Pro Se

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Second Circuit Rules that Correctional Association Report is Hearsay

In 2006, Isidro Abascal filed a lawsuit in the federal district court for the Western District of New York asserting that between 2003 and 2005, security staff at Attica C.F. (Attica) retaliated against him for filing grievances by preventing him from leaving his cell for meals and for recreation and, in the case of one officer, by physically assaulting him. Coincidentally, in September 2005, the Correctional Association of New York (CA) published a report on Attica C.F. (Report or CA Report) finding that correction officers abused inmates by refusing to let them out of their cells at mealtimes and by physically assaulting them.

The information in the CA Report was gathered in early 2005 by distributing anonymous questionnaires to inmates, interviewing inmates and security staff and observing the prison. The information in the Report is summarized but does not have the underlying data upon which the Report relies. The authors of the Report are not identified. The authors note that they could not adequately investigate the amount and severity of the abuse or evaluate the factors that contribute to the problems between inmates and staff.

The case went to trial and the CA Report was admitted as evidence supporting the plaintiff's claim that security staff retaliated against inmates who file grievances by denying them access to meals. The court ruled that the Report was admissible under the business records exception to the hearsay rule. Mr. Abascal won the trial on the issue of deprivation of food and the jury awarded him $1.00 in compensatory damages and a significant amount of punitive damages. The jury found in favor of the defendant on the issue of the unnecessary use of force.

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Also Inside . . .

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SOLITARY CONFINEMENT: THE PUSH FOR NEW LIMITS

A Message from the Executive Director, Karen L. Murtagh, Esq.

I wanted to share with you some *good* news from North Carolina which is quite encouraging and worthy of mention.

As reported in the Charlotte Observer on July 19, 2017, new disciplinary measures have been adopted in North Carolina which would dramatically reduce the use of solitary confinement in virtually all cases. For example, according to the Observer article, the new policy:

> "▪ Limits time in solitary to 30 days for inmates who commit Class A offenses, the most serious kind. Among those offenses: assaulting an officer and fighting with weapons.
>
> "▪ Reduces time in isolation for those who commit Class B offenses, the second-most serious class. The old policy allowed such prisoners to be placed in solitary for up to 45 days, but the new policy limits the time to 20 days. Those offenses include committing sexual acts and fighting without weapons.
>
> "▪ Eliminates solitary altogether for those who commit Class C offenses. The old policy allowed prison officials to isolate such inmates for up to 30 days. Those offenses include disobeying a prison official's orders and paying bribes.
>
> "The new policy also stipulates that 'special consideration must be given to those offenders whose mental illness contributed significantly to their behavior.' For instance, the policy states, inmates will not be cited for any violations that occur as a result of them being placed in mental health restraints."

The definition of what constitutes solitary confinement in North Carolina is similar to New York State: "22-23 hours alone each day in cells smaller than parking spaces." So too is the proportion of inmates in solitary confinement contrasted to those in general population: Approximately 2,300 out of 36,600 for North Carolina and 3,350 out of 51,400 for New York

As the article makes clear, the reasons for the policy change in North Carolina stem from science-based research concluding that long term placement in solitary confinement destroys a person's mental and physical health, and is often an insurmountable obstacle to a person's rehabilitation and successful re-entry into society upon release. Such evidence-based research, conducted (and widely accepted) both nationally and internally, has formed the predicate for reform efforts around the country, including advances in New York State on which I've previously reported in this column.

Noteworthy too has been the response to the policy change in North Carolina. Even among critics who see solitary confinement as one tool in the arsenal to "maintain control" behind bars, there is general acceptance that incarcerated people who "break the rules" will be spending less time in solitary confinement. Said one former North Carolina prison captain: "It's a proven fact that the longer they spend in segregation, the worse they get." Such a reaction echoes the sentiments of a North Carolina prison spokesman who wrote that the new disciplinary policy was based on "evidence-based practices for managing inmate behavior, thereby creating a safer prison environment." Worth remembering here too is the action of the corrections officers union in Texas which, a few years ago, agreed with reformers that solitary confinement made prisons less safe for both officers and incarcerated people.

Solitary confinement, be it called "restrictive housing", "special housing", the "box" or other labels, should be used in only the rarest of circumstances and for the shortest amount of time possible. An editorial in the July 18, 2017 Washington Post called such labels "semantic dodges" and urged vigilance and continued advances in mental health treatment and promotion of human rights for those behind bars. As with any reform effort, the situation in North Carolina will require monitoring to keep things moving in the right direction, for the health and safety of all involved.

