Pro Se

Vol. 28 No. 4 August 2018 **Published by Prisoners' Legal Services of New York**

SECOND CIRCUIT REINSTATES RLUIPA CLAIM

In 2011, Deandre Williams filed a claim asserting that DOCCS had violated his rights under the Religious Land Use and Institutionalized Persons Act (RLUIPA) by refusing to accommodate his religious dietary restrictions. According to the findings of the court, see *Williams v. Annucci*, 2018 WL 3352755 (2d Cir. July 10, 2018), for reasons related to religious convictions, Mr. Williams, who is an adherent of the Nazarite Jewish Faith, must eat a kosher vegetarian diet that is grape and egg free. In addition, Mr. Williams has a medical condition that precludes consuming dairy products. The defendants agreed that Mr. Williams' religious beliefs were sincerely held and that DOCCS' policies substantially burdened his beliefs. However, the defendants argued, and the lower court found, DOCCS' refusal to modify the menu for Mr. Williams furthered a compelling state interest in minimizing costs and administrative burdens and was the least restrictive way of furthering those interests. Based on these conclusions, the district court granted the defendants' motion for summary judgment.

The Defendants' Refusal to Accommodate the Plaintiff's Dietary Restrictions

When DOCCS first objected to accommodating Mr. Williams' religious dietary restrictions, the Department's method of preparing inmate meals consisted of processing food at a central location and shipping the food to each prison where the meals were prepared and served. Under this system, DOCCS prepared two types of meals: the general confinement menu (GCM) and the cold alternative diet (CAD). The GCM was not kosher and included grapes, meat and dairy. The CAD was kosher and included meat, dairy and grape products. In support of the Department's motion for summary judgement, the Director of Food and Nutritional Services submitted a declaration asserting that:

Continued on Page 5 …

Also Inside . . .

Page

Prison Reform: A Report From the National Front 2

Pro Se Victories! 7

Court Denies Petition to Compel Rescission of Parole Release Decision . . 9

Seeking Modification of a Child Support Order. 14

Subscribe to Pro Se. See Page 23

This project was supported by a grant administered by the New York State Division of Criminal Justice Services. Points of view in this document are those of the author and do not necessarily represent the official position or policies of the Division of Criminal Justice Services

PRISON REFORM: A REPORT FROM THE NATIONAL FRONT

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

Despite the partisan divide, there are glimmers of hope for prison reform from our federal government. How meaningful such reform might be, if consensus is reached at all, remains to be seen. But, for now, conversations about prison reform are continuing between elected officials who represent vastly disparate constituencies and political philosophies.

The spark that ignited these bipartisan efforts seems to have been related to the high cost of incarcerating large numbers of people for long periods of time and/or fairness; regardless of its source, hope springs eternal.

Case in point: a prison reform bill that recently passed the U.S. House of Representatives, co-sponsored by Reps. Hakeem Jeffries, D-N.Y. and Doug Collins, R-Ga. called the FIRST STEP Act, aims to better equip people incarcerated in federal prisons to support themselves and their families before they return to society. That legislation has a companion bill in the Senate (co-sponsored by Sens. John Cornyn, R-Texas and Sheldon Whitehouse, D-R.I).

Its fate is uncertain.

Pitched as a cost-saver for American taxpayers, it is also viewed by many as an important bipartisan effort that promises to improve overall public safety by increasing available activities within federal prisons that have been shown to most effectively reduce recidivism. These activities include faith-based mentorship, job training and work programs, education, victim impact classes, and family relationship-building.

The bill provides incentives for participants to engage in recidivism reduction programs. These incentives include increasing opportunities to talk to and visit with family members, mentors, and religious leaders; receiving as much as 15 days of earned time credit for every 30 days of successful participation in a program; allowing incarcerated individuals to spend a greater portion of their sentence in some form of community supervision or home confinement; and raising the possibility of transferring a federally incarcerated person to a correctional facility closer to his or her home (currently, on average, over 500 miles away).

The bill, however, is not without its critics. The criticism stems primarily from two issues: (1) how the legislation assesses each person's risk of reoffending during the prison intake process (a risk assessment tool that many deem "untested" and/or discriminatory) and (2) the absence from the legislation of front-end reform measures, such as sentencing reform.

Former Obama White House adviser, Van Jones, supports the First Step Act, calling it "A big win for men and women in federal prison." Joining Jones in urging passage of the First Step Act is Mary Jo White (the only woman to serve as U.S. Attorney for the Southern District of New York; then appointed by President Obama as chair of the Securities and Exchange Commission) and Michael Mukasey (Attorney General during the George W. Bush Administration), along with a group of 121 other former federal law enforcement officials.

On the flip side, the bill is opposed by the NAACP along with several prominent Congressional Black Caucus members such as Reps. John Lewis and Sheila Jackson Lee and Sens. Kamala Harris and Cory Booker.

The divergence of opinions regarding the legislation recently came to the fore during a House committee hearing on the bill.

At that hearing, Rep. Steve Cohen, D-Tenn., voted yes, "not wanting the perfect to be the enemy of the good," but Rep. Jamie Raskin, D-Md., voted no, wanting "the first step to be the best step that we can take."

Rep. Jeffries, the bill's co-sponsor, acknowledged support for other criminal justice initiatives — most notably, sentencing reform – among some Republicans and Democrats, but with respect to prison reform, he said, "we can begin to come together" and seize "a moment where we can take a first step toward meaningful change."

Jeffries argued that the bill would help prepare incarcerated people "to be job-ready upon release" and "significantly reduce the risk of recidivism in a way that will benefit them, their families, their communities and the American taxpayer." He noted how "transformative" the bill could be, not only for incarcerated people, but also for society at large.

Rep. John Rutherford, R- Fla., a former sheriff, said the FIRST STEP Act "is not about being soft on crime . . . (it) is actually about reducing crime."

The FIRST STEP Act is not the only topic generating healthy debate. Senate Judiciary Committee chairman Chuck Grassley (R-Iowa) has been spearheading an effort to pass a bipartisan sentencing reform bill. The bill would reduce some federal mandatory minimum sentencing guidelines (eliminating none and adding several new ones). It was recently voted out of committee on a bipartisan basis despite opposition from both the AG and the White House. Said Grassley, "This would be a bipartisan policy win for the Administration, and it seems like a no-brainer to me that we should get this done and the president would be backing it."

These bipartisan conversations about prison reform actually have an historical genesis.

For example, in 2004, President George W. Bush said that "America is the land of [the] second chance, and when the gates of the prison open, the path ahead should lead to a better life." In 2008, he signed the Second Chance Act into law, thereby authorizing re-entry programs, which have since enjoyed continued bipartisan support.

The current President, in his 2018 State of the Union Address, echoed those sentiments when he said: "That is why this year we will embark on reforming our prisons to help former inmates who have served their time get a second chance."

The recent efforts on prison reform continue in the "real world" as well. In fact, many would argue that these "outside voices" greatly influence the "inside game".

For example, Mark Holden, the general counsel for Koch Industries and a prominent conservative advocate for criminal justice reform, recently said. "Prisons should focus on rehabilitation, reformation and redemption. Reducing crime starts with lowering recidivism and the best way to do that is to make sure that incarcerated individuals – over 95 percent of whom will one day be released – leave prison better than when they arrived."

