Pro Se

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Court Finds That Parole Denial Was Irrational Bordering On Impropriety

In 1991, Laurie Kellogg learned that her husband had been molesting a 16 year old girl who lived with the couple and helped to care for the couple's children. Ms. Kellogg, who was 26, along with the babysitter, the babysitter's boyfriend and two other teens, planned to confront the husband at the couple's cottage. They took a loaded gun to the confrontation. While Ms. Kellogg waited in the car, the babysitter's boyfriend took the gun, entered the cottage and shot the husband. The group then disposed of the gun. The babysitter's boyfriend was found guilty of murder; Ms. Kellogg was found guilty of felony murder, manslaughter in the first degree and possession of a weapon. She was acquitted of intentional murder and multiple counts of conspiracy. The court sentenced Ms. Kellogg to 25 years to life.

Ms. Kellogg saw the Parole Board for the first time in 2016. While she was in prison, she had not received a single Tier II or III ticket. She worked as a teacher's aide, served as a chaplain's assistant, helped inmates with their GED studies and raised guide dog puppies. The COMPAS assessment placed her at the lowest risk to re-offend.

Denying at her parole interview that she had conspired to kill her husband or that she intended to kill him, Ms. Kellogg took responsibility for making choices and decisions that set in motion a chain of events that resulted in her husband's death. Toward the end of the interview, the board asked how she had changed, because the commissioners did not "see where she had admitted to being such a bad person." Ms. Kellogg replied that she did not

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CUOMO ADMINISTRATION PROPOSES NEW WORK RELEASE OPPORTUNITIES

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

At the time this article went to print, the State was in the midst of negotiating the final details of the State Budget for fiscal year 2018-2019. Included in these negotiations is Governor Cuomo's proposal to expand work release opportunities for a select number of incarcerated individuals who are "limited credit time allowance" (LCTA) eligible. Specifically, the Governor has proposed a pilot program to allow up to 50 LCTA eligible individuals into educational release and another 50 into conventional work release.

This is "big" news, despite the restricted eligibility pool, the relative small number of prospective participants and the nature of pilot programs, i.e., they are of limited duration. The reason it is momentous is that, if adopted, this measure would mark the first time since the mid-nineties, that a whole cohort of incarcerated individuals, otherwise barred by either statute or executive order, would be considered for temporary release.

Kudos to the Cuomo Administration and DOCCS for advancing this proposal (and here's hoping that the effort is successful and lays the groundwork for further reforms that increase the chances of successful reentry by formerly incarcerated individuals).

A review of the history of restricting access to work release would, I think, encourage bipartisan support for expansion of work release opportunities.

On January 24, 1995, less than a month after officially taking office, and in fulfillment of a campaign promise, then-Governor George Pataki signed an executive order severely restricting participation in work-release programs. The justification for this measure was that the restriction targeted individuals who had been convicted of violent felony offenses. Both corrections officers and prisoners' rights advocates widely criticized this measure; the former, because the measure exacerbated an already dangerous situation of severe prison overcrowding and forced an estimated 1,300 inmates to sleep in double bunks; the latter, for the same reason, but also because the measure summarily eliminated an entire class of people from work release consideration without regard to whether the individuals in the group had positive prison records and had engaged in rehabilitative efforts and self-improvement.

The argument was raised then, and is no less true today, that work release provides an invaluable opportunity for successful reintegration into the community upon an incarcerated individual's release and that the elimination of that program severely (and negatively) impacts not only the rehabilitation of the individuals who were no longer eligible for work release, but also the well-being of their families and the safety of the public, both behind and outside prison walls.

The executive order that was issued 23 years ago led to further restrictions on work release, as well as parole, which again failed to take into account the institutional records of the excluded inmates and their other efforts at rehabilitation.

It is against that backdrop that the current Administration's proposal must be assessed and applauded.

. . . Continued from Page 1

believe that she was a horribly bad person, but wished that she had not been impulsive, adding that she now understands that every decision a person makes, and everything a person says, carries weight and responsibility.

The Board denied parole because the commissioners believed that "there was a reasonable probability that if released, Ms. Kellogg would again violate the law." They also found that she had failed to take responsibility for her crimes and had insufficiently expressed remorse.

Ms. Kellogg filed an Article 78 challenge to the denial. The Supreme Court stated that subjective views of the petitioner's lack of remorse cannot be allowed to override objective evidence of 25 years of outstanding behavior, reversed the hearing and ordered the petitioner's release. The court rhetorically asked, "Does saying you are 'sorry' as a means to seek freedom from incarceration mean that you are any less likely to re-offend than if you do not?"