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The defendants appealed, arguing that the district court's admission of the CA Report was reversible error. Citing U.S. v. Ford, 435 F.3d 204 (2d Cir. 2006), the Court noted that in deciding whether evidence was admitted improperly, an appellate court has to decide whether admission of the evidence was "an abuse of discretion." Either an error of law or a clear error of fact can be an abuse of discretion. Further, even where a district court's evidentiary ruling is erroneous, the appellate court will not grant a new trial if the error was harmless.

The Court found that the district court erred in admitting the CA Report. The Federal Rules of Evidence bar the admission of hearsay. According to Rule 801(c), hearsay is a statement that the declarant does not make while testifying at the current trial or hearing and that a party offers in evidence to prove the truth of the matter asserted. The Court found that the CA Report is "classic hearsay": it was offered for the truth of the matter asserted and was not made under oath in the district court. Thus, unless it was admissible under one of the hearsay exceptions, the district court admitted it in error.

The district court admitted the Report pursuant to the business records exception of Rule 803(6). This rule provides that an otherwise hearsay business record may be admitted where:

1) the record was made at or near the time by someone with knowledge (or from information transmitted by someone with knowledge);

2) the record was kept in the course of regularly conducted activity;

3) making the record was a regular practice of that activity;

4) the custodian certifies the record; and

5) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

Business Records Must be Timely Made By Someone With Knowledge

Ordinarily, any trustworthy habit of making regular business records will involve the making of the record contemporaneously (at the same time). The CA visited Attica in March 2005 and issued the report in September 2005. A six month delay, the Court ruled, is too long a time to be considered contemporaneous. Further, the Court noted, there was nothing in the record that suggested that the surveys and interviews were conducted at or near the time of the underlying events that make up the information in the Report. Thus, there was no way to verify that the incidents that prisoners recounted occurred at or near March 2005.

In addition, the Report was not made by someone with personal knowledge of the underlying information. In fact, the Court found, the identity of the Report's author was unknown. And, there is no indication that the information gathered in the surveys and interviews was reported by someone with knowledge.

Making the Report Must Be a Regularly Conducted Activity

The making of the CA Report was not the kind of regularly conducted activity that the business records exception contemplated because it involved interpreting survey results and interviews and creating a summary of the findings. The rule was intended to allow the admission of records that were compiled from observable information.

Evidence of Untrustworthiness

The Court found that the defendants had successfully shown that the Report was untrustworthy. The finding of untrustworthiness was based on the fact that the identities of the inmates who completed the surveys were not known and because the inmates had no duty to report the information that they provided to the CA. A duty to report, the Court wrote, has long been recognized as the principal means of establishing the reliability of a hearsay statement offered under the business records exception.

Based on these findings, the Court concluded that the Report is hearsay and does not fall within the business records exception.

Harmless Error Analysis

The Court found that the admission of the Report was not harmless error. The Report, the Court found, bore on the most important issues at trial: the plaintiff's **credibility** (believability). Further, by stating that there was a pervasive problem at Attica with officers retaliating against inmates by depriving them of food, the Report **corroborated** (backed up) the plaintiff's testimony that the defendants had retaliated against him. Third, the plaintiff relied heavily on the Report in his closing argument. And fourth, there was little evidence supporting the plaintiff's claims beyond his testimony and the Report.

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Jeffrey Baase, of Rupp Baase Pfalzgraf Cunningham LLC, represented Isidro Abascal in this Section 1983 lawsuit.

News and Notes

PLS' Native Justice Project: Legal Services for Native American People who are Incarcerated

Beginning August 1, 2017, PLS Attorney Melina Healey is accepting clients for the Native Justice Project, which offers legal services to prisoners who identify as Native American and are incarcerated in New York State facilities. The Native Justice Project is funded by Equal Justice Works with sponsorship from the Albert and Anne Mansfield Foundation, and will be a year in duration. Ms. Healey specializes in Native civil rights issues. The Native Justice Project is intended for Native people who have legal concerns related to their incarceration or tribal identity, including conditions of confinement, religious freedom, education, disciplinary issues, Indian Child Welfare Act, and tribal enrollment and tribal benefits issues. **You may qualify for services if you identify as Native American and are currently incarcerated in a New York State facility.** If you meet this requirement and would like to request assistance, please write to:

Melina A. Healey
c/o New York University School of Law
245 Sullivan Street
Furman Hall C-34
New York, NY 10012

Please provide us with your name, date of birth, tribal affiliation (if you know it), CDIB number if you are an enrolled tribal member (**note that you do not need to be enrolled in order to be eligible for services**), and a brief summary of your issue and the relief you are requesting.