Holden's opinion was mirrored by the current Vice President who recently said:

"Every year, while 650,000 people leave America's prisons, within three years two-thirds of them are arrested again. More than half will be convicted; 40 percent will find themselves back where they started, behind bars. It's a cycle of criminality. It's a cycle of failure."

Mr. Holden is also the chair of the advisory council for Safe Streets & Second Chances, a $4 million initiative sponsored by Koch Industries and the Texas Public Policy Foundation. The initiative works with 1,000 participants in four states – Florida, Louisiana, Texas, and Pennsylvania – to enhance job opportunities for incarcerated people to help them successfully reintegrate back into their communities of origin.

The key lesson, I think, from all this activity is that an increasing number of our elected and civic leaders, for a variety of reasons, are engaging in important conversations in a civil, thoughtful and respectful manner about difficult topics that can truly improve the lives of all concerned – both inside and outside of prison bars.

That such conversations are occurring at all is surprising, given the tenor of the times, and demonstrates what can and should be done, despite the political climate.

On the New York State front, we need similar conversations on a host of issues.

In that vein, PLS, at our upcoming Pro Bono Event on October 19th, will be highlighting the importance of education as a recidivism reducing tool. The reasons are simple. According to a recent RAND study, which aggregated 37 years of research on correctional education programs (1980-2017), those individuals who participated in such programs were 28% less likely to recidivate when compared with those individuals who did not participate. RAND's conclusion: "Our meta-analysis demonstrates the value in providing inmates with educational opportunities while they serve their sentences if the goal of the program is to reduce recidivism."

The policies of New York State reflect an understanding of this connection. In New York state prisons, some of the country's most elite universities offer associate, Bachelor's and master's degrees. Dozens of colleges and universities – including Columbia, Bard, Cornell and Vassar – provide education behind the walls of the prisons to hundreds of incarcerated individuals each year. In 2016, Governor Cuomo blazed a path to expand such education programs in New York State by partnering with Manhattan District Attorney Cyrus Vance. The DA's office agreed to divert $7.5 million in criminal forfeiture money to add at least 800 more students to the college education rolls.

The bottom line here is that there is a science and a psychology to what works to improve prison conditions and reduce recidivism. That said, creating a sustainable appetite for real, meaningful change requires a respectful bipartisan conversation, patience and a willingness to continue the dialogue through challenging times – for the benefit of all.

As Rep. Collins recently said, "Yes, we can argue about how far we want to go" on criminal justice reform, but prison reform can be "the first step" to help strengthen communities and reduce crime.

Let the conversations continue.

. . .Continued from Page 1

- The kosher food program available at Green Haven C.F. is extremely expensive and administratively burdensome and therefore cannot be provided statewide;

- A statewide kosher food program would entail buying new equipment and hiring more staff;

- To provide inmates with a vegetarian kosher meal program would require extra time and energy to figure out how to provide adequate nutrition in a menu without meat.

Thus, the declarant concluded, due to fiscal and practical considerations, the Department has determined that a kosher vegetarian menu could not be provided since doing so is not financially or administratively feasible.

DOCCS accommodates prisoners whose medical issues preclude eating certain food. With respect to religious dietary restrictions, DOCCS advises prisoners to refrain from eating those items that their religions prohibit. Thus, DOCCS accommodated Mr. Williams' medical need for dairy free meals, but often did so in a manner that violated his religious dietary restrictions. For example, DOCCS would substitute grape jelly for cream cheese or cheese for meat. As a result, Mr. Williams could not eat much of the food that DOCCS provided him.

Mr. Williams proposed three alternatives that would satisfy his religious needs:

1. Provide him with a kosher vegetarian meal;

2. Provide him with a modified version of the CAD meals, replacing the items he cannot eat with high protein foods; and

3. Refrain from putting items he cannot eat on his trays.

DOCCS rejected these proposals.

The day before the appeal was argued, DOCCS informed the court that it had modified the kosher meal program at the prison where Mr. Williams resided to be largely vegetarian, serving meat only twice a week and eggs once a week. The Department subsequently transferred Mr. Williams to a prison that did not serve a kosher diet.

RLUIPA

Pursuant to RLUIPA: "No government shall impose a substantial burden on the religious exercise of [an incarcerated individual] unless the government demonstrates that imposition of the burden on that person 1) is in furtherance of a compelling governmental interest; and 2) is the least restrictive means of furthering that compelling governmental interest." 42 USC §2000cc-1(a). Where a plaintiff shows that the state has imposed a substantial burden on the exercise of his/her religion, the burden shifts to the state to demonstrate that the challenged policy furthers a compelling governmental interest and is the least restrictive means of furthering that interest.

In *Williams*, the defendants conceded, and the district court agreed, that the plaintiff had shown that his religious exercise was substantially burdened by the Department's policy. Thus, on appeal, the primary issue before the Second Circuit was whether the defendants had met their burden of showing that their policy furthered a compelling governmental interest and was the least restrictive means of furthering that interest.

Compelling Governmental Interest and Least Restrictive Alternative

Between when the magistrate judge in *Williams* recommended granting the defendants' motion for summary judgment and when the district court judge adopted the magistrate's report and recommendation, the U.S. Supreme Court issued its decision in *Holt v. Hobbs*, 135 Sup. Ct. 853 (2015), finding that the defendants had not shown that the need for safety and security justified a department of corrections policy prohibiting an inmate from growing a ½ inch beard (1/4 inch beards were permitted). The *Holt* defendants argued that their compelling interest in 1) stopping the flow of

contraband and 2) facilitating prisoner identification justified the policy.

In rejecting the defendants' support for this policy, the *Holt* decision emphasized that courts need not accept the argument that a department of corrections' interest is compelling but rather can probe and explore the factual bases for such claims. In *Holt*, the Court found that the district court erred in thinking that it was required to defer to the government's assertion that inmates could hide contraband in a ½ inch beard, a claim that the magistrate judge had written was "almost preposterous." Further, the Court noted, evidence of a policy's underinclusiveness relative to "analogous nonreligious conduct" may cast doubt on both whether the policy is compelling and whether the policy is the least restrictive means of furthering that interest. The *Holt* court pointed out that the defendants permitted prisoners to have hair (as opposed to requiring them to shave their heads) and to wear clothes and shoes, all of which aid in the concealment of contraband and impair identification in the same manner that a ½ inch beard does. These concessions were evidence of the policy's underinclusiveness, and undermined the government's assertion that its interest in restricting beard length was compelling and the least restrictive means of furthering that interest.

Application of *Holt* to *Williams*

Compelling Governmental Interest

The defendants in *Williams* defended their policy by arguing that they had a compelling interest in controlling costs and avoiding administrative burdens. With respect to this argument, the Second Circuit first noted that because RLUIPA expressly states that complying with its terms may require a department of corrections to incur expenses to avoid imposing a substantial burden on religious exercise, an interest in reducing costs is less compelling in the RLUIPA context than it is otherwise.

