Pro Se

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Prisoners Have a Liberty Interest in Not Having Parole Release Decisions Rescinded

At his parole release hearing, Albert Victory was granted release to parole supervision. Before Mr. Victory was released, a commissioner who had voted to grant release initiated a parole rescission hearing, asserting that after the hearing, he had become aware of a fact previously unknown to him – that Albert Victory had escaped from prison – which rendered the release decision inappropriate. Although there were numerous documents in the file before the Parole Board that granted release which referenced Mr. Victory's escape from prison, at the rescission hearing, the same commissioner gave unsworn testimony about his ignorance of the escape and decided that the grant of release to parole supervision should be rescinded.

Following this decision, Mr. Victory sued the commissioner and other state officials involved in the decision to rescind the grant of release for violating his rights to due process of law. The defendants brought a motion for summary judgment, asserting that there were no disputed material facts and that they were entitled to judgment in their favor. The district court agreed with the defendants, finding that there were no disputed issues of material fact and granted judgment in favor of the defendants. The Second Circuit Court of Appeals disagreed, reversing the judgment in favor of the defendants and remanding the case to the district court for additional proceedings.

Under the federal constitution, a prisoner does not have a **liberty interest** (guaranteed right) in being released to parole supervision. In Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979), the U.S. Supreme Court held that a prisoner does not have a justifiable expectation of release to parole unless the state law which establishes the state's parole system requires, in mandatory language, that an inmate shall be released on parole. If parole release is discretionary, as it is in New York State, a prisoner has no liberty interest in being released.

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2016 – A Review

A Message from the Executive Director – Karen L. Murtagh

No matter where you may have landed on the results of the Presidential election, 2016 was for many a disappointing, and some might say, disheartening year. We lost several icons: Gordie Howe, Pat Summitt, Muhammad Ali and Arnold Palmer in sports; David Bowie, Prince, Glenn Frey, Maurice White, Leon Russell and Leonard Cohen in music; John Glenn and Elie Wiesel in science and discovery; and other notables like Janet Reno, Harper Lee, Gene Wilder, Abe Vigoda, Carrie Fischer and Debbie Reynolds, to name just a few. The list is far too long to reprint here but, suffice it to say, it was a tough year for many of us who lost their heroes.

The good news is that many of PLS' clients fared much better in 2016. PLS successfully advocated for hundreds of clients appealing their disciplinary dispositions, resulting in the **expungement of over 61 years of solitary confinement time and the restoration of 19 years of good time**. PLS also handled dozens of jail time, parole jail time and sentencing cases resulting in the **restoration of over 17 years of jail time, parole jail time and sentencing credit.**

We also continued our monitoring tours pursuant to the Cookhorne settlement, **the PLS case that eliminated solitary confinement for juveniles.** PLS attorneys toured both Coxsackie Correctional Facility and the newly renovated Hudson Correctional Facility and provided DOCCS with valuable feedback regarding the juvenile units at both facilities. We continued the **Albion Telephone Project**, where individuals incarcerated at Albion Correctional Facility are able to call PLS weekly to discuss their legal issues and ask for advice and/or representation. In addition, PLS continued to publish our bi-monthly newsletter, **Pro Se,** sent, free of charge, to over 8000 incarcerated individuals.

PLS prevailed in two cases in the Court of Appeals. In Cortorreal v. Annucci, the Court of Appeals held that a hearing officer violates an inmate's right to call witnesses by failing to undertake a meaningful inquiry into a requested witness's allegation that the witness was coerced into refusing to testify in a related proceeding. In Henry v. Fischer, PLS represented the plaintiff at the administrative appeal level and then referred the case to Professor Donna Lee, CUNY Main Street Legal Services, who filed the Article 78. When the Court of Appeals granted leave, PLS requested and was granted permission to appear as amicus. The Court of Appeals reversed the disciplinary disposition and held that if a prisoner's request for documents or witnesses at a prison disciplinary hearing is denied, the issue is preserved for review, with no need for a specific objection to the adverse ruling.

PLS was also successful in the case of Corris v. Koenigsmann, a civil rights action challenging DOCCS' policy denying Hepatitis C (HCV) treatment to prisoners who have had a positive urinalysis test in the prior six months. After PLS filed a motion for a preliminary injunction, DOCCS agreed to settle the case by changing its policy so that evidence of substance use is not an automatic exclusion from HCV treatment and all patients who otherwise qualify for HCV treatment will now be seen by an infectious disease doctor regardless of drug use.

PLS advocated, litigated and prevailed in dozens of other cases, continuing our oversight and enforcement role to ensure accountability for unconstitutional or unlawful behavior and, in the process, promoting safer conditions and more just treatment for those incarcerated in New York State. Sadly, because of limited resources, we could not accept every request for assistance we received. Along those lines, we will continue to fight for adequate funding to allow us to provide representation to all those in need.

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In Victory v. Pataki, 814 F.3d 47 (2d Cir. 2016), the Second Circuit held that prisoners who have received decisions granting them release to parole supervision have a liberty interest in not having those decisions rescinded. Further, the Court found, although the New York Board of Parole retains broad discretion to rescind a grant of parole, that discretion is limited by the requirement that there be substantial evidence of significant information not previously known by the Board (or that there was a serious violation of the prison rules after the release decision was made).

