Pro Se

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Parole Board Denial of Release Was Deficient In Three Respects

When Richard Rivera was 16 years old, he committed offenses that resulted in an aggregate sentence of 30 years to life. In 2016, when Mr. Rivera was 52 years old and had spent 36 years in prison, the Board of Parole denied his application for parole release for the fourth time. After his administrative appeal was denied, Mr. Rivera filed an Article 78 challenge to the parole denial. The Supreme Court, Dutchess County, denied the petition and Mr. Rivera appealed to the Appellate Division, Second Department.

In *Matter of Rivera v. Stanford*, 172 A.D.3d 872 (2d Dep't 2019), the court noted that judicial review of a Parole Board determination is **narrowly circumscribed** (focused on only a few discrete issues). As with all administrative determinations, there must be sufficient evidence in the record to support the determination. In addition, Executive Law §259-i(2)(a)(i) requires that the Parole Board give the reason for the denial in detail and not in conclusory terms. In this case, the court ruled, the Parole Board's finding that the petitioner's release was not compatible with the welfare of society due to his disciplinary record while imprisoned, was "without support in the record." In addition, the decision was inadequate because the Board's "terse and conclusory" language did not explain the reason for the denial in detail.

According to the decision, the Board of Parole focused *exclusively* on the seriousness of petitioner's crimes and his disciplinary history

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PAROLE IN NEW YORK STATE – TIME FOR A CHANGE?

A Message From the Executive Director, Karen Murtagh, Esq.

While many people who are denied parole release challenge the denials, courts rarely reverse such decisions. The reason for this is that the Board of Parole has great discretion in granting or denying parole. As long as the parole board complies with the statutory requirements set forth in the Executive Law 259-i, courts typically affirm its decisions. See, for example, *Matter of Cobb v. Stanford*, 153 A.D.3d 1500, 1501 (3d Dep't 2017). It is only when a court concludes that the board's decision shows "irrationality bordering on impropriety" that it will reverse the denial. Convincing the court that a parole denial meets this standard is very difficult because the standard is subjective. Due to the subjectivity of the standard, it is very difficult to predict the outcome of any particular case. What makes a parole board's decision irrational? What makes that decision so irrational that it borders on impropriety?

In this issue of *Pro Se*, we report on a number of recent cases where the appellate courts examined the role and duties of the parole board and, while no hard and fast rule as to what constitutes an irrational decision was evident, a review of those cases helps identify the factors courts rely on to reach their determinations.

In *Rivera v. Stanford*, discussed on the first page of this issue, Mr. Rivera had served 36 years of a 30-to life sentence when he appeared before the parole board for his fourth parole hearing. The parole board denied him parole, citing concern for his poor behavior during incarceration. However, as the court pointed out, for the two years prior to seeing the parole board he had not received any disciplinary reports. In reversing the parole denial, the court held that the parole board failed to consider a number of relevant factors including his: age at the time of his crime (16); remorse for his crime; demonstrated maturity, self-control and leadership skills; low Correctional Offender Management Profiling for Alternative Sanction (COMPAS) scores; and significant accomplishments. Rather, the board focused mainly on the seriousness of the original crimes he committed. The court held that the parole board's failure to consider all of these "relevant factors . . . evinced irrationality bordering on impropriety."

In *Garafolo v. New York State Board of Parole, et al*., discussed on page 9, the petitioner, who was serving a sentence of 25 years to life, appeared before the parole board for his 11th parole board hearing. The board denied parole noting that, despite the low COMPAS score, it felt compelled to side with the "official and community opposition" to his release. Yet, when this case was brought before the court, the board failed to provide the court with the opposition upon which it purportedly had relied. The court reversed the parole board's decision. The court held that, "Because the Parole Board expressly relied on the opposition to justify its departure from petitioner's low COMPAS scores and support its finding that petitioner's release at this time would not be compatible with the welfare of society, the Court cannot presume that the Board acted properly in accordance with the statutory requirements without the complete administrative record, which includes such opposition."