On appeal, in Matter of Kellogg v. NYS BOP, 2018 WL 1162504 (1st Dep't March 6, 2018), the Second Department found that that the board's decision **manifested** (showed) irrationality bordering on impropriety and agreed with the Supreme Court that the hearing should be reversed. In reaching this result, the court found that the Board of Parole "failed to appreciate that the petitioner's murder conviction was not for intentional murder but rather for second degree felony murder." What the petitioner had been convicted of was having committed a burglary during which someone else shot and killed the victim. "The felony murder rule," the court wrote, "imposes strict and vicarious liability for a killing that one did not intend, provided that it was the result of [the commission of one of a list of felonies that includes burglary] that one intended to commit. Intent to kill, the court noted, plays no role in a conviction of felony murder.

Nonetheless, the court went on, petitioner accepted responsibility for the role that she played in the chain of events that led to the murder of her husband. And, her testimony at the interview was truthful, accurate, and consistent with the conclusions of the jury that had convicted her.

The court disagreed with the Supreme Court's order to release the petitioner to parole supervision. The proper remedy, the court wrote, is a re-hearing.

Spektor and Tsirkin, P.C., represented Laurie Kellogg in this Article 78 proceeding.

News and Notes

NYS Legislature Amends Section of the Correction Law Governing Transfers

Subsection 1 of Correction Law §23, the provision of the Correction Law governing the transfer of inmates has been amended to add the following provision: "Within twenty-four hours of arriving at the facility to which an inmate is transferred, he or she shall be allowed to make at least one personal phone call, except when to do so would create an unacceptable risk to the safety and security of inmates or staff. If security precautions prevent the inmate from making such call, a staff member designated by the superintendent of the facility shall make a call to a person of the inmate's choice unless the inmate declines to have such a call made."

DOCCS Clarifies the Policy Controlling the Receipt of Books at Television Facilities

On February 15, 2018, James O'Gorman, Acting Commissioner for Correctional Facilities, issued a memo clarifying the issue of whether inmates at "television facilities," i.e., those correctional facilities at which inmates are

permitted to purchase a television set but are only permitted to receive two packages a year, are permitted in addition to receive an unlimited number of packages of books and magazines. According to the memo, the limit on food packages at TV facilities does not apply to books, magazines and periodicals. Packages containing printed material are not to be counted toward the two package limit outlined in Directive No. 4921.

PLS' FAMILY MATTERS UNIT

In January 2017, PLS opened the 'Family Matters' Unit (FMU). A grant from Judiciary Civil Legal Services enabled PLS to open this unit. The FMU is staffed by PLS staff attorneys. The attorneys working in the FMU assist incarcerated parents who were convicted in the counties of *Albany, Bronx, Erie, Kings, Nassau, New York, Queens or Richmond* (or who have children living in those counties):

- To challenge prison disciplinary proceedings that result in interference with visitation or communication with their minor children;
- To prepare child visitation petitions;
- To prepare child support modification petitions; and
- To help incarcerated parents access family court records.

In the last year, we have helped a number of incarcerated parents with legal matters involving their children.

The FMU is a resource for incarcerated parents. The unit helps parents who were convicted in, or have children now living in, the eight identified counties to use the court system to help maintain family ties during their incarceration. For parents who are subject to child support orders, the FMU also helps to remove one of the major barriers to successful reintegration – the accumulation of insurmountable debt as a result of child support arrears.

You are eligible for services from PLS' Family Matters Unit if:

1. You are a prisoner whose county of conviction was *Albany, Bronx, Erie, Kings, Nassau, New York, Queens or Richmond;* **OR**

2. You have a visitation or support issue involving children who reside in *Albany, Bronx, Erie, Kings, Nassau, New York, Queens or Richmond;* **AND**

3. You have been subjected to a recent prison disciplinary proceeding that resulted in suspension or termination of visitation or communication with your minor children; **OR**

4. You are interested in seeking an order of visitation; **OR**

5. You are interested in seeking modification of an existing child support order; **OR**

6. You are having difficulty accessing family court records.

If you would like the assistance of the FMU and you meet the above eligibility requirements, please write to the FMU at this address:

Prisoners' Legal Services of New York
Family Matters Unit
41 State Street, Suite M112
Albany, NY 12207

PRO SE VICTORIES!