In Victory, the Court held because a prisoner has a liberty interest in not having the decision to release him to parole supervision rescinded, a prisoner facing a rescission hearing is entitled to an impartial decisionmaker. The Court found that in Mr. Victory's case, where he alleged that a commissioner of the Board of Parole both gave unsworn testimony adverse to Mr. Victory and served as a decisionmaker, Mr. Victory had raised a claim that his due process right to an impartial decisionmaker had been violated at his rescission hearing. Here, the commissioner denied that at the time that he first decided to release Mr. Victory, he knew that Mr. Victory had escaped from prison. Whether the commissioner lied when he gave unsworn testimony at the rescission hearing that at the release hearing, he had not known about the escape and would not have granted release to Mr. Victory if he had known, created a disputed issue of material fact that rendered summary judgment in the defendants' favor improper.

Further, noting that "[i]t is firmly established that a constitutional right exists not to be deprived of liberty on the basis of false evidence fabricated by a government officer," Zahrey v. Coffey, 221 F.3d 342, 355 (2d Cir. 2000), the Court also held that at his rescission hearing, Mr. Victory had a due process right not to be deprived of liberty on the basis of false evidence fabricated by the government. In this case, the Court did not conclude that the government had fabricated false evidence; rather, the court held, *a genuine issue of material fact existed* as to whether the commissioner of the state Board of Parole had lied at Mr. Victory's rescission hearing when he denied any prior knowledge of Mr. Victory's escape and whether other defendants had participated in the decision to conduct a rescission hearing on that basis. Based on the existence of a genuine issue of material fact as to the commissioner's knowledge of Mr. Victory's escape, the Court held, the defendants were not entitled to summary judgment on this claim.

Myron Beldock of Beldock Levine and Hoffman LLP represented Albert Victory in this Section 1983 proceeding.

PRO SE VICTORIES!

Derrick R. Omaro v. Sergeant O'Connell, Docket No. 6:14 CV 06209 (W.D.N.Y. Nov. 4, 2016). The court found that Sergeant O'Connell violated Derrick Omaro's First Amendment rights to practice religion when, after observing Mr. Omaro eating before sundown during Ramadan, he removed Mr. Omaro's name from the list of prisoners who were to receive Ramadan meals. An inmate's rights to practice his religion are violated where the defendant substantially burdens a sincerely held religious belief and the defendant's conduct is not reasonably related to a legitimate penological interest. Here, the contested issue was whether Sgt. O'Connell's actions advanced a legitimate penological interest; that Mr. Omaro's religious beliefs were sincerely held was not in dispute. Sgt. O'Connell argued that the legitimate penological interests at issue were expense – there was no reason for Mr. Omaro to receive the more expensive Ramadan meals if he was eating other food – and administrative effort – staff time was unnecessarily spent delivering special meals to Mr. Omaro. Following a lengthy legal and factual analysis, the court rejected both arguments, concluding that the sergeant had failed to advance a legitimate penological interest sufficient to justify Mr. Omaro's removal from the Ramadan meal list. Based on this conclusion, the court held that Sgt. O'Connell had violated Mr. Omaro's First Amendment right to religious expression.

Matter of Timothy Ginocchetti v. Venettozzi, Index No. 2662-15 (Sup. Ct. Albany Co. Feb. 26, 2016). Timothy Ginocchetti successfully challenged a Tier III determination that he had assaulted another inmate. At his hearing, Mr. Ginocchetti pled guilty with an explanation and requested that his social worker testify about his relationship with the other inmate involved in the incident. The hearing officer denied the witness because she had not been present when the incident occurred. The court held that the social worker's testimony was relevant and that the hearing officer's refusal to call her as a witness violated Mr. Ginocchetti's right to call witnesses. While this is only a regulatory violation, because Mr. Ginocchetti had already served the penalty imposed and because the witness's testimony could only have led to a more reduced penalty, the court ordered that the hearing be reversed and the charges expunged.

Pro Se Victories! *features summaries of successful unreported pro se litigation. In this way, we recognize the contribution of pro se litigants. We hope that this column 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

Hearing Officer's Failure to Call Inmate Witness Leads to Reversal of Hearing

After a visit, the petitioner in Matter of McFarlane v. Annucci, 2016 WL 7234371 (3d Dep't Dec. 15, 2016), was charged with having a foreign substance in his rectal area and he was placed on contraband watch. Claiming that he had observed the petitioner place what looked and smelled like marijuana on his food tray, and then having found some bags containing what appeared to be marijuana and heroin, an officer had the substances tested, following which he wrote a misbehavior report charging the petitioner with smuggling and possession of a controlled substance. The petitioner was found guilty and filed an Article 78 challenge to the hearing.

The petitioner asked that an inmate who had overheard a conversion between the charging officer and the petitioner testify, establishing that the officer had lied about seeing the petitioner place drugs on his food tray. The petitioner said that the witness would confirm the petitioner's testimony that the officer had admitted that he reported having seen petitioner put drugs on the food tray in order to "cover his ass" and after having been advised to do so by another correction officer. Further, the petitioner asserted that the conversation between the two officers about this fabrication was videotaped.

The hearing officer obtained the videotape but the audio did not work. As a result, the court wrote, the only evidence to corroborate the petitioner's defense was the other inmate's testimony. The hearing officer refused to call the inmate as a witness, because the hearing officer said, he was not present in the contraband watch room and did not have personal knowledge of the facts. The court ruled that this was an error as the inmate's testimony was "clearly relevant" to the petitioner's defense.

