been admitted to an observation cell at Bedford Hills C.F., tore open her mattress and used the stuffing mixed with water to cover her cell window. Three female officers and one male officer entered the cell to remove the obstruction. Ms. Harris was then asked whether she had concealed additional mattress stuffing in her vagina. The visual examination of her vagina was made by the male officer while the three female officers restrained Ms. Harris. After filing a grievance and exhausting her administrative remedies, Ms. Harris filed a section 1983 lawsuit claiming that the officers had violated her 4th Amendment right to be free from unreasonable searches and seizures and her 8th Amendment right to be free from cruel and unusual punishment. The district court granted summary judgment to the defendants. On appeal, in Harris v. Fischer, 2016 WL 963904 (2d Cir. Mar. 15, 2016), the Second Circuit found that contrary to the district court's conclusion, genuine issues of material facts existed as to whether the search had violated the 4th Amendment.

In reviewing a district court decision granting summary judgment, the appellate court must view the evidence in the light most favorable to the party against whom summary judgment was granted and must draw all reasonable inferences it that that party's favor.

Here the plaintiff argued that the search violated her 4th Amendment right to be free from unreasonable searches and seizures and her 8th Amendment right to be free from cruel and unusual punishment. The district court addressed only the 8th Amendment claim.

While a prisoner does not have a 4th Amendment right to be free from unreasonable searches of his or her cell, see Hudson v. Palmer, 468 U.S. 517 (1984), the maintenance of prison security is not burdened unduly by the recognition that prisoners have a limited right to bodily privacy, see Covino v. Patrissi, 967 F.2d 73 (2d Cir. 1992).

There is a two-step process to the court's assessment of whether a prisoner's 4th Amendment rights to bodily privacy were violated. First, does the prisoner have an actual subjective expectation of bodily privacy? Second, did prison official have sufficient justification to intrude on the prisoner's 4th Amendment rights? Looking at the second question, courts apply "two separate but overlapping" frameworks. If the claim challenges a prison regulation or policy the courts use the Turner v. Safley, 482 U.S. 78 (1987), analysis: Is the regulation or policy reasonably related to legitimate penological interests?

Where the 4th Amendment claim challenges an isolated body search, courts apply the standard set in Bell v. Wolfish, 441 U.S. 520 (1979): In each case, the court must balance the need for the particular search against the invasion of personal rights necessitated by the search. Here, the relevant factors are, 1) the scope of the intrusion; 2) the manner in which the search was conducted; 3) the justification for the search; and 4) the location of the search.

Here viewing the facts most favorably to the plaintiff, the court first noted that there was a medium level of intrusion: the intrusion was greater than that resulting from a strip search, where an

officer observes a naked individual but does not look at body cavities, but was less than a manual body cavity search where an officer touches or probes body cavities. A visual cavity search, such as what the plaintiff was subjected to, is invasive. Here, the level of invasion was increased because the officer who examined Ms. Harris's body cavity was a man, that is, a member of the opposite sex.

Further, the court wrote, it is unclear why a body cavity search was done. The defendants did not submit any evidence that challenged Ms. Harris's version of what happened. In their papers, they denied the search took place and in the alternative, gave a vague justification assuming that the search occurred as the plaintiff described. The Second Circuit noted that a court cannot assess the reasonableness of an intrusion on a prisoner's constitutional rights unless the officers provide a justification that is supported by record evidence. Further, the Court wrote, requiring record evidence to support the officer's justification for a visual body cavity search is sensible, "We would for example, almost certainly find a constitutional violation for a search that objectively appears to have been conducted solely to gratify the sexual desires of the officer." Without record evidence supporting the officer's justification, courts would be unable to assess whether the officer had an objectively reasonable basis for the search.

In the absence of evidence provided by the defendants for the justification for the search, here the district court supplied what the Second Circuit said was a hypothetical justification: that the search was necessary to determine whether plaintiff had the means to obstruct their view of her after they removed the mattress, which the court found, justified the "brief visual inspection of the plaintiff's genitalia." However, on appeal the defendant's conceded that this justification was questionable, as it would have been difficult for Harris to conceal enough cotton to obstruct the floor to ceiling windows on both the front and back side of her cells. Had the district court known this fact, the Second Circuit wrote, it likely would have concluded that the justification was exaggerated.

The court also rejected the defendants' alternate justification: that they were searching for items that she could have used to harm herself and that she could have used the stuffing to choke herself. The court noted the failure to search her mouth for cotton rendered this justification unconvincing.

Finally, the court noted that in the absence of evidence in the record, it was difficult to determine the reasonableness of a visual body cavity search. And, there are at least disputes of fact concerning whether the search occurred and the defendants' justification that should have precluded summary judgment in the defendants' favor.

Based on these findings, the Court vacated the district court's order dismissing the plaintiff's constitutional claims relating to the visual body cavity search.

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Arun Subramanian of Susman Godfrey L.L.P. represented Audra Harris in this §1983 proceeding.

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