Second, the Court noted that the compelling interests on which the defendants based their argument must be particularized. Here, the Court pointed out, the declaration from the Director of Food and Nutritional Services was insufficiently detailed with respect to the significance of the burden in meeting Mr. Williams' religious needs. The Director's declaration set forth his claims in a conclusory manner; it did not state the cost of changes that he claimed would be too expensive or the amount of that cost relative to the overall cost of feeding inmates. Nor did the Director estimate the costs of Mr. Williams' proposed alternatives, i.e., not placing the prohibited food on his tray or giving him more of the items that he is permitted to eat. Thus, the Court found, the defendants' evidence of what seems to be marginal, as opposed to compelling, interest in cost efficiency fell short of evidence necessary to meet their burden of justification.

The Court also found that the Department's policy is underinclusive relative to accommodations that the Department makes for medical dietary restrictions that are comparable to the accommodations that Mr. Williams requested for religious reasons. The unexplained disparate treatment of analogous non-religious conduct caused the Court to question whether DOCCS' interest in cost efficiency was as compelling as DOCCS argued, given that it produced no evidence of increased costs associated with providing medical accommodations of a similar nature.

Finally, the Court noted, the fact that DOCCS operates a kosher meal facility at Green Haven, in spite of the alleged expense and burden of doing so, and is now providing prepackaged kosher meals cast considerable doubt on the Department's claim that providing vegetarian kosher meals to Mr. Williams would be too expensive and administratively burdensome. As the Court (perhaps wryly) observed, "[I]t appears that the systems are now in place that [the Director of Food and Nutritional Services] anticipated would be too costly to build, namely systems for preparing food off-site, individually sealing it, and reheating it on site." Thus, the Court concluded, "Taking the DOC at its word under such circumstances would involve 'a degree of deference that is tantamount to unquestioning acceptance.' "

Based on these conclusions, the Court found that the Department of Corrections had failed to meet its burden of showing with particularity that it had a compelling interest in not accommodating Mr. Williams.

Least Restrictive Alternative

The Court also found that the defendants failed to show that Mr. Williams' proposed alternatives were not viable. Mr. Williams identified three ways in which DOCCS could accommodate his religious dietary restrictions:

1. Provide him with a kosher vegetarian meal;

2. Provide him with a modified version of the CAD meals, replacing the items he cannot eat with high protein foods; and

3. Refrain from putting items he cannot eat on his trays.

The Court found that the defendants had failed to discuss, "much less demonstrate," why they could not give Mr. Williams more of the acceptable food that the Department already prepares or stop serving him food he cannot eat. At this point, the Court noted, it seems that Mr. Williams's request that he be served a full kosher vegetarian meal would be at most minimally burdensome, due to the Department's decision to make kosher compliant substitutions.

Based on the Court's determination that DOCCS had not met its burden under RLUIPA, the Court concluded that the district court had erred when it granted summary judgment to the defendants. Nonetheless, because it was still possible for the Department to show a compelling interest, and that its means are the least restrictive, the Court remanded the case for further fact finding.

Rajeev Muttreja, Jones Day, New York, NY represented Deandre Williams in the appeal to the Second Circuit.

PRO SE VICTORIES!

***Matter of Randolph Robinson v. The NYS BOP*, Index No. 18-0349 (Sup. Ct. Ulster County April 27, 2018). The Supreme Court of Ulster County found that because the denial of parole was based on an error of fact, the hearing that resulted in the denial of release must be annulled and ordered the matter remitted for a new hearing.** In August 2017, a month before completion of the SHOCK incarceration program, and pursuant to the normal time of SHOCK release consideration, the Board of Parole (BOP) conducted a parole release hearing for Randolph Robinson. According to the court, Mr. Robinson had a good disciplinary record and an Earned Eligibility Certificate. Nonetheless, the BOP denied release, based in part on its finding that Mr. Robinson's COMPAS assessment indicated a "high risk for felony violence." In fact, Mr. Robinson's COMPAS risk assessment stated that he presented a low risk of felony violence and he had no convictions for violent offenses. Finding that where a parole board denial is based on information that is erroneous, the determination must be annulled and remitted for a new hearing, the court granted Mr. Robinson's petition and remitted the matter for a new hearing within 45 days. On June 21, Mr. Robinson was released to parole supervision.

***Matter of Pedro Busted v. Commissioner of DOCCS*, Index No. 5207-17 (Sup. Ct. Albany Co. Mar. 27, 2018). Court reverses FOIL denial because the factual basis for Respondent's refusal to produce the requested document was not sufficiently detailed.** Pedro Busted made a Freedom of Information Law (FOIL) request for Directive #4931, Aggravated Harassment of an Employee by an Inmate. DOCCS refused to produce the Directive, asserting it was exempt from disclosure pursuant to Public Officer's Law §82(2)(f). In response to the Article 78 challenge to this denial, the Respondent failed to address how disclosure of the directive "could endanger the life or safety of any person" so as to justify exempting it from disclosure. Finding that the Respondent had not met its burden of establishing how the document was

exempt from FOIL, the court ordered the Respondent to produce the Directive.

***Maurice Cotton v. State of New York*, Claim No. 123717 (Court of Claims Mar. 14, 2018). After a trial on the issue of whether DOCCS employees were liable for losing Maurice Cotton's property, the court issued a judgment finding the employees were responsible and awarding Mr. Cotton the value of his lost property.**

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

Failure to Inquire into Witness's Reason for Refusing to Testify Leads to Reversal

After a search of Darnell Ballard's cube resulted in the recovery of a jar of urine, a container of bleach, 12 unidentified loose pills, five latex gloves and a box of service gloves, he was charged with possessing an altered item, smuggling, possessing contraband, possessing unauthorized medication, unhygienic act, unauthorized exchange, possessing property in an unauthorized area, and stealing or misusing state property. At the hearing related to the charges, Mr. Ballard was found guilty of the charges.

In his Article 78 challenge to the determination of guilt, Mr. Ballard argued that the hearing officer had violated his right to call witnesses when the hearing officer failed to inquire into the reason that Mr. Ballard's requested witness had refused to testify. In this case, the court in *Matter of Ballard v. Annucci*, 2018 WL 3058070 (3d Dep't June 21, 2018), wrote, Mr. Ballard had informed his employee assistant that he wanted to call a particular inmate as a witness. Informing the employee assistant or the hearing officer before the hearing begins is one of the ways an inmate may request a witness. The other way is informing the hearing officer during the hearing. See 7 NYCRR 254.59(c)(1), (2). The assistance form showed that the witness had refused to testify but there was no reason for the refusal on the form. There was nothing in the record of the hearing that set forth the reason for the witness's refusal. At the hearing, when the hearing officer advised Mr. Ballard that his requested witness had refused, Mr. Ballard responded, "Okay." No witness was called to testify that an inquiry was made of the requested witness to establish his refusal to testify and the reasons therefore. There was nothing in the record establishing what efforts, if any, the hearing officer made to determine a plausible explanation for the witness's refusal.

The court went on to state that Mr. Ballard did not request at the hearing that the inmate be called to testify or demand an inquiry into his refusal. However, the court notes, the hearing officer never advised Mr. Ballard of his constitutional and regulatory right to call witnesses. This is problematic, because "the constitutional right to call witnesses at a prison disciplinary proceeding is not waivable in the absence of [an inmate] being informed of its existence." For this reason, the court held, the determination of guilt must be annulled. And, the court further held, because Mr. Ballard's due process rights were violated and because this situation is comparable to the outright denial of the constitutional right to call witnesses, expungement is the proper remedy.