Matter of James F. Warren v. Superintendent, Clinton C.F., Index No. 2017-0242 (Sup. Ct. Clinton Co. Jan. 18, 2018). Based on the unusual facts in his case, James Warren was able to persuade the court that the proper remedy for the hearing officer's failure to electronically record the entire Tier III hearing at issue in this Article 78 proceeding was reversal and expungment rather than remittal for a rehearing. The court found while audibility issues or tape recorder malfunction may be unavoidable, where the petitioner alleged that the hearing officer did not even turn on the tape recorder, the respondent failed to rebut this assertion with an affidavit from the hearing officer, there had been a significant passage of time since the misbehavior was written and the petitioner had been transferred to a different prison, dismissal of the charges was the proper remedy.

Matter of Lamont Kinard v. NYS BOP, Index No. 2174/17 (Sup. Ct. Dutchess Co. Jan. 19, 2018). The court held that the Board of Parole erred as a matter of law when it relied on letters allegedly stating that there was community opposition to the petitioner's release to parole supervision. According to the court, Executive Law §259-i(2)(c)(A), which sets forth the factors that the Board is required to consider, does not include "the opinion of community members." Rather, the section of the law states the Board must consider any current or prior statement made to the Board by the crime victim or the victim's representative (where the victim has died or is mentally incapacitated). In this case, the Board did not include the letters of community opposition in its response but expressly stated that it had considered community opposition as a basis for denying parole. The court found this violated the principle that members of the Parole Board are not permitted to apply their own penal philosophy in making release decisions (here, that community opposition should be a factor in determining whether a person should be granted release). Based on this analysis, the court granted the petition and ordered the Board to conduct a new hearing within 60 days.

Mr. Kinard is serving a sentence of 14 to 40 years. He committed the crime for which he is incarcerated when he was 17 years old. He is now 43 and has been married for 14 years. This was his seventh or eighth appearance before the Board. In the February 2017 Board decision, the Board ruled that he should come before it again in 19 months. As a result of the court order, Mr. Kinard recently went before the Board and was given an open date in April 2018.

Matter of Javon Gonzalez v. Kirkpatrick, Index No. 2016-1075 (Sup. Ct. Clinton Co.). DOCCS chose to reverse and expunge the Tier II hearing challenged in this Article 78 proceeding rather than to argue that the hearing officer's determination of guilt was supported by substantial evidence and that the hearing officer had not violated Mr. Gonzalez's rights to due process of law.

Javon Gonzalez v. State of New York, Motion No. 91211 (Court of Claims Jan. 23, 2018). By means of a motion for leave to file a late claim, Javon Gonzalez persuaded the Court of Claims to allow him to file a claim even though Mr. Gonzalez had failed to successfully serve a notice of intent on the attorney general within the 90 day period provided for doing so. To win this motion, Mr. Gonzalez had to address the following issues:

1. Whether the delay was excusable;

2. Whether the state had notice of the facts that formed the basis for the claim;

3. Whether the state had the chance to investigate the facts underlying the claim;

4. Whether the claim appears to be meritorious; and

5. Whether the state was prejudiced by the movant's failure to timely file the notice of intent.

Here, the court found the delay was not excusable, the claim appeared meritorious – i.e., the movant showed that proposed claim was not patently groundless, frivolous or legally defective and there was reasonable cause to believe a valid cause of action existed – and the state had notice and opportunity to investigate and was not harmed by the failure to timely file the notice of intent.

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

Insufficient Connection Found Between Petitioner and Weapon Found in Cube

In an unusual finding, the Third Department, in Matter of Gerard Carter v. Annucci, 157 A.D.3d 1174 (3d Dep't 2018), found that a weapon recovered from a location in a cube to which three inmates had access was insufficient to support the determination that the petitioner possessed the weapon. Here, the petitioner shared a cube with at least 2 other inmates. The cube was divided in two by a moveable wall. Petitioner and one other inmate lived on one side of the wall; at least one other inmate lived on the other side of the wall. The weapon was found under the wall. The court held that because all the inmates in the cube had access to the weapon's location and the wall could easily be moved, and because no evidence eliminated the other inmates housed in the cube from being responsible for possessing it, a reasonable inference could not be drawn that the petitioner possessed the weapon. In reaching this result, the court cited Matter of Dushock v. Prack, 949 N.Y.S.2d 802 (3d Dep't 2012) (finding insufficient evidence supported the determination that petitioner possessed the weapon where 5 other inmates had access to the location from which the knife was recovered) and Matter of Derti v. Annucci, 41 N.Y.S.3d 801 (3d Dep't 2016) (finding that insufficient evidence supported the determination that petitioner possessed a cell phone hidden in the steel channel stock next to his cell gate where the phone was difficult to access and to see and where the prior occupant of the cell had been disciplined for possessing a cell phone and had access to petitioner's cell after he [the prior occupant] was moved to the neighboring cell).