The court ordered the hearing reversed and because the hearing officer had provided a good faith reason for the denial of the witness, found the violation to be regulatory rather than constitutional. Based on this determination, the court ordered a re-hearing.

Wayne McFarlane represented himself in this Article 78 proceeding.

Court Orders Refund of Filing Fee as Part of Remedy

In Matter of Anderson v. Venettozzi, 41 N.Y.S.3d 920 (3d Dep't 2016), the attorney general advised the court that the determination had been administratively reversed, all references to the charges had been expunged from the petitioner's prison record and the $5.00 mandatory surcharge had been refunded to the petitioner's inmate account. The court therefore dismissed the petition as moot and granted the petitioner's request that his $15.00 filing fee be refunded.

Jerome Anderson represented himself in this Article 78 proceeding.

Officer's Testimony Undercuts Evidence that Petitioner Possessed the Cell Phone Found in His Cell

After a cell phone, SIM card and battery were found hidden in the steel channel stock next to the door to petitioner's cell, officers charged the petitioner with possession of contraband. At his hearing, the author of the misbehavior report testified that it was difficult to reach the contraband inside the column and that the only access to the column was from the petitioner's cell. Petitioner defended himself by pointing out that 1) his cell was often left open and could be accessed by other prisoners, and 2) the occupant of a nearby cell had previously been assigned to the petitioner's cell and that prisoner had been investigated for possessing a cell phone. Petitioner argued that the phone might have been the other prisoner's. Petitioner called as a witness the officer who investigated the phone found in the column, who stated that he had interviewed the other prisoner and had not yet determined to whom the phone belonged. Petitioner then requested that the calling records for the phone be reviewed to aid in identifying its owner. The hearing officer denied the request, saying that the records were confidential.

In Matter of Derti v. Annucci, 41 N.Y.S.3d 801 (3d Dep't 2016), the court held that the facts did not permit a reasonable inference that the petitioner possessed the contraband simply because he had access to the area where the contraband was found and that to some extent, it was under his control. In the absence of proof tying the contraband to the petitioner, the court wrote, the determination is not supported by substantial evidence and must be annulled.

Court Finds Deviation in the Proof Insignificant

After Conrad Marhone sent to a DOCCS employee an envelope containing letters addressed to two other DOCCS employees (the facility steward and the inmate records coordinator), he was charged with violating facility correspondence rules, smuggling and solicitation. He challenged the determination of guilt in an Article 78 proceeding, arguing that in the absence of the envelope that allegedly contained the other letters, there was not substantial evidence that he had violated the rule prohibiting the inclusion of any written material in outgoing mail not specifically intended for the addressee identified on the exterior of the envelope. Petitioner admitted that he had written the letters, but argued that he should not be found guilty because the charging officer had not saved the exterior envelope and in fact, the envelope had been addressed to the superintendent and not to the charging officer.

In Matter of Marhone v. Conroy, 42 N.Y.S.3d 688 (3d Dep't 2016), the court rejected the petitioner's argument, finding that even if his version of the events was true, his conduct – sending letters addressed to two other staff members in an envelope addressed to the Superintendent – still violated the correspondence rules.

Conrad Marhone represented himself in this Article 78 proceeding.

HO's Failure to Investigate Witnesses' Reason for Refusing Leads to Reversal

Following an incident in which two prisoners threw a mixture of heated oil and water on to the face and upper body of a sleeping inmate, the petitioner in Matter of Doleman v. Prack, 2016 WL 7234716 (3d Dep't Dec. 15, 2016), was charged with having directed the two inmates to attack the injured inmate. At his Tier III hearing, the petitioner asked the hearing officer to call as witnesses, among others, two inmate witnesses who could testify that he had no issues with the victim. The hearing officer reported that the two inmates had refused to testify. Based on confidential information from officers, the hearing officer found the petitioner guilty.

In his Article 78 action, the petitioner argued that the hearing had to be reversed because the hearing officer had failed to ascertain the reasons that the two inmates had refused to testify. The Supreme Court granted the petition, reversed the hearing and ordered all references to the charges expunged from the petitioner's records. The respondent appealed.

The Third Department affirmed the lower court decision, noting that at a prison disciplinary hearing, an inmate has the right to call witnesses. In this case, the witnesses had refused to testify when asked by the employee assistant whether they were willing to testify. At the hearing, the petitioner informed the hearing officer that he was requesting the two inmate witnesses to confirm that he had no issues with the inmate who was attacked. While the hearing officer said that he would see if the inmates would testify, he later stated only that they had refused. He did not however, say what, if any efforts he had made to ascertain the inmates' willingness to testify or any reasons they provided for refusing.

The record, the court noted, did not reveal that the hearing officer had made any inquiry of the witnesses or that they had completed witness refusal forms. In addition, no reason for their refusal appears in the record and there was no testimony from anyone who might have questioned them regarding their refusal to testify or any inquiry into why they were refusing. In the absence of this evidence, the court upheld the lower court's determination that the petitioner was denied his right to call these witnesses. In the absence of any evidence that the hearing officer made any effort to secure the testimony of these witnesses or to ascertain if they refused to testify, the court found that the situation was "comparable to the outright denial of a witness and was a violation of petitioner's right to call witnesses, making expungement rather than remittal for a new hearing the appropriate remedy."