Darnell Ballard represented himself in this Article 78 proceeding.

Superintendent's Failure to Authorize Mail Watch in Writing Leads to Reversal

When a DOCCS employee in the prison mailroom noticed that an outgoing envelope from Ijal Sudler's cell block had the return address of an inmate who did not live on the cell block, with the Superintendent's verbal permission, she opened the envelope. In the enclosed letter were the names, social security numbers and dates of birth of two inmates with respect to whom the author of the letter urged the recipient to file false tax returns. Subsequently, the employee saw a second envelope with Ijal Sudler's name as the return address and she recognized the handwriting as being that which was on the first envelope. Mr. Sudler was then charged with and found guilty of solicitation, possessing contraband and stolen property and violating facility correspondence procedures. Mr. Sudler filed an Article 78 challenge to the determination.

In *Matter of Sudler v. Annucci*, 2018 WL 3057890 (3d Dep't June 21, 2018), Mr. Sudler argued that the Superintendent's failure to give written authorization to open the outgoing correspondence that led to the investigation violated the requirement set forth in DOCCS Directive 4422(III)(B)(9) for opening outgoing mail. The Directive provides that "outgoing correspondence . . . shall not be opened, inspected, or read without express written authorization from the facility superintendent," and that "such written authorization shall set forth the specific facts forming the basis for the action." Here, the court found, there was no evidence – documentary or testimonial – that the Superintendent had given written authorization, supported by facts, to open the first envelope. Under these circumstances, the court ruled, the determination of guilt must be annulled and all references to the charges expunged from the petitioner's institutional records.

Ijal Sudler represented himself in this Article 78 proceeding.

Parole

Court Denies Petition to Compel Rescission of Parole Release Decision

After spending 40 years in NYS prisons, Herman Bell was granted release to parole supervision. He was serving a sentence of 25 years to life. He had been denied parole 7 times before his application was granted. Between the date of the parole interview and Mr. Bell's release date, the widow of one of the victims of Mr. Bell's crime asked that the Board of Parole rescind its decision to release Mr. Bell, arguing that the decision should be rescinded because the Parole Board had failed to consider the sentencing minutes and her victim impact statement. The Parole Board held a second meeting at which the members took into account the sentencing minutes and reached the same decision that they had at the hearing.

When the Board of Parole did not agree to rescind Mr. Bell's parole release, the victim's widow filed an Article 78 action challenging that decision. In *Matter of Piagentini v. Board of Parole*, 2018 WL 2667093 (Sup. Ct. Albany Co. April 20, 2018), the petitioner asked for and received a temporary restraining order suspending Mr. Bell's release date while the action was pending. Within a week of issuing that order, the court dismissed the petition.

The court defined the issue before it as whether the widow of a slain police officer may properly challenge a decision of the Parole Board after it had considered her position as a victim representative and after the Parole Board has complied with the statutory factors governing its decision making function. Or, as the court put the question: Does this Petitioner have standing?

The Board of Parole argued that while the Criminal Procedure Law gives a crime victim or his/her representative the authority to be heard at sentencing and the Executive Law likewise provides the victim or his/her representative the authority to be heard with respect to a parole release decision,

neither confer standing to a victim who desires to challenge a subsequent sentencing or parole release decision. The court noted that there is no legislative history advanced to suggest a contrary conclusion.

Further, the Parole Board argued, it "had properly considered the factors set forth in Executive Law §250-i(2)(c)(A), including the victim impact statement," and its failure to consider the sentencing minutes prior to reaching its decision was harmless error as there is no recommendation regarding parole release in the minutes and the Board met a second time to address that issue, following which they again voted to release Mr. Bell.

To have standing to sue, an individual must be "aggrieved." There is a three part test to determine this issue:

1. Did the petitioner suffer injury in fact from the challenged act;

2. Is the petitioner arguably within the zone of interests protected by a constitutional, statutory or regulatory scheme at issue; and

3. Is there a clear legislative intent to preclude review.

The court concluded that the petitioner was not aggrieved and therefore did not have standing. Relying on the analysis in *Matter of Hancher v. Travis*, 1 Misc.3d 903(A), 2003 WL 22939482 (Sup. Ct. Westchester Co. Dec. 10, 2003), the court found that the Board's action does not have an effect on the petitioner that is different from the effect the action has on the public at large; that the statutory scheme does not authorize any participation beyond making a statement at the time of sentencing and of parole consideration; and that the alleged injury does not fall within the zone of interests promoted or protected by the statute under which the government has acted. For this reason, the court dismissed the petition.

Mr. Bell was released to parole supervision on April 27.

Joshua McMahon, Assistant Attorney General for the State of New York, represented the NYS Board of Parole in opposing this Article 78 proceeding.

Court of Claims

Court Reverses Dismissal, Finding Alleged Defect Was Not Trivial as a Matter of Law

In *Bennett v. State of New York*, 2018 WL 2752264 (4th Dep't June 8, 2018), the plaintiff alleged that he was entitled to damages as a result of injuries that he sustained when he fell due to a dangerous condition on a walkway. According to the plaintiff, as he was walking from his housing area to the commissary, there was a large puddle that he attempted to step over. However, when he put down his foot, the concrete shifted, causing him to lose his balance and fall.

Two officers gave depositions at which they testified that inmates had to stay on the walkway and were not permitted to step on the grass. One officer testified that he had had to step around the puddle in the past, but could not recall whether he avoided it by stepping on the grass.

The defendant moved for summary judgment, arguing that, as a matter of law, the alleged defect was trivial. The trial court found that the alleged defect was trivial and granted summary judgment to the defendant.

To win a motion for summary judgement based on the triviality of the defect, the defendant must persuade the court that the defect was, under the circumstances, physically insignificant and that the characteristics of the defect **or the surrounding circumstances** did not increase the risks it posed.

The court concluded that even if the defendant had met its burden of showing that the defect was trivial as a matter of law, the claimant had raised an issue of fact with respect to whether it was possible to navigate the defect without stepping on the grass, which the two officers had testified inmates were not allowed to do. This, the court concluded, created an issue of fact as to whether the walkway was difficult to traverse safely on foot.

Further, the court held, contrary to the lower court's conclusion, the defendant had failed to meets its burden of establishing that it lacked actual or constructive notice of the allegedly dangerous condition. In his deposition testimony, an officer who had been assigned to the prison for 27 years stated that he was familiar with the walkway and that the concrete was broken and uneven and that water collected on it after it rained, although he did not consider the condition to be dangerous. In addition, the claimant testified that the walkway was cracked prior to his arrival at the prison and flooded every time it rained.

Brian Dratch of Franzblau Dratch, P.C., represented Marlon Bennett in this Court of Claims action.

Miscellaneous

Over Objection from DOCCS, DAs and a Court, Court Grants Name Change

A prisoner identified as A.H.M. petitioned the Supreme Court of Clinton County to change her name to L.A.L. L.A.L. (we use the first initials of the name by which the petitioner asked to be known) is a transgender individual in DOCCS custody where she anticipates she will remain until at least 2026. The stated reason for the request is that L.A.L.'s male name causes her extreme embarrassment and subjects her to harassment and discrimination. L.A.L. has several criminal convictions in counties other than the county of her current conviction. The district attorneys in all of these counties of conviction were notified of the petitioner's request. The judges who presided over the sentencing procedures that are related to the petitioner's convictions were also notified.