Pro Se Soon to be Available Online in DOCCS Law Libraries

Thanks to a suggestion from Jeremy Zielinski, *Pro Se* will soon be available electronically in the DOCCS law libraries. After Mr. Zielinski contacted PLS about his idea to make *Pro Se* available through the Inmate Legal Resources Program (ILRP), PLS and DOCCS agreed that this could be done. PLS is converting the last 6 years of *Pro Se* to be compatible with the documents that DOCCS loads on ILRP, following which DOCCS will load them on the computer. We will let you know when the plan has been fully implemented. Thank you Mr. Zielinski for your great idea!

Challenge to DOCCS Use of Residential Treatment Facilities

Pro Se has previously reported on Alcantara, et. al. v. Annucci, et. al., the case in which PLS, the Legal Aid Society and Willkie Farr & Gallagher LLP, are challenging DOCCS' policy of confining sex offenders beyond the maximum expiration dates of their prison terms or the expiration of their parole violation time assessments. DOCCS does this because the Sexual Assault Reform Act (SARA) provides that Level 3 sex offenders, and sex offenders (regardless of level classification) whose

victims were under the age of 18, cannot reside within 1,000 feet of school grounds. As a result, sex offenders are frequently unable to locate a private residence that meets the SARA requirements. This is particularly true in New York City. If such individuals do not have an approved residence when they reach the maximum expiration date of their sentences or the expiration dates of their time assessments, they may be held in a residential treatment facility (RTF). DOCCS has opened RTFs in several prisons.

The Alcantara case was brought against DOCCS officials and New York City officials in May 2016. The State and City defendants responded with a motion to dismiss the petition. In February 2017, the Albany County Supreme Court judge who heard the case issued a decision which partly granted and partly denied the motions to dismiss. A brief summary follows.

One of the issues raised in the petition is whether the State has the authority to hold people in an RTF for more than six months. Penal Law §70.45(3) states that the Parole Board may impose, as a release condition, that a person be held in an RTF for the first six months of his/her period of PRS. In their papers, the State relied on the language of Correction Law §73(10) which states that the Commissioner of DOCCS has the authority to transfer any inmate who is or will soon become eligible for community supervision, to an RTF. The court ruled that as a matter of law the six month period referred to in Penal Law §70.45(3) does not establish a limit on DOCCS authority to hold people in RTFs, and that Correction Law §73(10) gives DOCCS the authority to confine people in RTFs for more than six months.

The petitioners also argued that DOCCS does not do enough to meet its statutory duty to help individuals find SARA-compliant housing and that New York City officials do not do enough to make space available in city shelters for released sex offenders. The court ruled against the petitioners with respect to these claims. The court considered documents filed by the State and determined that DOCCS' limited efforts to assist individuals locate appropriate housing were good enough, finding that it was neither arbitrary and capricious nor a violation of law for DOCCS to hold people in RTF status due to the inability of those individuals to locate SARA-compliant housing. Because the court rejected these claims, the New York City defendants were dismissed from the case.

Shortly after the court issued its decision in Alcantara, the Appellate Division, Third Department issued a decision in Gonzalez v. Annucci, 149 A.D.3d 256 (3d Dep't 2017). Gonzalez was a challenge to RTF confinement at Woodbourne. The Gonzalez court analyzed the laws that relate to DOCCS duty to help prisoners find housing upon release. In Alcantara and Gonzalez, DOCCS argued that it is a prisoner's responsibility to locate housing and that DOCCS' responsibility is limited to investigating potential residences proposed by a prisoner. In Gonzalez, the Third Department held that DOCCS has "affirmative and significant" duties to help persons housed in RTFs find housing, and that it is not enough for DOCCS to simply investigate proposed residences. Because the Third Department is an appellate court, and because no other appellate courts have ruled on this issue, its decision is binding precedent on all county level courts such as Albany County Supreme Court, where the Alcantara case is pending. For this reason, the Gonzalez decision may affect the Alcantara court's view as to whether DOCCS is doing enough to help people in RTF confinement find housing outside of prison.