The court therefore ordered the determination annulled and directed the respondent to expunge all references to the matter from petitioner's institutional records.

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Gerard Carter represented himself in this Article 78 proceeding.

Witness Flip Flop on Willingness to Testify Requires that HO Investigate Even Where the Witness has been Transferred

After pleading guilty to fighting and violent conduct, Gregory Radcliffe pleaded not guilty to assault and possessing a weapon. Before his hearing began, he told his employee assistant that he wanted to call as a witness the inmate with whom he had been fighting. The inmate agreed to testify. However, at the hearing, the hearing officer reported that the witness had been transferred to another prison and was no longer willing to testify. According to an Officer who had tried to escort the witness to give testimony over the phone, the witness had refused, saying that he did not want anything to do with it. After he was found guilty

and the determination of guilt affirmed on appeal, Mr. Radcliffe filed an Article 78 challenge to the hearing, alleging that the hearing officer had violated his right to call witnesses. The Supreme Court dismissed the petition.

On appeal, the Third Department, in Matter of Radcliffe v. Annucci, 157 A.D.3d 1177 (3d Dep't 2018), reversed the determination of guilt with respect to the charges of assault and possession of a weapon and remitted those charges for a new hearing. In reaching this result, the court found that even though the inmate witness had been transferred, the hearing officer had an obligation to conduct "a personal inquiry unless a genuine reason for the refusal is apparent from the record and the hearing officer makes a sufficient inquiry into the facts surrounding the refusal to ascertain its authenticity." The court acknowledged that where the inmate witness has been transferred, "the inquiry may be limited." Here, the court found, the record does not show that the hearing officer attempted to personally interview the witness to confirm the reason for the refusal; obtain a written refusal form from the witness setting forth the reason for refusing; or call as a witness the officer to whom the witness gave the refusal to discuss the circumstances. This, the court concluded, violated the petitioner's regulatory right to call witnesses mandating remittal for a rehearing on the charges of assault and possessing a weapon.

Gregory Radcliffe represented himself in this Article 78 proceeding.

In Spite of Conflicting Testimony of Two DOCCS Employees, Court Finds Sufficient Evidence of Guilt

In Matter of Stokes v. Annucci, 67 N.Y.S.2d 729 (3d Dep't 2018), the Court was confronted with the issue of having to decide whether to credit the testimony of a correction officer or that of a civilian employee. The officer testified that he had observed the petitioner exchanging closed fist punches with another inmate. The civilian testified that the other inmate had assaulted the petitioner and that he had not seen petitioner strike the other inmate. The hearing officer credited the testimony of the officer and found the petitioner guilty of engaging in violent conduct, creating a disturbance, fighting in addition to refusing a direct order and interference.

The court, reviewing this issue, was not concerned that there was a wide discrepancy between the observations of two DOCCS employees. Rather, without discussing the conflict, the court concluded that the determination of guilt was supported by substantial evidence.

James E. Stokes represented himself in this Article 78 proceeding.

Court Finds DNA or Fingerprint Analysis Would Not Defeat Evidence Against Inmate

After Timothy Wood was charged with possessing a weapon that was found in his locker, he denied that he had put the weapon there and asked the hearing officer to order DNA or fingerprint analysis of the weapon. The hearing officer refused and found Mr. Wood guilty of the charges.

On appeal, in Matter of Wood v. Annucci, 158 A.D.3d 856 (3d Dep't 2018), the Appellate Division rejected the petitioner's argument that when the hearing officer refused the request for DNA or fingerprint analysis, he violated the petitioner's right to due process of law. In the court's view, the mere presence of another inmate's DNA or fingerprints on the weapon – and presumably the absence of DNA or fingerprint evidence connecting the petitioner to the weapon – would not defeat the inference of possession that arises by virtue of the petitioner's control over the locker. In support of the inference of possession that arises when someone has control over the area where contraband is found, the court cited to Matter of Vaughn v. Selsky, 714 N.Y.S.2d 386 (3d Dep't 2000).