A judge in Monroe County objected to the petition, noting that L.A.L. used deadly force in the act that led to her most recent conviction and showed no regard for society. This judge also stated that a name change may render collection of the $325.00 mandatory surcharge and crime victim assistance fee, already reduced to a judgment against A.H.M., more difficult. An attorney for DOCCS objected to the request, citing the brutality of the petitioner's prior assault and the existence of a protective order in the petitioner's birth name; a change in the petitioner's name, he suggested, could make more difficult efforts by the victims of the petitioner's past crimes who may wish to ascertain her whereabouts in the future.

In *Matter of A.H.M.*, Index No. Redacted (Supreme Court, Clinton Co. March 22, 2018), the court noted that a court's authority to deny a name change petition is quite limited and that there is a strong judicial preference for granting name change petitions. In support of this principle, the court cited Civil Rights Law §63 which provides: "If the court to which the petition is presented is satisfied . . . that the petition is true, and that 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. . . . "

Interestingly, while the Civil Rights Law, the Criminal Procedure Law and the Executive Law were amended in 2000 to require that notice of name change petitions filed by incarcerated persons or individuals with criminal convictions be provided to the district attorney of every county in which such person has been convicted of a felony and upon the courts in which the sentence of such felony was entered, in no way was the right of incarcerated individuals to change their names limited. The primary limitation on the right of an incarcerated individual's right to change his or her name is the same limitation that is placed on all petitioners: petitions that show a fraudulent intent or a desire to misrepresent the petitioner or impair the rights of others should be denied.

The court found that name changes are frequently part of life for transgender individuals and that there was no evidence of fraudulent intent on the part of the petitioner nor of a desire to misrepresent herself or impair the rights of others. The court further found that given the significant amount of time remaining on the petitioner's sentence, her use of various aliases and the practice of identifying prisoners by DIN rather than by name, the arguments as to impairing the rights of her victims and/or causing record keeping confusion were unpersuasive. The court therefore granted the petition.

_____

Emile Primeaux, Empire Justice Center and Charlie Arrowood and Noah Lewis, Transcend Legal, represented A.H.M. n.k.a. L.A.L. in this NYS Supreme Court action.

Court Upholds Preliminary Relief Granted to the Office of Victim Services

In 1988, after he was convicted of a violent felony offense, Denroy Vigo was committed to DOCCS. Almost twenty years later, DOCCS notified the Office of Victim Services (OVS) that the amount in Mr. Vigo's inmate exceeded $10,000.00, whereupon OVS notified the victims of Mr. Vigo's crimes that if they wanted, they could commence a civil action for damages against Mr. Vigo. At least one victim responded that she wanted to do so. The OVS then initiated a lawsuit on behalf of the victim seeking a preliminary injunction to preserve the funds. In response, Respondent Vigo moved to dismiss the petition, arguing that 1) because the notice to the victims was not statutorily required, the statute of limitations should not be extended to allow the victims to commence litigation against him and 2) his earned income should be excluded from any future recovery and therefore should be excluded from the funds that would be frozen by the preliminary injunction.

Generally speaking, the victim of a violent crime has 10 years within which to file suit against the perpetrator of the crime. CPLR §213-b(2). The Son of Sam law, however, allows that limitation period to be renewed for three years from the date upon which a victim discovers the existence of "funds of a convicted person." Executive Law §632-a(3). Funds of a convicted person is defined as, "all funds and property received from any source by a person convicted of a specified crime, or by the representative of such person as defined in subdivision six of section six hundred twenty-one of this article excluding child support and earned income." Exec. Law §632-a(1)(c). Executive Law §632-a(2) imposes a requirement on superintendents of correctional facilities to notify the Office of Victims' Services whenever the account of an inmate convicted of a violent felony offense exceeds $10,000.00.

The lower court ruled against Mr. Vigo and he appealed. In *Matter of NYS Office of Victims Services v. Vigo*, 2018 WL 3058360 (3d Dep't June 21, 2018), the Appellate Division affirmed the lower court's decision to grant the preliminary injunction. In reaching this result, the court rejected the arguments that the petition should be dismissed because 1) as earned income, the funds in his account did not impose a duty on DOCCS to notify the Division of Victims' Services and 2) the funds in his account were earned income, and thus did not create a basis for extending the statute of limitations.

Citing *Matter of NYS Crime Victims Board v. Sookoo*, 909 N.Y.S.2d 823 (3d Dep't 2010), the court first found that the applicability of the extended statute of limitations is not connected to the $10,000 requirement that triggers the notice provisions of the statute. Second, the court found, although Executive Law §632-a(3) does not statutorily mandate the type of notice that was provided, it also does not prohibit such notice. Thus, the court found, having received notice of newly discovered funds of a convicted person, respondent's victims were entitled to the benefit of the extended limitations period, "without regard to the amount of funds in the respondent's inmate account." [From this statement, an inference can be drawn that Mr. Vigo had contested the amount of funds in his inmate account and asserted that because there was under $10,000 in the account, DOCCS did not have the authority to notify the Office of Victims Services].

Finally, the court found that while the statute excludes earned income from the funds of a convicted person, the distinction between earned and unearned income is relevant only to determine whether the DOCCS must notify the Office of Victims Services and has no effect on the ability of the victim or the victim's representative to recover such income in a civil action when the victim [or his/her representative] learns of the income.

Denroy Vigo defended himself in this civil action pursuant to Executive Law §632-a for a preliminary injunction.

FEDERAL COURT DECISIONS

High Court Strikes Law Prohibiting Registered Sex Offenders from Using Social Media

In *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017), the United States Supreme Court addressed the issue of whether a state law making it a felony for registered sex offenders to access social media sites where the offender knows that the site permits minor children to be members and/or to maintain personal webpages violates the First Amendment. The appellant in *Packingham* was a registered sex offender. After a traffic ticket was dismissed, he posted a statement about the dismissal on his Facebook page. A member of the local police department, recognizing that the poster was a registered sex offender, charged him with violating the law. Mr. Packingham was convicted and given a suspended sentence. On appeal, the North Carolina Supreme Court rejected his challenge to the constitutionality of the statute. The U.S. Supreme Court **granted certiorari** (agreed to review) the constitutionality of the law.

Before addressing the legal issue before it, the Court first recognized the extremely important role that the internet plays in the circulation and discussion of ideas in the 21st century and noted that the *Packingham* case is one of the first cases that the Court has taken to address the relationship between the First Amendment and the modern Internet. The Court then found that because the law is "content neutral" – that is, the law prohibits access to **all** social media sites on which minor children are permitted to participate, without regard to the subject matter discussed or the purpose of the websites – the question before the Court was whether the law was narrowly tailored to serve a significant governmental interest. "In other words," the Court wrote, "the law must not 'burden substantially more speech than is necessary to further the government's legitimate interest.' "

The Court concluded that the statute imposes a prohibition "unprecedented" in the scope of the First Amendment speech it burdens:

> "Social media allows users to gain access to information and communicate with one another about it on any subject . . . By prohibiting [registered] sex offenders from using those websites, North Carolina . . . bars access to what for many are the principal sources for knowing current events, [seeking jobs], speaking and listening in the modern public square and otherwise exploring the vast realms of human thought and knowledge."