SHOUT OUT TO DOCCS STAFF WHO GO ABOVE AND BEYOND

Pro Se recently received a letter from a prisoner in the CAR program at Sullivan. He wanted to recognize the terrific work done by the CAR staff and to give a special shout out to Deputy Assistant Superintendent Garber and CAR Counselor Conklin for the contribution that they make to the CAR program. According to the writer, the CAR staff is truly trying to help prisoners better themselves.

Letters to the Editor

To the Respectable People of *Pro Se*

I, Ricky Owens, am writing to you because I am happy to inform you that with the help of *Pro Se*, I was successfully able to overturn my Tier III hearing from March 28, 2016 for dirty urine. When this happened, I didn't know how to do an Article 78, but knew that I had to do something. So I wrote to you asking for help and was blessed with an Article 78 guide that was very easy to understand.

I want to commend you because without that guide, I would not have this administrative reversal. Please report this in Pro Se to show other brothers that they have to fight when DOCCS is wrong.*

With that said, you guys keep up the good work because these young brothers need all the help they can get and Pro Se is 40% of that help, at least it was for me, and I am thankful for that.

Respectfully,

Ricky Owens

*Mr. Owens' successful decision will officially be reported in the next issue of *Pro Se*.

Letters to the editor should be addressed to:

Pro Se, 114 Prospect Street, Ithaca, NY 14850, ATTN: Letters to the Editor.

Please indicate whether, if your letter is chosen for publication, you want your name published. Letters may be edited due to space or other concerns.

PRO SE VICTORIES!

Arthur Blake v. State of New York, Claim No. 126902 (Ct of Clm. May 12, 2017). Arthur Blake filed a claim relating to negligently lost or destroyed property. After trial, the court ruled in favor of Mr. Blake and awarded him damages plus interest.

Billy D. Ganoe, Jr. v. State of New York, Claim No. 114372-A (Ct. of Clm. April 28, 2017). Billy Ganoe filed a claim relating to negligently lost property. After trial, the court ruled in favor of Mr. Ganoe, and awarded him damages plus interest. Parenthetically, this claim was filed in 2007 but was not tried until 2017. Due to his meticulous record keeping, Mr. Ganoe was able to prevail on his claim ten years after it arose.

Matter of Dylan Schumaker v. Erie County District Attorney, Index No. I-2016-000180 (Sup.Ct. Erie Co. May 16, 2017). Petitioner successfully argued that he was entitled to the records he had requested through FOIL. During the administrative process, the respondent provided some of the requested documents, but denied the petitioner a copy of the statement made by one of the witnesses at the petitioner's criminal trial and the record of text messages from his phone. In the litigation, the petitioner's criminal defense attorney stated that he no longer had a copy of the witness's statement. Finding that the records were no longer in the possession of the petitioner or his attorney, the court ordered that the respondent produce a copy of the witness's statement and a copy of People's Exhibit 55 (the text message).

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

In Matter of Reyes v. Keyser, 150 A.D.3d 1502 (3d Dep't 2017), the petitioner challenged determinations of guilt made with respect to two misbehavior reports. The first report charged the petitioner with assaulting an officer who was pat frisking the petitioner. A second officer observed the frisk. The petitioner asked to call the second officer as a witness. The hearing officer agreed and the petitioner reminded him later in the hearing that the witness had not yet testified. Nonetheless, the hearing officer closed the evidentiary portion of the hearing without calling the second officer. The court ruled that the unexplained failure to call the second officer was a violation of the petitioner's fundamental right to call to witnesses, the remedy for which is reversal and expungment of the charges in the first misbehavior report.

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Jacob Reyes represented himself in this Article 78 proceeding.

Reversal: Unexplained Refusal to Allow Witness to Testify in the Accused's Presence

In Matter of Kalwasinski v. Venettozzi, 2017 WL 2674237 (3d Dep't June 22, 2017), the petitioner was found guilty of threats, harassment, obscuring visibility and refusing a direct order. At his hearing, he requested that two witnesses be called. He agreed that one of the witnesses, who was in the SHU, could testify outside of his presence. With respect to the other witness, when the hearing officer asked the petitioner what questions he wanted the hearing officer to ask the witness, and was permitted to hear the recorded testimony of that witness, the petitioner "repeatedly objected to the testimony being taken outside his presence."