In addition to these recent decisions from the judiciary, other entities seem to be taking a hard look at how parole is (or is not) working in New York and examining ways to improve the parole process. This past year, there were several legislative proposals focused on parole reform including Assembly Bill A4319 – referred to as the Elder Parole Bill – and Assembly Bill A5493-A and Senate Bill 1343-B – known as the Less is More Act. The Elder Parole Bill, prime sponsored by Assemblyman Weprin, proposed a process to evaluate elderly incarcerated individuals (over the age of 55) who have served at least 15 years in prison for possible parole. The Less is More Act, prime sponsored by Assemblyman Mosely and Senator Benjamin, sought to reduce the parole board's discretion and limit the types of infractions that could result in the revocation of parole so as to reduce the number of individuals sent back to prison for technical violations of parole. According to the U.S. Department of Justice's Bureau of Justice Statistics, New York has the second highest rate of re-incarceration for technical violations of parole in the nation. "Technical violations include parole supervision violations such as simply missing a meeting with a parole officer. Further, technical violations accounted for 29 percent of the 21,675 people who were sent to prison in New York State in 2016."(See: *Building Bridges* Newsletter August 2019.) Both bills stalled in the Legislature.

More recently, Hank Greenberg, the new President of the New York State Bar Association formed a Task Force on Parole. The Taskforce's mission is to "to study the current parole system with a focus on release practices as well as revocation and reincarceration." The goal of the task force is to "identify problems in the current system and propose policy solutions, including new concepts in the administration of the parole system and changes in the law." The Task Force will focus on four areas: granting parole, parolee supervision, re-incarceration of parolees, and the appeal process for parole violators. "There's a widespread recognition, I believe, that the parole system is in need of a deep dive and careful study and that there are areas that should be looked at and potential reforms to consider," said Greenberg.

Admittedly, a few successful parole challenges do not alter the general rule that most parole denials are upheld by the courts. However, those decisions, together with the push for parole reform in other sectors of the State, indicate that there is at least some interest in taking a serious look at our current parole system in an effort to identify and address those areas in most need of reform.

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while in prison. While this in itself problematic – neither the transcript of the interview nor the decision showed that the Board had considered the factors that it is statutorily required to consider – of additional concern to the court was the Board's failure to recognize that while Mr. Rivera's disciplinary history when he was younger had been poor, he had had no tickets since his previous parole interview. Nonetheless, the Board concluded that his poor behavior in prison shows limited maturity and self-control.

In addition, the court found, the Board had failed to consider Mr. Rivera's youth and its attendant characteristics at the time that he committed the crimes. This is constitutionally required because without consideration of these factors, an individual who commits crimes as a juvenile may have his constitutional right not to be punished with life imprisonment for a crime reflecting transient immaturity violated. During the Parole Board interview, the members questioned petitioner about the circumstances of the crimes underlying his convictions. Neither the transcript of the interview nor its decision show that the Board considered the petitioner's youth at the time and its attendant characteristics in relationship to the crimes committed. When it decided to deny him parole release based on the seriousness of the instant offenses, the Board did not factor in the petitioner's age at the time of the crimes and the impact that his age had on his decisions and actions during the commission of the crimes.

Further, the court noted, the record demonstrates that petitioner does not lack maturity and self-control. He took responsibility for his actions, acknowledged the crimes were not excused by his difficult upbringing, abusive father or his cocaine addiction. During his nearly 40 years of imprisonment, among other positive activities, petitioner learned to read, earned a bachelor of arts degree in philosophy and a master's degree in theology and was working on obtaining a second bachelor's degree in sociology. He was on the IGRC, co-founded the Prisoners AIDS Counseling and Education Program, and was in the process of establishing a program for older prisoners known as 50 Plus. In addition, he was assessed low for all COMPAS risk factors.

In light of all of the relevant factors – including petitioner's understanding of and remorse for his crimes, his significant accomplishments, his leadership and demonstrated maturity – and notwithstanding the seriousness of his crimes, the court concluded that the Parole Board's decision to deny the petitioner parole release showed irrationality bordering on impropriety. For this reason, the court reversed the judgment of the lower court and remitted the matter to the Parole Board for a de novo hearing before a different panel.

On July 23, 2019, Richard Rivera was released to parole supervision.