Eric Doleman represented himself in this Article 78 proceeding.

Courts Issue Decisions Discussing the Preservation of Issues for Appeal

In Matter of Henry v. Fischer, 2016 WL 7235151 (Dec. 15, 2016), the Court of Appeals addressed the issue of whether an inmate's failure to explicitly object or otherwise protest a hearing officer's ruling denying production of the documents that the inmate had requested constitutes a waiver of the right to production of those documents. In this case, Mr. Henry asked the hearing officer to produce any to/from reports, relevant log book entries and the unusual incident report. After the testimony of several witnesses, Mr. Henry reminded the hearing officer of his request for documents. The hearing officer then refused to produce the documents, explaining that the UI did not name Mr. Henry, the to/froms were confidential and the logbook did not have a description of the incident. In addition, the hearing officer stated that one witness had refused to testify but failed to provide a reason for the refusal. Twice during the hearing, Mr. Henry stated that he objected to the whole hearing. The hearing officer found Mr. Henry guilty of the charges and imposed a SHU sanction of two years.

In his administrative appeal, Mr. Henry argued that he was wrongfully denied his right to the production of relevant documents and that the hearing officer had wrongfully failed to ascertain the reason that a witness had refused to testify. The

Office of Special Housing affirmed the determination of guilt.

When Mr. Henry filed his Article 78 petition, the respondent moved to dismiss the petition, arguing that Mr. Henry had failed to preserve the issues that he sought to raise because he had not properly objected at the hearing. The Supreme Court agreed with the respondent and dismissed the petition. The Appellate Division affirmed, holding that the claims were unpreserved due to Mr. Henry's failure to specifically object at the hearing.

The Court of Appeals rejected the lower courts' reasoning and decisions, holding that the record showed that "Henry plainly requested access to specific documents and witnesses and that the hearing officer denied some of those requests. In light of the denials of Henry's requests, the courts below erred in determining that Henry's failure to specifically object to the hearing officer's unfavorable rulings constituted a failure to preserve those rulings for judicial review." The Court remitted the case to the Supreme Court, Albany County, for further proceedings.

Similarly, in Matter of Doleman v. Prack, 2016 WL 7234716 (3d Dep't Dec. 15, 2016), discussed in more detail in the preceding article, the petitioner first told his employee assistant that he wanted to call two witnesses. The assistant reported that the two witnesses had refused to testify. At his hearing, the petitioner asked the hearing officer to call the two witnesses, saying that they would testify that the petitioner did not have issues with the inmate that he was accused of conspiring to assault. The hearing officer replied that he would see if the inmates would testify, but later stated, without more, that each had refused to testify. The hearing officer did not disclose what if any efforts had been made to ascertain these inmates' willingness to testify nor did he say what, if any, reasons the witnesses had given for their refusal.

The court ruled that while the petitioner did not reply to the hearing officer's statement that the witnesses had refused, this failure did not constitute an affirmative waiver of the petitioner's right to call witnesses, given his specific request that they be called and the hearing officer's assurance that he would see if the inmates would testify.

In the above discussed decisions, Donna Hae Kyun Lee, Senior Associate Dean of Clinical Programs and Professor at City University of New York represented Jevon Henry and Eric Doleman represented himself.

Failure to Ascertain Reason for Refusals to Testify Leads to Reversal

After being charged with having assaulted another inmate, Robert DeJesus advised his employee assistant that he wished to call two witnesses. The assistant noted that the two witnesses had refused. No reasons were given for the refusals. At his hearing, Mr. DeJesus again asked that the witnesses be called. The hearing officer noted that the witnesses had told the assistant that they refused. However, there was no reason for the refusals in the record and the hearing officer made no effort to verify the refusals. In Matter of DeJesus v. Venettozzi, 2016 WL 7234775 (3d Dep't Dec. 15, 2016), the court held, without objection from the respondent, that the failure to provide the reasons for the refusals violated the petitioner's regulatory right to call witnesses and remitted the matter for a new hearing.

Robert DeJesus represented himself in this Article 78 proceeding.

X-Ray and Testimony of Technician is Substantial Evidence of Drug Possession

In Matter of Sparks v. Annucci, 144 A.D.3d 1352 (3d Dep't 2016), upon learning that petitioner had swallowed an object during a pat frisk, security staff ordered an X-ray which revealed a scalpel or razor in petitioner's digestive track. Although no scalpel or razor was recovered during the contraband watch, the petitioner was charged with smuggling, possession of contraband weapon and possession of an unauthorized item. After being found guilty of the charges, petitioner filed an Article 78 challenge, asserting that the determination should be annulled because no contraband was recovered.

The Third Department rejected the petitioner's argument. The court held that the X-ray evidence, in combination with the X-ray technician's testimony and the portion of the misbehavior report wherein the charging officer reported that the petitioner had admitted that he disposed of the contraband through defecation was substantial evidence of guilt.

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Jon Crain of Whiteman Osterman & Hanna LLP represented Yusuf Sparks in this Article 78 proceeding.