The court first noted that "an inmate has a conditional right to call witnesses on his or her behalf and any witness shall be allowed to testify at the hearing in the presence of the inmate unless the hearing officer determines that doing so will jeopardize institutional safety or correctional goals," (quoting from 7 N.Y.C.R.R. 254.5(b). Prior to excluding a witness from testifying in the accused's presence, the regulation requires that the hearing officer determine that his or her presence will threaten institutional safety or correctional goals and must inform the accused of the reason for this conclusion. In this case, the hearing officer did not make a finding that having the witness testify in the petitioner's presence would threaten institutional safety or security.

After reviewing the record of the hearing, the court found that because the hearing officer had not followed the Department's regulation, the determination must be annulled. In addition, the court found that although the petitioner gave questions to the hearing officer to ask the witness and was allowed to hear the witness's testimony, the petitioner repeatedly objected to the testimony being taken outside of his presence. Thus, the court concluded, the petitioner had not waived his right to receive a reason for the exclusion of the witness.

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Mitchell Kalwasinski represented himself in this Article 78 proceeding.

Charge of Harassment Not Supported by Substantial Evidence

After observing Louis Jackson staring at her in an intimidating manner and then moving to a location where he could see her but she could not easily see him, a librarian charged Mr. Jackson with harassment. The prisoner was found guilty at a Tier II hearing and the determination of guilt was affirmed on appeal.

In Mr. Jackson's Article 78 challenge to the hearing, Matter of Jackson v. Gerbing, 150 A.D.3d 734 (2d Dep't 2017), he argued that the determination of guilt was not supported by substantial evidence. The rule prohibiting harassment provides:

"An inmate shall not harass an employee or any other person verbally or in writing. Prohibited conduct includes, but is not limited to, using insolent, abusive, or obscene language or gestures, or writing or otherwise communicating messages of a personal nature to an employee or any other person including a person subject of an order of protection with the inmate or who is on the inmate's negative correspondence list." 7 NYCRR 270.2(B)(8)(ii).

The court found that the evidence was insufficient to establish that the petitioner's conduct toward the librarian constituted harassment of prison staff as prohibited by rule 107.11. Thus, the court wrote, the determination of guilt must be annulled as to that charge.

Louis Jackson represented himself in this Article 78 proceeding.

"Good Faith" Denial of Witnesses and Evidence Leads to Reversal and Rehearing

Following alleged combativeness during a pat frisk and an assault on an officer during the subsequent escort to the medical clinic, Jacob Reyes was found guilty of refusing a direct order, assaulting staff and engaging in violent conduct. At his hearing, Mr. Reyes asked the hearing officer to produce a letter written by another inmate that was mentioned by the Superintendent in his review of the Unusual Incident Report as a basis for seeking additional investigation. He also requested that two officers who were present during the escort be called as witnesses. The hearing officer denied production of the letter because it was written "after the fact." He denied the witnesses because they did not have material evidence; he drew this conclusion from Mr. Reyes' alleged concession that the witnesses were not present during the escort.

Mr. Reyes filed an Article 78 challenge to the hearing. In Matter of Reyes v. Annucci, 150 A.D.3d 1373 (3d Dep't 2017), the respondent conceded that the failure to produce the letter that the Superintendent relied upon in re-opening the investigation was relevant and should have been produced. The respondent argued that the witnesses had been properly denied.

With respect to the issue of the witnesses, the court found that the record was not clear that the witnesses had not been present during the escort. One of the escort officers could not recall whether any other officers accompanied the escort; the other escort officer was not asked. Confidential documents in the record, the court noted, disclosed that the officers in question reported to the medical clinic immediately after responding to the initial altercation and may have been in the hallway during the escort. Because the officers' testimony was potentially relevant to the petitioner's defense, the court concluded, the hearing officer erred in denying them as witnesses.

The court held that because there was a good faith basis for the hearing officer's failure to produce the document and to call the witnesses, the appropriate remedy for the regulatory violations was remittal for a new hearing rather than expungment.

The Albany Office of PLS represented Jacob Reyes in this Article 78 proceeding.