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Janet Sabel of the NYC Legal Aid Society, and Alex Chachkes and Christopher Cariello of Orrick, Herrington & Sutcliffe LLP, represented Richard Rivera in this Article 78 proceeding.

PRO SE VICTORIES!

Matter of Renato Albanese v. Anthony J. Annucci, Index No. 4686-18 (Sup. Ct. Albany Co. Feb. 1, 2019). After the court granted the respondent's motion to dismiss for failure to comply with the service requirements set forth in the Order to Show Cause, the petitioner, Renato Albanese, successfully moved to reargue or renew. An incarcerated individual's failure to comply with the service requirements of an Order to Show Cause will result in dismissal of the petition unless the individual demonstrates that obstacles presented by his or her imprisonment prevented compliance. In his motion papers, petitioner argued that his imprisonment prevented him from timely replying to respondent's motion. The court found that petitioner had demonstrated that he had a meritorious basis for opposing the respondent's motion to dismiss. Based on the particular facts and circumstances of this case – which the court did not specify – the court granted the petitioner's motion to renew and denied the respondent's motion to dismiss.

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NOTICES

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STATE COURT DECISIONS

Disciplinary & Administrative Segregation Hearings

Court Finds Waiver of Right to Attend Tier III Hearing Was Not Voluntary and Knowing

In September 26, 2017, as petitioner was being moved from his cell to the Behavioral Health Unit at Great Meadow, he allegedly engaged in conduct with respect to which the involved officers charged him with assault on staff, violent conduct, refusing orders, creating a disturbance, interference and tampering with property. From that date until May 17, 2018, petitioner was on suicide watch in the Residential Crisis Treatment Program (RCTP) or an observation cell or being treated at Central New York Psychiatric Center. Although the hearing officer presiding over the Tier III hearing relating to the charges requested and was granted several extensions due to the petitioner's mental health status, the hearing officer inexplicably commenced the hearing three weeks before the petitioner was released from RCTP, at a time when his OMH classification was 1S.

When the hearing began, the officer assigned to escort the petitioner to the hearing room reported that he had informed the petitioner that the hearing was starting but that the petitioner had refused to speak to him and that the officer had further advised the petitioner if he did not attend the hearing, it would be conducted in his absence and he could incur a penalty. After putting this on the record, the hearing was adjourned until April 3. On that date, an officer testified that he had advised petitioner that the hearing was re-convening and reported that the petitioner did not respond. The hearing was completed that day, petitioner was found guilty and the hearing officer imposed a SHU sanction of over a year.

After exhausting his administrative remedies, the petitioner filed an Article 78 challenge to the hearing, arguing that because he had not made a knowing, intelligent and voluntary waiver of his right to be present at the hearing, the hearing officer had deprived him of his right to attend the hearing.

In *Matter of Wright v. Annucci*, Index No. 7673-18 (Sup. Ct. Albany Co. July 17, 2019), the court first reviewed an incarcerated individual's right to attend a prison disciplinary hearing. According to *Matter of Alicea v. Selsky*, 31 A.D.3d 1080 (3d Dep't 2006), incarcerated individuals have a fundamental right to attend their own disciplinary hearings. "Before an inmate can make a knowing, voluntary, and intelligent waiver of [the] right to be present," the court wrote, citing *Matter of Rush v. Goord*, 2 A.D.3d 1185, 1186 (3d Dep't 2003), "[he or she] must be informed of that right and of the consequences of failing to appear at the hearing."

Applying this to the facts before it, the court found that on both of the dates on which the hearing took place, the hearing officer had "summarily accepted the escort officer's characterization of petitioner's conduct as a blatant refusal to attend the hearing **without making any further inquiry into the possibility that *petitioner may have been unable to knowingly, voluntarily and intelligently waive his right to attend his hearing*.**" At the time that the hearing officer made the decision to rely on the officers' testimony, he knew that petitioner was in RCTP in an observation cell. Moreover, the hearing officer also knew that petitioner's mental state at the time of the incident and at the time of the hearing was at issue. Yet, the court remarked, "the record reflects no information regarding the steps taken to ascertain the legitimacy of the petitioner's refusal . . ."