Timothy Wood represented himself in this Article 78 proceeding.

Parole

Board of Parole's Denial of Release Was Irrational, Bordering on Impropriety

In Matter of Coleman v. NYS DOCCS, 157 A.D.3d 672 (2d Dep't 2018), the Second Department – which reversed the denial of parole release given to Laurie Kellogg, a decision which is reported on page 1 of this issue of Pro Se – reviewed the Supreme Court's decision to dismiss David Coleman's Article 78 challenge to a denial of release to parole supervision. In this case, Mr. Coleman was convicted of intentionally killing a young teenage girl when he was 17. He was sentenced to 25 years to life. By the time of this parole denial, he had served 37 years in prison.

While in prison, Mr. Coleman earned three college degrees, protected a civilian employee from assault by another inmate and attempted to save the life of an inmate. His COMPAS assessment was low for all risk factors. Nonetheless, the Parole Board denied him parole release, finding that if released, he would not remain at liberty without violating the law and that his release was would be incompatible with the welfare of society and would so deprecate the seriousness of his crime as to undermine respect for the law. The Board concluded that petitioner had "distanced himself from his crime."

The Appellate Court disagreed with the Board's conclusions, finding that the petitioner had taken full responsibility for his actions and was remorseful. The court concluded that the record demonstrated that the Board's determination to deny petitioner parole release evinced irrationality bordering on impropriety. The court ordered that the matter be remitted for further proceedings.

David Lenefsky represented David Coleman in this Article 78 proceeding.

Miscellaneous

Parolee Facing Revocation Wins Bail Through Habeas Action

In People ex rel. Dolan v. Schiff, Sheriff of Sullivan Co. and Annucci, Acting Commissioner, NYS DOCCS, 2018 WL 1077130 (Co. Ct. Sullivan Co. Feb. 26, 2018), the petitioner, a parolee, was subject to a parole revocation proceeding based on his possession of a cell phone. Petitioner's position was that he was permitted to possess a cell phone. After the preliminary violation hearing, alleging that there was no probable cause to detain him, Petitioner brought a habeas corpus proceeding pursuant to Article 70 asking that the court either release him from jail or set bail pending resolution of the habeas proceeding. At oral argument, petitioner argued that in the absence of probable cause to believe that he had wrongfully possessed a cell phone, detention pending a final hearing is unlawful.

The respondents' attorney argued that the petitioner was not constitutionally entitled to bail, that the Criminal Procedure Law did not apply to parole revocation hearings, and that habeas proceedings are civil in nature and thus bail is inapplicable.

The court agreed with the petitioner and found that there is a bail provision that applies to habeas cases. CPLR §7009(e) states that, "pending final disposition of a [writ of habeas corpus], the court may place the person detained in custody or parole him or admit him to bail as justice requires. Based on this statute, the court wrote, the court has authority to grant or deny an application for bail.

The court ruled that where petitioner had demonstrated that he been a model prisoner and had completed sex offender treatment and courses and where the respondents had failed to show that the penological interests of the State of NY or public safety would be jeopardized by petitioner's release

on bail, the court would set bail. The court then ordered bail set in the amount of $5,000.

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Alan Lewis of Carter, Ledyard and Milburn, LLP, represented Rory Dolan in this habeas proceeding.

Challenge to 30 Minute Limit on Attorney Phone Call Fails

In Matter of Johnson v. Annucci, 67 N.Y.S.3d 505 (3d Dep't 2018), the petitioner challenged the 30 minute limit on his phone calls. The respondents moved to dismiss, asserting that the petitioner had failed to exhaust his administrative remedies.

Exhaustion of Administrative Remedies

Prior to bringing an Article 78 proceeding, a prospective petitioner must request the relief he wants from the state agency which has the authority or responsibility to provide it to him. In addition, if the agency has provisions for reviewing an initial denial of the request, before filing an Article 78, the prospective petitioner must seek review of any decision with respect to which the agency has a review process. The purpose of the exhaustion requirement is to give the agency the opportunity to correct its own errors.

DOCCS has different remedies for various types of requests and proceedings. All of these procedures are written. The two most common are found in the Inmate Grievance Program (IGP) Directive and the regulations governing the conduct of Tier III hearings. The IGP is a program through which inmates can seek to resolve many of the issues that they have. The IGP is a three step process:

1. File a grievance with the Inmate Grievance Review Committee;

2. If the grievance is denied, submit an appeal to the Superintendent;

3. If the Superintendent denies the grievance, submit an appeal to the Central Office Review Committee (CORC).

Prior to filing an Article 78 challenge to a determination of guilt made at a Tier III hearing, an inmate must file an appeal with the Director of the Office of Special Housing.