Failure to Photograph Contraband as Required by Directive Leads to Reversal

In Matter of Adams v. NYS DOCCS, 2017 WL 2492048 (4th Dep't June 9, 2017), the petitioner was found guilty of, among other charges, possession of contraband and smuggling. In his Article 78 proceeding, the petitioner argued that the findings of guilt with respect to those charges had to be annulled because the respondent had failed to preserve and photograph the contraband in accordance with DOCCS Directive 4910A. Citing Matter of Clark v. Fischer, 981 N.Y.S.2d 187 (3d Dep't 2014) and Matter of Roman v. Selsky, 705 N.Y.S.2d 88 (3d Dep't 2000), the court found that the respondent's failure to follow the DOCCS Directive governing the preservation and photographing of contraband must result in the annulment of the determinations of guilt that the

hearing officer made with respect to the smuggling and contraband charges.

James Adams represented himself in this Article 78 proceeding.

To Violate Rule 102.10, a Threat Need Not Relate to Future Violent Conduct

Rule 102.10 provides that "an inmate shall not, under any circumstances make any threat, spoken, in writing, or by gesture." In Matter of Sinclair v. Annucci, 54 N.Y.S.3d 604 (3d Dep't 2017), the petitioner was charged with violating the rule prohibiting threats. The misbehavior report alleged that the petitioner, a prisoner who was responsible for delivering items, grew impatient because while in a cell block, he was required to wait for an officer to open a gate so that he could leave. Told that he would need to wait, the petitioner allegedly replied that the next time that he was called upon to make a delivery to the cell block, he would delay the delivery. After he was found guilty and his administrative appeal resulted in a decision affirming the hearing officer's determination, the petitioner filed an Article 78 petition, arguing that in order to violate 102.10, a prisoner must threaten violence. The court disagreed, finding that the allegation that petitioner had made a threat to take detrimental action in retaliation for the failure to promptly release him from the cell block was sufficient to establish a violation of the rule prohibiting threats.

James G. Sinclair represented himself in this Article 78 proceeding.

Court of Claims

Claimant's Failure to Respond to Cross Motion Results in Dismissal

In Walker v. State of New York, 54 N.Y.S.3d 322 (3d Dep't 2017), the claimant was seeking damages for injuries suffered when another prisoner assaulted him due to the Department's negligent failure to protect. Claimant Walker moved for summary judgment on liability against the State of New York. The defendant opposed the motion and cross moved for summary judgment on the ground of immunity. The Court of Claims denied the plaintiff's motion but granted the defendant's.

The claimant appealed. The court held that the appeal had to be dismissed because the claimant had defaulted when he failed to oppose the defendant's cross motion. Citing Matter of Rottenberg v. Clarke, 144 A.D.3d 1627 (4th Dep't 2016), the court wrote, "It is well settled that no appeal lies from an order that is entered upon the default of the appealing party." Here, the court held, claimant failed to oppose defendant's cross motion for summary judgment seeking to dismiss his common law negligence cause of action.

Robert Walker represented himself in this Court of Claims action.

Miscellaneous

Mail from Court Clerk is Not Privileged

In Johnson v. McKay, 54 N.Y.S.3d 341 (3d Dep't 2017), a Section 1983 action brought in Franklin County Supreme Court, the plaintiff challenged the Department's regulation, 7 N.Y.C.R.R. 721.2(b)(5), which provides that mail from a county clerk is general incoming correspondence that, unlike privileged legal mail, may be opened and inspected for contraband outside of the prisoner's presence. The court, citing Johnson v. Goord, 445 F.3d 532, 534 (2d Cir. 2006), noted that prisoners have a right to the free flow of incoming and outgoing mail." That right however, may be regulated in ways "reasonably related to legitimate penological interests." Accordingly, the court found, prison officials are allowed to inspect most incoming mail for contraband outside the presence of the prisoner to whom it is addressed. Further, the court noted, citing Wolff v. McDonnell, 418 U.S. 539 (1974), by agreeing to a rule whereby a prisoner is present

when mail from attorneys is inspected, DOCCS has done all, and perhaps more, than the Constitution requires.

Here, the court found, mail from a county clerk does not raise the same concerns as mail from an attorney, even where the clerk is writing as a clerk of the court. This is because the letter does not come from someone who can provide legal advice about a prisoner's rights and involves matters of public record. And, because the plaintiff made no effort to argue that the facts in his situation were different in a legally significant way, such that application of the regulation to him deprived him of a constitutional right, the court found that he had not demonstrated a likelihood of success on the merits.