Court Finds that 12 Month SHU Sanction Is Not Excessive

In Matter of Safford v. Annucci, 144 A.D.3d 1271 (3d Dep't 2016), the petitioner was found guilty of conspiring with visitors and other prisoners to smuggle drugs into prison. The hearing officer imposed a penalty of 12 months SHU. On appellate review, the court found that due to the length of time that petitioner was engaged in the conspiracy, his conduct posed a serious threat to institutional safety and security. Based on this analysis, the court rejected the petitioner's claim that the penalty was excessive.

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Jermaine Stafford represented himself in this Article 78 proceeding.

Parole

Court Rules Denial of Parole Was Arbitrary and Capricious

Niki Rossakis, convicted of having murdered her husband, was originally sentenced to 23 years to life. On appeal, the court, finding that the sentence was excessive, reduced the term to 15 years to life, the minimum sentence for a conviction of murder in the second degree. After having served fifteen years, Ms. Rossakis was three times denied parole release. After the third denial, she filed an Article 78 challenge to the Parole Board's decision, arguing that it was arbitrary and capricious. The Supreme Court, New York County, granted the petition and ordered that the petitioner receive a new hearing before a new panel of commissioners and directed, "in the strongest way possible, that the Board consider all of the factors which emphasize forward thinking and planning." The respondent appealed the decision.

In Matter of Rossakis v. NYS Board of Parole, 41 N.Y.S.3d 490 (1st Dep't 2016), The First Department affirmed the lower court's finding that the denial of parole was arbitrary and capricious. In its decision, the court first stated what a prisoner who has been denied parole must show in order to successfully challenge that decision: "the petitioner bears the burden of showing that the decision is the result of 'irrationality bordering on impropriety,' and is thus arbitrary and capricious." The court also set forth five of the eight factors which the Parole Board is required to consider and which the court thought were relevant to Ms. Rossakis' appeal:

> 1. The inmate's institutional record of rehabilitative programming and her adjustment to prison life;
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> 2. The inmate's release plans and resources;
>
> 3. Statements from the victim or the victim's representative;
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> 4. The seriousness of the offense including the type and length of sentence, recommendations of the sentencing court, district attorney and the attorney for the inmate, the pre-sentence report as well as consideration of mitigating or aggravating factors and activities following arrest prior to confinement; and
>
> 5. The inmate's prior criminal record.

With respect to these factors, the court noted that in its decision, the Board is not required to refer to each factor or to give equal weight to every factor, however, the court wrote, "[t]he role of the Parole Board is not to resentence petitioner according to the personal opinions of its members as to the appropriate penalty for murder, but to determine whether, as of this moment, given all of

the statutory factors, (s)he should be released." With respect to this role, the court wrote, the statute expressly mandates that the Parole Board affirmatively take the prisoner's education and other achievements into consideration in determining whether he or she meets the general criteria relevant to parole release. Finally, the court noted, with respect to Parole Board denials challenged in the courts within the First Department, the Parole Board may not deny parole based solely on the seriousness of the offense.

With respect to her life before the crime that resulted in her imprisonment, Ms. Rossakis had been in a sexually and physically abusive relationship with her husband for twenty years. She shot her husband after he once again threatened to rape her. At trial, although an expert witness testified that her actions were consistent with those of an abused woman, the jury rejected her defenses of justification and extreme emotional disturbance and convicted her of murder in the second degree. Initially sentenced to 23 years to life, as noted above, the Second Department reduced her sentence to 15 to life, the minimum sentence for the offense that Ms. Rossakis was convicted of committing.

During her incarceration, Ms. Rossakis earned two associates degrees and completed numerous rehabilitative programs. She tutored other inmates, was an IGRC rep, and was praised for her work as a telephone operator for the NYS Department of Motor Vehicles.

A family violence agency had offered Ms. Rossakis a job when she is released and she planned to pursue her bachelor's and master's degrees, continue in therapy and become involved with her church.

Ms. Rossakis had no prior history of violent crime and received the best score possible on her COMPAS evaluation.

At her parole hearing, Ms. Rossakis expressed remorse for having killed her husband and apologized. She acknowledged that there were other ways that she could have removed herself from her abusive marriage and faulted herself for not doing so.

In a four paragraph decision, the Parole Board found that Ms. Rossakis' release to parole supervision would be incompatible with the welfare of society and then described the crime that she committed. It listed her achievements in prison without comment or analysis. It found Ms. Rossakis to be unremorseful, concluded that she continued to blame the victim for his death, and continued to identify as an abuse victim in spite of the jury's guilty verdict.

The lower court found that the Board's decision was based almost exclusively on the petitioner's crime and that it ignored the other applicable statutory factors, including institutional achievements, release plan, remorse and the absence of any prior violent criminal history.

On appeal, the First Department concluded that the lower court had correctly determined that the Board had acted irrationally in denying parole by focusing exclusively on the seriousness of petitioner's crimes and statements from the victim's family. It also found that the Board had failed to recognize that a person can be a victim of domestic abuse yet not be able to meet the "exacting requirements" of the defenses of extreme emotional distress or justification. Thus, the appellate court concluded, apologizing for the shooting while maintaining that she was an abuse victim did not indicate a lack of remorse.

Further, the court noted, in spite of an "impressive" COMPAS score, showing a low risk for violence or substance abuse, the Board had concluded that there was a reasonable probability that the petitioner would again violate the law based on her crime and the fact that she was addicted to prescription medication around the time of her arrest and trial (early 1990s) and her use of drugs in the early 1980s. The court also held that the Board had given undue weight to the family's statements as these statements were affirmatively rebutted by the objective evidence supporting the petitioner's release.