Oddly, while the hearing officer took confidential mental health testimony from an Office of Mental Health (OMH) clinician, such testimony did not include information on the petitioner's mental status on the days that the hearing took place. And, while the OMH testimony was taken pursuant to the requirements of 7 NYCRR §254.6(b) – which requires the hearing officer to consider evidence of the accused's mental condition at the time of the incident and at the time of hearing – the hearing officer found that the petitioner had

waived his right to attend the hearing after being told by the escort officers that petitioner had refused to speak. Both statements were made without any further inquiry into the reasons for petitioner's silence or whether his mental health status and placement in the RCTP could affect his ability to knowingly, voluntarily and intelligently waive his right to attend the hearing.

Based on this record, the court found that the petitioner had not willfully refused or knowingly, voluntarily and intelligently waived his right to attend the hearing. The court ordered that the hearing be reversed and all references to the hearing be expunged from the petitioner's institutional record.

The Albany Office of Prisoners' Legal Services represented Jermaine Wright in this Article 78 proceeding.

HO's Obligation to Ascertain Reason for Witness's Refusal to Testify

In Matter of Getfield v. Annucci, 173 A.D.3d 1318 (3d Dep't 2019), the petitioner faced a number of charges as a result of fighting and conduct that occurred after he left the infirmary following a post-fight examination. In the Article 78 challenge that he filed after the determination of guilt was affirmed administratively, petitioner argued that the hearing officer had violated his right to call witnesses.

When he met with his employee assistant, the petitioner advised the assistant that he wanted to call three witnesses whom he identified by name. The assistance form indicates that two of the petitioner's requested witnesses refused and one agreed to testify. At the hearing, the hearing officer advised the petitioner that because the two witnesses had refused before the hearing started, neither a witness refusal form nor an explanation of their refusal was required. The hearing officer then said, "If you ask for an additional witness who is not on [the employee assistance form] and that person says no, I don't want to testify, then a form would have to be done in that instance." Petitioner then requested additional witnesses, but did not mention the two witnesses who had reportedly told the employee assistant that they would not testify.

The respondent conceded that when the hearing officer advised the petitioner that he could not re-request the two witnesses who had reportedly refused to testify, the hearing officer had misinformed the petitioner. In fact, he could have asked for these two witnesses and the hearing officer would have required an officer to determine whether they were willing to testify and if not, to ask the witnesses the reason for their refusal. The court therefore found that the hearing officer had violated the petitioner's right to call witnesses.

The second question that the court had to answer was whether the violation was constitutional or regulatory. Violations of an incarcerated individual's right to call witnesses have been divided into two categories: constitutional violations and regulatory violations. The remedy for a constitutional violation is expungement of the charges; the remedy for a regulatory violation is remittal for a new hearing.

In *Matter of Alvarez v. Goord,* 30 A.D.3d 118 (3d Dep't 2006), the court wrote, "a hearing officer's outright denial of a witness without a stated good-faith reason, or lack of any effort to obtain the requested witness's testimony, constitutes a clear constitutional violation." On the other hand, the court continued, citing *Matter of Morris-Hill v. Fischer*, 104 A.D.3d 978 (3d Dep't 2013), "where a good-faith reason for the denial appears on the record, this amounts to a regulatory violation requiring that the matter be remitted for a new hearing."

In this case, the court ruled that the hearing officer's explanation for not investigating the reasons that two witnesses had reportedly refused to testify did not appear to have been in bad faith. Therefore, the hearing officer's misstatement fell within the realm of a regulatory violation. Accordingly, the court annulled the determination and remitted the matter for a new hearing.

Darnell Getfield represented himself in this Article 78 proceeding.

Charge of Smuggling Supported by Substantial Evidence Though No Drugs Were Recovered

Petitioner was found guilty at a hearing related to the charges that an officer had observed him in the visiting room bathroom inserting a balloon into his anal cavity. According to the report, when the petitioner saw the officer enter the bathroom, the petitioner threw a second balloon into the toilet and flushed it. The petitioner filed an Article 78 challenge to the determination that he was guilty of smuggling. He argued that no contraband was discovered and thus substantial evidence did not support the hearing officer's determinations that he had engaged in smuggling and had violated visiting room procedures.