The court used the standard, "likelihood of success on the merits" because the plaintiff had made a motion for a preliminary injunction. To win a motion for a **preliminary injunction** (a court order that will be in effect while the case is pending), the moving party must show:

1. A likelihood of success on the merits;

2. That without an injunction, the party will suffer irreparable harm; and

3. The equities tip in the moving party's favor.

In addition to finding that the plaintiff had not proven that there was not a likelihood of success on the merits, the court also found that the plaintiff failed to state how he would be irreparably harmed in the absence of injunctive relief or that the equities balanced in his favor. Thus, the court held, the lower court had not abused its discretion in denying plaintiff's motion for injunctive relief.

Johnathan Johnson represented himself in this Section 1983 action.

Denial of Visitation with Incarcerated Father Upheld by Appeals Court

The Facts

An incarcerated father identified only as EA commenced an action in the Family Court of Bronx County seeking visitation with his 7 year old son who has been diagnosed with autism. Associated with his diagnosis, the child has difficulty with strangers, long car rides and loud noises.

The child was born in 2008. EA lived with the child's mother, RA, for a few months after the child's birth. After they stopped living together, EA had visitation once a week beginning when the child was three months old. This arrangement lasted for about a year, until EA was arrested for the offense that led to the sentence he is now serving. EA is incarcerated for the murder of a three year old child.

The circumstances of the murder, as the court found relevant to the visitation petition, are that EA repeatedly struck and ultimately killed his then girlfriend's three year old daughter in front of her younger brother because she was not listening to EA or eating her food. He failed to seek medical attention for her.

Although he speaks to the victim's mother every day, and the victim's mother has visited with him several dozen times, EA has not seen his son since he was two; he is now seven years old. EA is on the waiting list to take parenting skills and anger management classes. EA did not attempt to contact his child prior to filing the visitation petition. He only learned of the child's condition after he filed the petition.

EA argues that visitation would be in the child's best interests because it would allow the child to know and understand petitioner. His mother and two brothers, who visit monthly, could bring his son to prison.

EA's mother has not seen or had any contact with the child in the last two years and was unaware of his sensitivity to strangers, long car rides and loud noises. She admitted to being a stranger to him.

RA testified that the child has sudden outbursts of yelling, frequently trips, is sensitive to loud noises and is unable to sit still. She opposes visitation because the child cannot talk to strangers, and will yell at times for 10 minutes at a time. Given instructions, he will say, "No," and refuse to comply. He often has difficulty communicating and requires frequent supervision. Although toilet trained, he still has accidents.

RA and the Attorney for the Child, AFC, argued that visitation is not in the child's best interests. His sensitivity to unfamiliar places and people, difficulty with loud noises and long trips, physical limitations, and other symptoms would complicate visitation. They also argue that even if the symptoms could be managed, the prison itself is unsuitable to the child's special needs. Finally, they note that EA has done nothing to warrant visitation; he has had no relationship with the child for 5 years, and his crime is indicative of someone who does not have the ability to meet the child's needs.

The Court's Analysis & Decision

The court noted that it must make every effort to determine what is in the best interest of the child and what will promote the child's welfare and happiness. It also noted that there is a rebuttable presumption in favor of visitation even when the parent seeking visitation is incarcerated. "Denying visitation to a biological parent is a drastic remedy," the court wrote, "and should only be done where there are compelling reasons and substantial evidence that such visitation is detrimental to the child welfare." Incarceration alone does not make visitation inappropriate. A demonstration that such visitation would be harmful to the child, or otherwise not in the child's best interest, will justify denying such a request.

Here, the court found, the presumption in favor of visitation "is readily rebutted by the [evidence in] the record." EA does not have a elationship with his son and had made no effort to develop a relationship. Neither EA nor the family members who would assist with visitation know the child well and are not trained to deal with potential outbursts. EA is not familiar with visiting conditions for children and did not know whether the child would be subject to a strip search. Moreover, the court found, "the brutal facts underlying petitioner's conviction take on added significance because of the child's special needs"; he was convicted of murdering a child because the child refused to follow his instruction. The child's documented instances of uncooperative behavior, particularly in response to strangers, also counsel against allowing EA to visit with the child.

Accordingly, the court denied EA's petition for visitation with leave to file a renewed petition based upon a showing of changed circumstances. The court allowed EA to immediately contact the child through letters, cards, and other writings in monthly correspondence.

DONORS

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