Finally, the court noted that the Parole Board, was required to consider the recommendations of the sentencing court -- in this instance, the Second Department -- which reduced the sentence from 23 years to 15. Here the court held, the Board's

repeated denials of parole release have had the effect of undermining the sentence reduction.

Based on this analysis, the court affirmed the lower court's finding that the Board had acted irrationally. However, it vacated that portion of the lower court's order directing the Board to emphasize forward thinking and planning over the other statutory factors. This portion of the order, the court wrote, usurped the administrative function by directing the agency to proceed in a specific manner.

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Richard Greenberg, Office of the Appellate Defender, represented Niki Rossakis in this Article 78 proceeding.

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Court of Claims

Claim Not Timely Filed

Following a Tier III determination that he had assaulted his cellmate, Claimant Steele was placed in SHU for five months. He was released from SHU on May 27, 2012. He successfully challenged the determination of guilt in an Article 78 on the basis that the hearing officer had violated his right to call witnesses when he failed to inquire as to the reason that one of the claimant's witnesses had refused to testify. The court reversed the hearing in September 2012.

The claimant filed a claim on October 29, 2012 and served it on November 19, 2012. The claim was for damages for time spent in SHU. The defendant filed an answer, asserting that the court lacked subject matter jurisdiction because the claim had not been filed within 90 days of when it accrued as required by Court of Claims Act §§ 10(3) and 11(c).

The court denied the claimant's motion for summary judgment and declined to strike the defense of lack of subject matter jurisdiction, holding that the record was inadequate. It set a date by which all motions should be made. By the deadline set by the court, the claimant had not filed a motion for permission to file a late claim nor had the defendant filed a motion to dismiss for lack of subject matter jurisdiction. The case then went to trial.

At the trial, the defendant moved to dismiss for lack of subject matter jurisdiction. The court denied the motion, finding that the defendant had waived the defense by not making the motion to dismiss by the motion deadline. The court ruled in the claimant's favor and awarded damages.

The Third Department, in Steele v. State of New York, 2016 WL 7469555 (3d Dep't Dec. 29, 2016), reversed the trial court's decision. The court first noted that it had already held that a claim for wrongful confinement accrues when a claimant is released from SHU. Thus, the claimant had 90 days from the date that he was released from SHU – May

27, 2012 – within which to file his notice of intent. By failing to file the Notice of Intent by August 27, 2012, the claimant had missed the deadline for filing. Further, the Court wrote, a failure to comply with the time provisions of Court of Claims Act §10, strips the Court of Claims of subject matter jurisdiction.

A defendant can waive a claimant's failure to serve a notice of intent within 90 days where the defense is neither raised in a motion filed before the answer is filed or in a responsive pleading. Here, the court noted, the defendant had preserved the defense in its answer. In light of this, the court held that the trial court lacked the authority to impose a pretrial motion deadline precluding this defense. For this reason, the court concluded that the claimant's failure to timely serve the claim deprived the Court of Claims of subject matter jurisdiction and dismissed the claim.

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William Steele represented himself in this Court of Claims action.

Miscellaneous

Incarceration Not Justification For Denying Name Change

In Matter of Anthony Lamont Jackson to assume the name of Toniesha Sissy Jackson, 144 A.D.3d 1539 (4th Dep't Nov. 10, 2016), the supreme court denied the petition for a name change based solely on the fact that the petitioner was incarcerated. On appeal to the Fourth Department, the court, referencing Matter of Powell, 95 A.D.3d 1631 (3d Dep't May 31, 2012) and Civil Rights Law §63, held that a court's authority to review an application for a name change is limited: "If the petition is true and there is no reasonable objection to the change of name proposed, . . . the court shall make an order authorizing the petitioner to assume the name proposed." Reviewing the petition before it, the court found that it satisfied the requirements of Civil Rights Law §63 and held that the petitioner's incarceration alone does not justify denial of the petition. Further, the court noted, the Department of Corrections and Community Supervision had received notice of the petition and filed no objections to it. Under these circumstances, and in the absence of an indication of fraud, misrepresentation or intent to interfere with the rights of others, the appellate court held that the lower court should have granted the petition. Based on this analysis, the court reversed the order appealed from and granted the petition.

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Mik Kinkead of the Sylvia Rivera Law Project represented Toniesha Sissy Jackson in this Article 78 proceeding

Denial of Temporary Release Application Not Irrational

After her application for temporary work release was denied, Virginia DeCapria filed an Article 78 asserting that the denial was irrational. In Matter of DeCapria v. Annucci, 144 A.D.3d 1305 (3d Dep't 2016), the court rejected her argument. Because participation in the temporary release program is a privilege and not a right, the court wrote, the court's review is limited to deciding whether the determination violated any positive statutory requirement or constitutional right of the inmate or whether it is affected by irrationality bordering on impropriety. Here, the court found, the record shows that while serving as a treasurer for a county organization, the petitioner stole a significant sum of money over a several year period. The court concluded that this conduct was an appropriate basis for the denial of the application and that the denial was neither irrational nor a violation of the petitioner's statutory or constitutional rights.

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Virginia DeCapria represented herself in this Article 78 proceeding.