In *Matter of Dunbar v. Annucci*, 173 A.D.3d 1598 (3d Dep't 2019), the court found that the misbehavior report and the testimony of the report's author were substantial evidence of guilt even though no contraband was recovered. The court noted that the report and the testimony were consistent but continued – in an apparent response to an argument made by the petitioner – that "any perceived inconsistencies" created only a credibility issue which it was the hearing officer's job to resolve. In addition, the court held that it was proper for the court to cite to the increased drug use in the prison as a basis for imposing an enhanced penalty.

Ravanel Dunbar represented himself in this Article 78 proceeding.

Sentencing & Jail Time Credit

Jail Time Properly Credited to Previously Imposed Sentence

In 1986, Melvin Moore was sentenced to a term of 10 to 20 years. While on parole from this sentence, on December 27, 1999, Mr. Moore was arrested on new charges and a parole violation warrant was lodged against him. On December 30, the court issued a release order with respect to the new charges. Mr. Moore remained confined due to the parole warrant until December 5, 2001, when Mr. Moore was re-arrested on the new charges. Mr. Moore was convicted of the new charges and sentenced on April 25, 2001.

In *Matter of Moore v. Annucci*, 173 A.D.3d 1630 (4th Dep't 2019), the petitioner argued that the period between December 31, 1999 and December 4, 2001 – 704 days – should be credited to the sentence that he received for the new charges. The court disagreed. It ruled that because petitioner was in custody due to the parole violation warrant during the 704 day period, the credit accrued during this period applied, by operation of law, to the interrupted 1986 sentence, even if, as petitioner argued, he should not have been released on the new charges on December 30, 1999. In support of its conclusion, the court cited Penal Law §70.40(3)(c) and *Matter of Ellis v. Head Clerk Otisville Correctional Facility*, 128 A.D.2d 525, 526-527 (2d Dep't 1987). Penal Law §70.40(3)(c) provides:

"Any time spent by a person in custody from the time of delinquency to the time service of the sentence resumes shall be credited against the term or maximum term of the interrupted sentence, provided:

1 That such custody arose from an arrest or surrender based upon the delinquency. . .”

Based on this analysis, the Appellate Division concluded that the Supreme Court, Monroe County, had properly dismissed the petition.

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Adam Koch of the Wyoming County-Attica Legal Aid Bureau represented Melvin Moore in this Article 78 proceeding.

Parole

Parole Denial Reversed Due to Reliance on Info Not In the Record

In 1977, Steven Garofolo entered DOCCS custody to begin serving a sentence of 25 years to life. Forty-three years later, he was denied parole for the eleventh time. After the denial of his administrative appeal, Mr. Garofolo filed an Article 78 challenge to the Parole Board’s decision. In his petition, Mr. Garofolo argued that the Parole Board’s decision was an abuse of discretion, arbitrary and capricious, affected by error of law, and in violation of lawful procedure. Specifically, Mr. Garofolo argued:

- The Parole Board’s decision was driven by a punitive, backward looking fixation with the crimes that Mr. Garofolo committed rather than with the person he has become in the last four decades and the objectively low risk that he now poses;

- The Board’s preoccupation with the crimes committed 43 years ago to the exclusion of the overwhelming evidence supporting release was improper and amounts to re-sentencing by an agency that lacks sentencing authority;

- The aggravating factors cited by the Board do not provide a rational basis to support its decision;

- The Board’s purported (supposed) reliance on undisclosed opposition to Mr. Garofolo’s release was improper and fails to justify its decision;

- The Board failed to provide non-conclusory individualized reasons for its decision as required by the Executive Law;

- The Board failed to explain its departure from Mr. Garofolo’s COMPAS scores, as is required by the regulations governing decision making by the board; and

- The Board violated Mr. Garofolo’s rights to due process of law.