In addition to these two well-known procedures for exhausting administrative remedies, there are procedures for exhausting administrative remedies that are in the Directives that provide a benefit to inmates. In this case, for example, Directive 4423 provides a procedure for requesting approval for attorney phone calls that exceed 30 minutes.

The petitioner in this case filed his Article 78 proceeding before he requested that DOCCS allow him to have an attorney phone call that was longer than 30 minutes. For this reason, the court granted the respondents' motion to dismiss for failure to exhaust administrative remedies.

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Johnathan Johnson represented himself in this Article 78 proceeding.

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FEDERAL COURT DECISIONS

Preliminary Injunction Allows Plaintiff to Pray in the Yard at Cayuga C.F.

In March, 2016, the federal district court for the Northern District of New York issued an order requiring DOCCS to allow Aurel Smith, a Muslim, to pray in the yard at any DOCCS facility. See, Stipulation and Order of Discontinuance, Aurel Smith v. Dale Artus, No. 07-CV-1150 (N.D.N.Y. Mar. 24, 2016), ECF No. 188, paragraph 10, setting forth the terms and conditions under which Aurel Smith is permitted to engage in demonstrative prayer. Shortly thereafter, because he was not permitted to pray in the yard, Bornallah Wright, filed a grievance at Cayuga C.F. where DOCCS was then permitting Mr. Smith to pray in the yard. The grievance was denied through the Central Office Review Committee (CORC) on the basis that Mr. Smith is the only inmate who will be allowed to pray in the yard. CORC noted that a recent settlement agreement permits only one specific inmate to pray in a designated area of the yard during recreation and that other inmates are not allowed to pray there."

Bornallah Wright then filed a §1983 action and requested a preliminary injunction allowing him to pray in the yard while the lawsuit was pending. Prison officials then allowed him to pray in the yard and moved to dismiss Mr. Wright's lawsuit.

In Bornallah Wright v. David Stallone, 2018 WL 671256 (N.D.N.Y. Jan. 31, 2018), the court discussed and ruled on the various legal issues raised by the parties in support of and opposition to the motion for a preliminary injunction. (This article does not discuss the court's assessment and rejection of much of the defendants' motion to dismiss which the court granted in part and denied in part).

First, the court found, to be entitled to a preliminary injunction, the plaintiff must be able to show a likelihood of success on the merits, irreparable harm if the injunction is not granted and that the balance of equities tips in the plaintiff's favor.

Likelihood of Success on the Merits

The court rejected the defendants' claim that the motion for a preliminary injunction was moot because the defendants are permitting Mr. Wright to pray in the yard. With respect to this claim, the court held that there is no indication that absent his litigation, the defendants would have altered their previous position or that the plaintiff will not be denied the opportunity to pray in the yard in the future. Second, the court found that "it is also improbable that the State defendants would present an argument that plaintiff's ability to pray demonstrably threatens a legitimate penological interest since Muslim inmates at Cayuga are now permitted to pray in the yard.

Irreparable Harm

The court found that it is well established that the loss of first Amendment freedoms, for even minimal periods of time, constitutes irreparable injury. Thus, the court held, irreparable harm may be presumed to exist.

Balance of Equities

Here, the court found that the hardship suffered by the plaintiff was potentially substantial, while that of the defendants is minimal, because inmates are now permitted to pray in the yard at Cayuga C.F. In addition, defendants had not argued that allowing prayer in the yard while the action is pending would impose a hardship on them.

Public Interest

The court found that securing First Amendment rights is in the public's interest and that it is decidedly against the public's interest to permit the enforcement of an unconstitutional policy of law.

As Mr. Wright had established each of the factors necessary for a court to grant a preliminary injunction, the court issued an order requiring the

defendants to permit Mr. Wright to engage in prayer in the yard at Cayuga C.F.

Congregate Prayer in the Yard

The court refused to extend the injunction to cover all Muslim inmates at Cayuga as Mr. Wright did not have the authority to represent any interests other than his own. The court also refused to order the defendants to allow congregate prayer in the yard (as opposed to individuals praying in separate designated areas of the yard) because it could not find that the plaintiff is likely to prevail on the merits of this claim.

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Bornallah Wright represented himself in this §1983 action.

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

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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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