Court Had Sufficient Information to Dismiss Petition for Visitation

In Matter of Otrosinka v. Hageman, 41 N.Y.S.3d 182 (4th Dep't 2016), Mr. Otrosinka filed a petition for visitation from a prison in Michigan where he would remain incarcerated for ten more years. Prior to his incarceration, in 2009, the Department of Social Services had removed the children with whom he sought visitation from his

care due to neglect. Ultimately, the petitioner admitted that he had engaged in inappropriate conduct with the older sister of the children with whom he was now seeking visitation. An order of protection was issued with respect to all of the children; the order of protection expired in February 2012. After the order expired, the petitioner had little to no contact with the children. Based on this history, the lower court dismissed the petition without conducting a hearing and imposed conditions on the petitioner that he had to meet before could file another petition for visitation.

On appeal, the court concluded that despite the presumption in favor of visitation, dismissal of the petition was supported by the record and an evidentiary hearing was not required. It was clear from the record, the court wrote, that the lower court possessed sufficient information to render an informed determination that was consistent with the children's best interests, particularly in view of the lengthy period of the father's incarceration and the virtually nonexistent previous relationship of petitioner with his children following their removal from his custody.

The appellate court found however, that the conditions set by the lower court which the father must meet before he filed another petition for visitation were not appropriate. The appellate court noted that it is well settled that public policy mandates free access to the courts, but that a party may give up that right if she or he abuses the judicial process by engaging in meritless litigation motivated by spite or ill will. Here, the appellate court wrote, there was no basis in the record from which to conclude that the father had engaged in "meritless, frivolous or vexatious litigation or that the he had otherwise abused the judicial process." For this reason, the court modified the lower court's order by vacating that portion which restricted the petitioner from filing visitation petitions in the future.

Court Finds that Petitioner Failed to Exhaust Administrative Remedies

In Matter of Beaubrun v. Annucci, 144 A.D.3d 1309 (3d Dep't 2016), after the petitioner was found guilty of violating prison rules, he was informed that he was no longer eligible for merit release. Petitioner sent letters to the prison superintendent, objecting to the determination. The superintendent responded that the decision was proper. The petitioner did not file a grievance protesting the determination that he was not eligible for merit release. He then filed an Article 78 challenge seeking to annul the determination of merit ineligibility. The lower court dismissed the petition for failure to exhaust administrative remedies because the petitioner had not used the Inmate Grievance Program to address the determination that he was not eligible for merit release.

The appellate court approached its analysis by first referencing Correction Law §803(1)(d)(iv). This law provides that an inmate is disqualified from receiving a merit time allowance if he or she has committed any serious disciplinary infraction. (A serious disciplinary infraction is defined in 7 NYCRR 280.2(b) as an infraction which results in the imposition of 60 or more days of SHU or keeplock time or of a recommended loss of good time). Because petitioner's challenge to the merit time determination concerned the application of a DOCCS written regulation or rule, the court found, he was required to file a grievance to challenge that determination and pursue the appeal process through an appeal to the Central Office Review Committee (CORC). Not having done so, the petitioner did not exhaust his administrative remedies. The court therefore affirmed the lower court's dismissal of the petition.

Lyonel Beaubrun represented herself in this Article 78 proceeding.

Court Approves Standing Force-Feeding Order

In 2013, the Supreme Court, Greene County, granted a one year force-feeding order. DOCCS sought the order with respect to a prisoner serving a sentence of 25 years to life. During the year that the order was in effect, the prisoner was "frequently" subjected to force-feeding. When that order expired, the Department filed a new proceeding seeking authorization to force-feed the prisoner when necessary throughout the remainder of his period of incarceration. The prisoner objected to the proposed

order, arguing that it would violate his constitutional rights to refuse medical treatment and to privacy, liberty and free speech and that the Department had not showed a state interest that was sufficiently compelling to overcome his constitutional rights. The court ruled in favor of the Department and issued an order authorizing DOCCS to force feed the prisoner throughout his incarceration.

In Matter of Jua TT. v. Daniel Martuscello, 2016 WL 7469596 (3d Dep't Dec. 29, 2016), the court began its analysis by noting that "when an inmate commences a hunger strike which, if continued, would create a substantial risk of imminent death or serious permanent injury, a force-feeding order is warranted if the state's intervention, even if contrary to the inmate's constitutional rights, is reasonably related to its legitimate penological interests, including those of preserving the inmate's life and maintaining safety and discipline within the facility."

The court then examined the facts in the record which supported the force-feeding application and found that:

1. The prisoner had repeatedly engaged in hunger strikes since May 2013 with the stated goal of a transfer to a max A facility;

2. The prisoner stated that he would continue the strike until he was transferred or died;

3. The facility doctor testified that the hunger strike, if continued, would result in death or irreversible organ damage and that the prisoner was aware of the risk; and

4. The facility doctor testified that it might be necessary to force-feed the prisoner throughout his incarceration to prevent his death and serious injuries.

The court concluded that the record supported a finding that the prisoner intended to pursue his hunger strike until he was transferred to another prison based on reclassification of his status or until he dies from malnutrition. Citing Matter of Bezio v. Dorsey, 21 N.Y.3d 93 (2013), the court stated that the state's interest in preserving the prisoner's life outweighed any claimed infringement of the prisoner's constitutional rights. Thus, the court found, on the record before it, the lower court properly issued a force-feeding order for the duration of respondent's incarceration.