Thus, the Court ruled, criminalizing access to social media stops users from engaging in the legitimate exercise of their First Amendment rights.

The Court then turned to the question of whether the law must be this broad to serve the purpose of keeping convicted sex offenders away from victims. With respect to this issue, the Court first found that no U.S. Supreme Court case or holding has approved of a statute as broad as the statute challenged in *Packingham*. The closest case, the Court mentioned, was *Board of Airport Commissioners of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987). There, the Court struck down as overbroad a statute that prohibited a broad range of protected expression at the L.A. airport. Applying the analysis used in that case to the facts in the *Packingham* case, the Court held that if a law prohibiting a broad range of speech at a single airport was not constitutional, it follows that "the State may not completely bar the exercise of First Amendment rights on websites integral to the fabric

of our modern society and to the fabric of our modern society and culture."

At least two courts have held that the reasoning and analysis upon which the Court relied in *Packingham* applies to the imposition of parole conditions prohibiting sex offenders from using electronic devices and/or accessing social media sites. *See Mutter v. Ross*, 240 W.Va. 336 (Sup. Ct. W.Va. 2018); *United States v. Malenya*, 736 F.3d 554 (D.C. Cir. 2013) [note: the decision in *Malenya* predates the *Packingham* decision]; *but see United States v. Rock*, 863 F.3d 827 (D.C. Cir. 2017) (holding that the *Packingham* analysis was not applicable where the condition that appellant Rock challenged on First Amendment grounds was imposed as part of his supervised-release sentence and was not a post-custodial restriction of the sort imposed in *Packingham*).

Readers having questions about the *Packingham* decision may contact PLS Senior Supervising Attorney Jim Bogin at this address: 41 State Street, Suite M112, Albany, NY 12207.

Letters to the Editor

Pro Se accepts submissions for Letters to the Editor. Letters are printed when space in an issue is available. 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 PRACTICE

Seeking Modification of a Child Support Order

The laws regarding child support in New York State are set forth in the Domestic Relations Law (for married parents) and in the Family Court Act (any parent). (Domestic Relations Law §240 and Family Court Act Article 4.) Generally, all parents with child support orders entered in New York are liable for financially supporting their children until they are 21 years old.

In New York State, under the Child Support Standards Act (CSSA) (DRL §240-b and Family Court Act §413), a parent's basic child support obligation is a percentage of his or her gross income (income before taxes). The percentage of income that a parent will be required to pay depends on the number of children which the award will support:

Number of Children	Percentage
One	17%
Two	25%
Three	29%
Four	31%
Five or more	*at least* 35%

Unless the court finds the amount resulting from the application of the percentage to be unjust and inappropriate, the court will order that the parent pay the amount resulting from application of the appropriate percentage. *In addition to* the basic child support award, the non-custodial parent will also be ordered to pay a portion of the child's (or children's) unreimbursed medical expenses and child care expenses.

Example 1: John makes $24,000 a year and has two children with Ann. His annual basic child support obligation will be 25% of $24,000, which is $6,000 a year. This means his monthly basic child support obligation will be $500. He will also be required to pay additional amounts for medical and child care expenses.

Where a parent has more than one child support order as a result of having children with more than one person, the awards will generally be based on the order in which the awards were issued (regardless of which child was born first). The amount owed on the later-entered order(s) will usually be based on the parent's income *after the* amount owed for the basic child support obligation on the earlier-entered support order has been subtracted.

Example 2: John makes $24,000 a year and has two children with Ann and one child with Mary. Mary files for child support and has an order entered before Ann does. John will be subject to two child support orders. First, with respect to the order obtained by Mary, he will owe 17% (because there is one child) of $24,000, which is $4,080 a year ($340 per month). Second, with respect to the order obtained by Ann, because he has two children with Ann, he will owe 25% of his remaining income. This will be based on his income *after* paying the child support he owes Mary. So, he will owe 25% of $19,920 ($24,000 minus $4,080), which is $4,980 per year ($415 per month). In total, John will owe $9,060 a year ($755 per month) in child support payments, plus any additional amounts he owes for medical and child care expenses.

WHAT IF PAYING CHILD SUPPORT WOULD NOT LEAVE ME WITH ENOUGH INCOME TO SUPPORT MYSELF?

Regardless of how low a parent's income is, there will almost always be an award of child support under the CSSA. If your income falls under the "self-support reserve," which is set at 135% of the federal poverty line, then the Court may order a reduced amount of child support. Generally speaking, if your income after paying child support would fall below the "self-support reserve," but is still above the poverty line, then no matter how many children you have, you will owe the greater of 1) $600 per year or 2) the difference between your income before child support payments and the self-support reserve. Examples follow.

If your income would fall below the federal poverty line after making your child support payments, then you will be required to pay the greater of 1) $300 a year or 2) the difference between your income and the self-support reserve. Again, examples of these situations are below.

Generally, even if you receive public assistance or earn no income, courts will nonetheless order that you pay a minimum

amount of child support − $300 per year ($25 per month). However, Domestic Relations Law §240 (1-b) and Family Court Act §413(1) permit a court to order any amount of child support that the court deems to be just and appropriate. In the past, the laws provided that the support order could never fall below $25 per month, but these laws were amended following a Court of Appeals decision. Specifically FCA §413 (1) (g) used to have language creating an irrefutable presumption that the absolute minimum for a support payment was $25. This meant that regardless of how low (or even nonexistent) a non-custodial parent's income, his or her support obligation could not be less than $25 a month. This provision was struck down by the Court of Appeals (Rose v Moody, 607 N.Y.S.2d 906 (1993)), and FCA §413 (1) (g) was then amended to eliminate the language imposing a $25 minimum monthly payment. Accordingly, the presumption in favor of a minimum order of $25 per month is **rebuttable** (it can be opposed and refuted) if the parent can show that such an order would be unjust or inappropriate. That is, while a $25 per month order in each case is presumed to be appropriate, the court may order a lower amount if the non-custodial parent can demonstrate that in fact $25 per month would be inappropriate.

The ten factors that courts consider in determining whether an order is unjust or inappropriate are listed in Domestic Relations Law §240 (1-b) subdivision (f) and Family Court Act §413(1)(f):

> 1. The financial resources of the custodial and non-custodial parent, and those of the child;
>
> 2. The physical and emotional health of the child and his/her special needs and aptitudes;
>
> 3. The standard of living the child would have enjoyed had the marriage or household not been dissolved;
>
> 4. The tax consequences to the parties;
>
> 5. The non-monetary contributions that the parents will make toward the care and well-being of the child;
>
> 6. The educational needs of either parent;
>
> 7. A determination that the gross income of one parent is substantially less than the other parent's gross income;
>
> 8. The needs of the children of the non-custodial parent for whom the non-custodial parent is providing support who are not subject to the instant action and whose support has not been deducted from income pursuant to subclause (D) of clause (vii) of subparagraph five of paragraph (b) of this subdivision, and the financial resources of any person

obligated to support such children, provided, however, that this factor may apply only if the resources available to support such children are less than the resources available to support the children who are subject to the instant action;

9. Provided that the child is not on public assistance (i) extraordinary expenses incurred by the non-custodial parent in exercising visitation, or (ii) expenses incurred by the non-custodial parent in extended visitation provided that the custodial parent's expenses are substantially reduced as a result thereof; and

10. Any other factors the court determines are relevant in each case, the court shall order the non-custodial parent to pay his or her pro rata share of the basic child support obligation, and may order the non-custodial parent to pay an amount pursuant to paragraph (e) of this subdivision.

These factors may lead courts to order child support payments that are above or below the amount arrived at by the guidelines described above.

Examples involving the poverty and self-support reserve guidelines:

Example 3: For the purpose of these examples, we will say that the poverty line is $10,890 per year and the self-support reserve is $14,702 per year. These numbers change each year and cannot be relied upon for your own calculation.

Example 3a: John makes $16,000 per year and has two children with Ann. Following the percentage guidelines, John would owe $4,000 per year in child support. The income remaining to John after child support payments would be $12,000 which is below the self-support reserve, but above the poverty line. This means John owes the greater of $600 per year or the difference between his income before child support payments and the self-support reserve. John's income of $16,000 minus the self-support reserve of $14,702 is $1,298. This is greater than $600, so John owes $1,298 per year ($108.17 per month) in child support.

Example 3b: John makes $15,000 a year and has two children with Ann. Following the guidelines, John would owe $3,750 a year in child support. This would leave John with $11,250 per year after making his support payments. This is below the self-support reserve, but above the poverty line, so John owes either $600 per year or the difference between his income and the self-support reserve, whichever is greater. The difference between John's

income and the self-support reserve is $298, which is less than $600. Therefore John owes the greater amount, $600 a year ($50 per month) in child support.

Example 3c: John makes $14,000 a year and has two children with Ann. Following the percentage guidelines, John would owe $3,500 per year in child support. This would leave him with $10,500 a year, which is below both the self-support reserve and the federal poverty line. John owes either $300 per year or the difference between his income and the self-support reserve, whichever is greater. However, John's income is *below* the self-support reserve. This means John owes the greater amount, $300 per year ($25 per month), in child support.

Example 3d: John makes $15,500 a year and has *four* children with Ann. Following the percentage guidelines, John would owe $4,805 per year (31% of his income) in child support. This would leave him with $10,695 remaining per year, which is below the poverty line. John owes either $300 per year or the difference between his income and the self-support reserve. John makes more than the self-support reserve, and the difference between his income and the self-support reserve is $798. He owes the greater amount, so John owes $798 per year ($66.50 a month) in child support.

WHAT HAPPENS TO MY CHILD SUPPORT ORDERS WHILE I AM INCARCERATED?

Parents who are subject to court ordered child support must continue to make payments while they are in prison. If you can afford to continue making child support payments while you are in prison, you can arrange to have the amounts taken out of your inmate account.

If you cannot afford to continue making your payments, you may be able to seek a modification of the court order. Whether you will be successful in seeking a modification depends upon several factors, including the date of the original order of support and whether you were already in prison on that date.

If you do not obtain a modification of your child support order from the court, the amount you owe in child support will accrue (add up). The total amount of back child support payments that you owe is called "the arrears"). If you wait until after you are released to attempt to modify the amount of child support you owe each month, the court generally cannot adjust the amount of unpaid child support that accumulated while you were in prison. That is why it is important to ask the court to modify the amount of child support that you are required to pay as soon as your income changes, if you are eligible to seek such a modification.

There is one very important exception to the limitation on when a court may adjust the amount of accrued unpaid child support that is likely to be helpful to many prisoners. Under certain circumstances, Family Court Act §413 (1) (g) permits the application of a cap on child support arrears. During periods in which a non-custodial parent's income is at or below the Federal income poverty level for a single individual, arrears accumulated during that period cannot exceed $500. Arrears accumulated prior to falling below the poverty income level are not capped at $500. Thus, this provision is not a blanket $500 cap. Rather, it caps arrears that accumulate only during the period when a parent's income is at or below the Federal poverty income level. As soon as a parent's income rises above that level, arrears begin accumulating again.

Accordingly, if you have accumulated a large amount of unpaid child support, and if your income has been at or below the Federal poverty level during any or all of the period of time when the arrears were accumulating, you may be eligible for application of a cap to all or some of the arrears. An individual whose a child support order is set at $25 a month (the standard minimum payment in New York State for an individual whose income is below the poverty level) may automatically have a $500 cap applied to arrears that accumulated while his/her child support order was set at $25 and his/her income was below the poverty level.

It is, therefore, very important for a prisoner to seek modification of his/her child support order if his/her income has fallen below the poverty level where his/her child support amount is over $25 a month. When seeking modification of a child support order, you should also ask the court to apply a $500 cap to arrears. Though Family Courts across the state have, at times, applied the arrears cap differently, generally speaking, courts will not apply the cap retroactively. In other words, if the Court grants a petition for modification to $25 a month and imposes a $500 cap on arrears, it is likely the cap on the arrears will only be for amounts accrued after the date of that the modification petition was filed.

If you are the respondent in a child support enforcement proceeding and your child support payment has been $25 a month because your income is below the poverty level, but your support order does not specifically state arrears will be capped at $500, any arrears which accumulated while your income was at the poverty level and your child support order was at $25 a month should be automatically reduced and capped at $500. Although this is something which may and should be considered by the court without you having to raise the issue, being prepared to raise this as a defense to the enforcement action may be critical to ensure that the court applies the cap.

By way of information, listed below are the Federal poverty guideline amounts since 2010. These amounts are for a family of one (1). If you, as the non-custodial parent, lived in Alaska or Hawaii, or lived with other people, the applicable amount would be different. As a prisoner, you would be considered a family of one.

Year	Poverty Guideline
2018	$12,140
2017	$12,060
2016	$11,880
2015	$11,770
2014	$11,670
2013	$11,490
2012	$11,170
2011	$10,890
2010	$10,830

REQUESTING MODIFICATION OF CHILD SUPPORT ORDERS

After a court order for child support has been entered, *only* the court has the authority to modify the amount of child support owed. You can petition the court for a modification of the amount of child support you owe, and if you are eligible and if the court agrees modification would be warranted, then the court may issue a new order that changes your monthly obligation.

As noted above, the new order usually will not cancel or change the amount you already owe in unpaid arrears that accumulated before you filed the request for modification. Domestic Relations Law §236 Part B, subd. 9(b) states:

> [N]o modification or annulment shall reduce or annul any arrears of child support which have accrued prior to the date of the application to annul or modify any prior order or judgment as to child support.

There is a similar provision in Family Court Act §451.

As also noted, however, the one important exception to modification of the arrears is the potential $500 cap for any period of time when the non-custodial parent's income was at or below the Federal income poverty level.

Modifying Child Support Orders Payable to the NYC Department of Social Services Only:

The success of a suspension or downward modification petition brought by a prisoner in New York State Family Court will depend on the magistrate presiding over the case, and on the specific details of the child support matter. There is no guarantee that a suspension or downward modification petition will be granted. However, if you have an order from New York City that is payable to the New York City Department of Social Services (NYC DSS), you may be able to more easily have your child support payments reduced or even suspended while you are incarcerated.