FEDERAL COURT DECISIONS

Prisoner Awarded Punitive Damages for DOCCS Employee's Theft of Mail and Photos

In 2007, Jarron Santos' grandmother sent him a letter and some family photographs. Mr. Santos did not receive the letter and photos because Bonnie Hoffman, a DOCCS employee whose job it was to handle prisoners' mail, stole the letter. Bonnie Hoffman was arrested for possession of stolen mail and in 2011, DOCCS sent Mr. Santos a letter advising him of Ms. Hoffman's arrest and delivering the letter that his grandmother had sent. Shortly thereafter, in Santos v. Hoffman, 2016 WL 6581334 (S.D.N.Y. Nov. 7, 2016), Mr. Santos sued Ms. Hoffman for damages. Although defendant Hoffman was served, she did not file an answer to the lawsuit. Plaintiff Santos then made a motion for a default judgment. The court granted the motion, entered judgment against the defendant, and remanded the case to the magistrate judge to determine the appropriate amount of damages.

Jarron Santos represented himself in this Section 1983 action.

Notice About Delivery of *Pro Se*

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KNOW YOUR RIGHTS

The Right to Special Education

This article provides an overview of what special education is, the federal law that requires DOCCS to provide it, and the steps DOCCS must take to provide it. **If you are a person with a disability who is 21 or under and you want more information about special education, you can write to Maria Pagano in the Buffalo Office of Prisoners' Legal Services. The address of the office is Prisoners' Legal Services, 14 Lafayette Square, Suite 510, Buffalo, New York 14203.**

A federal law called the Individuals with Disabilities Education Act (IDEA) requires DOCCS to provide special education services to eligible prisoners under age 22. Special education is instruction that is designed specifically for you based on needs related to your disability. Special education can include an aide assigned just to you or another student, a small class size, a resource room, and an extra teacher. It can also include "related services" such as speech-language therapy, counseling, physical therapy, psychological services, assistive devices, and interpreter services.

The law requires that prisoners under the age of 22 be assessed at reception to determine their special education needs. If you meet one of the following prerequisites, you should be assigned to a facility designated to provide special education:

(1) a history of special education services;

(2) a reading or math score below the 5th grade level; or

(3) an IQ below 70.

Once at that facility, a Committee on Special Education (CSE) is required to evaluate you for special education eligibility. The CSE is chaired by a psychologist and includes administrators, teachers, and other professional staff. The CSE arranges for evaluations and reviews those evaluations to determine whether someone has disabilities that prevent him or her from making sufficient academic progress. Those disabilities include: learning disability, emotional disturbance, autism, hearing impairment or deafness, intellectual disability, speech or language impairment, traumatic brain injury, or visual impairment.

If the CSE determines that you have one of those disabilities, and that your disability prevents you from making sufficient academic progress, the CSE is required to create an Individualized Education Plan (IEP) for you. The IEP says what special education services you will receive. If you have an IEP, DOCCS is required to place you in a classroom that is appropriate for your educational needs and educational level. That setting is referred to as the Least Restrictive Environment (LRE).

Once you have an IEP, DOCCS cannot remove you from your education setting (for example, place you in cell study) unless you opt out of education or DOCCS has demonstrated a "bona fide security or compelling penological interest that cannot otherwise be accommodated." There are some other situations when DOCCS does not have to provide you with special education even though you are otherwise eligible. If you want to learn more about these other situations, please write to Maria Pagano at the address provided in the first paragraph.

If you qualify under the IDEA, you are entitled to receive special education while you are in prison. Your IEP will stay with you until you graduate high school, achieve high school equivalency, or are declassified by the CSE.

If DOCCS did not identify you at reception as a person entitled to special education, you can identify yourself at your current prison, or ask (1) a CSE chairperson; (2) an education supervisor; (3) a parent; or (4) a professional security staff member to refer you. The person referring you should state the reason for the referral and include test results or reports if available.

You may have legal recourse if DOCCS failed to identify you or failed to take certain steps to evaluate you, classify you, or declassify you. As mentioned above, if you are a person with a disability who is 21 or under and you are interested in obtaining more information about the special education services that DOCCS is required to provide, you can write to Maria Pagano.

This article was written by Maria E. Pagano, Managing Attorney, Prisoners' Legal Services of New York, 14 Lafayette Square, Suite 510, Buffalo, NY 14203.

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PLS Offices and the Facilities Served

Requests for legal representation and all other problems should be sent to the local office that covers the prison in which you are incarcerated. Below is a list identifying the prisons each PLS office serves:

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

Prisons served: Bedford Hills, CNYPC, Coxsackie, Downstate, Eastern, Edgecombe, Fishkill, Great Meadow, Greene, Green Haven, Hale Creek, Hudson, Lincoln, Marcy, Mid-State, Mohawk, Otisville, Queensboro, Shawangunk, Sing Sing, Sullivan, Taconic, Ulster, Wallkill, Walsh, Washington, Woodbourne.

BUFFALO, 14 Lafayette Square, Suite 510, Buffalo, NY 14203

Prisons served: Albion, Attica, Collins, Gowanda, Groveland, Lakeview, Livingston, Orleans, Rochester, Wende, Wyoming.

ITHACA, 114 Prospect Street, Ithaca, NY 14850

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

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

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

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