Specifically, NYC DSS has a policy which allows the Department (DSS) to consent to the suspension or modification of child support orders when the person owing payments is incarcerated. This applies only to people whose child support payments are made to NYC DSS, and not people whose payments are made to the custodial parent directly. Most orders payable to NYC DSS are entered in the Child Support Enforcement Term (CSET), a special term of the NYC Family Court that handles child support orders where the child receiving support receives public assistance. If your

child support order falls within this group of orders, you should file a suspension petition as soon as possible to stop the continuing accrual of arrears. To file such a petition, you should write to:

Petitions Department
Family Court
60 Lafayette Street
New York, NY 10013

In your letter to the Petitions Department, request blank forms that you can fill in by hand and, if you have it, provide your child support docket number or account number. If you do not know your docket number or account number, provide your Social Security number, your date of birth, the name of the custodial parent or guardian, and the names, birth dates, and social security numbers of the children supported by the order. This will help the court to identify your docket number for you.

In NYC, if you are also eligible for the reduction of your child support arrears to the $500 cap noted previously, you may seek such a reduction before an enforcement action is commenced. Again, the arrears must be owed to the NYC DSS, and the arrears must have accumulated while you (the non-custodial parent) were at or below the federal poverty level.

Because of the way that DOCCS collects encumbrances, obtaining a reduction in your child support arrears while you are incarcerated can be very be very useful. Since the $500 cap is not generally put into place *prior* to an attempt to collect the arrears, DOCCS will list the full amount in arrears as an ongoing encumbrance, and so will continue to withhold inmate funds until the encumbrance is paid in full. Thus individuals who have increasing arrears will continue to have money withheld until (1) they can pay the full amount of the encumbrance (as on file) or (2) they are released. If while you are incarcerated you obtain a reduction to the $500 cap, your account will only be encumbered until payment of the $500 is satisfied.

With respect to child support orders issued by courts outside of New York City, however, it appears that obtaining the benefit of the $500 cap on arrears may only be possible after an enforcement action is commenced against you, something that usually does not occur until after the non-custodial parent is released from prison.

Modifying All Other Child Support Orders

If your support order is not from New York City or is not payable to the New York City Department of Social Services (NYC DSS), and you are unable to make your court-ordered child support payments, you may still seek modification. In this case, write to the Family Court in the county where your support order was entered and ask for a copy of:

Family Court Form 4-11: "Petition for Modification of an Order Made by Family Court or Another Court" **and** the "Financial Disclosure Affidavit."

Complete the Petition and the Financial Disclosure Affidavit and mail them back to the applicable Family Court. Attach a copy of the Order requiring you to make support payments to your petition. If the Court

decides to modify your support payments, the Court can make the modification date back to the date of your petition.

Unfortunately, there is no guarantee that you will get a modification of your support order. The New York Court of Appeals ruled in *Knights v. Knights*, 527 N.Y.S.2d 748 (1988), that a Family Court did not **abuse its discretion** (go beyond its authority) by refusing to suspend child support payments during the petitioner's incarceration. For many years, this prohibited prisoners from seeking and obtaining a support order modification.

However, in 2010, the Domestic Relations Law and the Family Court Act were amended to give courts discretion to consider a reduction of income due to incarceration as a "substantial change in circumstances" that may justify a downward modification to child support payments. The Court still has the authority to deny your motion to modify your support order, but the amendments provide that incarceration is no longer an absolute bar to finding a substantial change in circumstances that is required for a court to alter a support order.

There are several exceptions to the rule that incarceration is not a bar to finding a substantial change in circumstances that justifies a downward modification of a support order. First, the rule will not apply if your incarceration is the result of your non-payment of child support. Second, it will also not apply if your incarceration is the result of committing an offense against either the custodial parent or child(ren) that is/are the subject of the support order. Finally, the 2010 amendments were not retroactive to support orders entered before the date of the amendments. In other words, incarceration will no longer be an automatic bar to modification only for support orders that were entered by a court after the date of the amendment (on or after October 13, 2010). If your support order was entered by the court in October 12, 2010 or earlier, then incarceration will continue to bar modification.

Though it is the general rule that the child support order must have been entered on or after October 13, 2010 in order to qualify for modification based on incarceration as a change in circumstances, there may be an exception to the rule. If you owe your child support to a local Department of Social Services (DSS) office, that DSS office may be willing to consent to modify your child support order even if it was entered before October 13, 2010. Whether or not DSS is willing to consent to such a modification will depend on the policies of each individual DSS office.

These 2010 amendments may also be relevant to the $500 cap provision of FCA §413(1)(g) discussed previously. In 2002, the Fourth Department held in *Onondaga County v Timothy S.*, 741 N.Y.S.2d 622 (4th Dept. 2002), that the $500 cap is unavailable to prisoners because "to conclude otherwise would allow an incarcerated noncustodial parent to benefit from the conduct that led to his or her incarceration." In so holding, the Court relied upon the Court of Appeals' decision in *Knights*. However, since the 2010 amendments to the Family Court Act and Domestic Relations Law effectively overturned this holding in *Knights*, it can also reasonably be argued that the *Onondaga* holding is also no longer good

law. So, if you seek application of the $500 cap on eligible arrears and if your request is opposed by citing the *Onondaga* decision, be prepared to argue that the holding in the *Onondaga* case is no longer good law because of the 2010 amendments.

Assistance From PLS

PLS may be able to provide you with limited assistance in seeking modification of your child support order.

If your **support order was entered by the court after the 2010** amendments to the law which makes incarceration no longer a bar to modification (on or after October 13, 2010), then you may write to the PLS Family Matters Unit at 41 State Street, Suite M112, Albany, New York, 12207 and request assistance. In such instances, the Family Matters Unit may be able to draft a petition on your behalf and provide it to you, along with other necessary documents, and instructions on how to submit the petition pro se (on your own).

Subscribe to *Pro Se*!

Pro Se is published six times a year**.** ***Pro Se*** accepts individual subscription requests. With a subscription, a copy of ***Pro Se*** will be delivered, free of charge, directly to you via the facility correspondence program. To subscribe send a subscription request with your name, DIN number, and facility to ***Pro Se***, 114 Prospect Street, Ithaca, NY 14850.

Pro Se Wants to Hear From You!

Send your comments, questions or suggestions about the contents of ***Pro Se*** to: ***Pro Se,*** 114 Prospect Street**,** Ithaca, NY 14850.

Please **DO NOT** send requests for legal representation to ***Pro Se***. Send requests for legal representation to the PLS office noted on the list of PLS offices and facilities served which is printed in each issue of ***Pro Se***.

Pro Se On-Line

Inmates who have been released, and/or families of inmates, can read ***Pro Se*** on the PLS website at www.plsny.org.

Pro Se
114 Prospect Street
Ithaca, NY 14850

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.

Pro Se Staff

EDITORS: BETSY HUTCHINGS, ESQ., KAREN L. MURTAGH, ESQ.
COPY EDITING AND PRODUCTION: ALETA ALBERT