In *Matter of Garofolo v. NYS Board of Parole*, Index No. 90093-19 (Sup. Ct. Albany Co. July 8, 2019), the court first laid out the basic rules for judicial review of Parole Board decisions:

1. Parole release decisions are discretionary and will not be disturbed so long as the Board complied with the statutory requirements set forth in Executive Law §259-i, citing among other cases, *Matter of Cobb v. Stanford*, 153 A.D.3d 1500, 1501 (3d Dep’t 2017);

2. Given that it is not required to state each factor that it considers, weigh each factor equally or grant parole as a reward for exemplary institutional behavior, when

> reviewing a discretionary parole release determination, the court's role is not to assess whether the Board gave proper weight to the relevant factors, citing among other cases, *Matter of Comfort v. NYS Division of Parole*, 68 A.D.3d 1295, 1296 (3d Dep't 2009);
>
> 3. Rather, the court must determine only whether the Board followed the statutory guidelines and rendered a determination that is supported, and not contradicted, by the facts in the record, citing *Matter of Comfort v. NYS Division of Parole*, 68 A.D.3d at 1296.

In Mr. Garofolo's case, the court found, it was unable to conclude that the Board rendered a determination that is supported and not contradicted by the facts in the record. The reason for this inability was that in the Board's decision, the Board indicated that it had reviewed official and community opposition to Mr. Garofolo's release. In fact, the Board departed from Mr. Garofolo's low risk COMPAS score in favor of the opposition to his release which [the opposition] indicates that release at this time would not be compatible with the welfare of society. Yet the administrative record submitted to the court did not include any statement of opposition to Mr. Garofolo's release. Nor did Mr. Garofolo's counsel receive any such statements in response to a FOIL request for them and the response to the FOIL request did not indicate that any records were withheld based on a perceived FOIL exemption.

The court held that because the Board had expressly relied on opposition to parole release to justify its departure from petitioner's low risk COMPAS score and to support its conclusion that Mr. Garofolo's release was incompatible with the welfare of society, in the absence of the records showing community opposition, the court was unable to conclude that the Board acted in accordance with the statutory requirements. For this reason, the court granted the petition to the extent of vacating the decision and granting a de novo parole release interview before a panel of the Board consisting of members who were not involved with the interview that was the subject of the review.

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Elizabeth Sacksteder and David W. Brown of Paul, Weiss, Rivkind, Wharton & Garrison represented Steven J. Garofolo in this Article 78 proceeding.

Third Department Addresses Whether the BOP Considered Factors Not in Statute

In deciding an application for parole release, the Board of Parole must decide whether there is a reasonable probability that, if [the applicant] is released, he [or she] will live and remain at liberty without violating the law, and that his [or her] release is not incompatible with the welfare of society and will not so deprecate the seriousness of his crime as to undermine respect for the law. In making this determination, the Board must consider the factors set forth in Executive Law §259i(2)(c)(A):

> (i) the [applicant's] institutional record including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy and interactions with staff and inmates;
>
> (ii) [the applicant's] performance, if any, as a participant in a temporary release program;
>
> (iii) [the applicant's] release plans including community resources, employment, education and training and the support services available to the inmate;

(iv) any deportation order issued by the federal government against the [applicant] while in the custody of the department and any recommendation regarding deportation made by the DOCCS Commissioner pursuant to Correction Law §147.

(v) any current or prior statement made to the board by the crime victim or the victim's representative, where the crime victim is deceased or is mentally or physically incapacitated;

(vi) the length of the determinate sentence to which the [applicant] would be subject had he or she received a sentence pursuant to Penal Law §70.70 or a felony defined in Penal Law Articles 220 or 221;

(vii) the seriousness of the [applicant's] offense with due consideration to the type of sentence, length of sentence and recommendations of the sentencing court, the district attorney, the attorney for the [applicant], the pre-sentence probation report as well as consideration of any mitigating and aggravating factors, and activities following arrest prior to confinement; and

(viii) [the applicant's] prior criminal record, including the nature and pattern of offenses, adjustment to any previous probation or parole supervision and institutional confinement.

In *Matter of Payne v. Stanford*, 173 A.D.3d 1577 (3d Dep't 2019), in reviewing the denial of the petitioner's parole application, the appellate court considered whether the Board had impermissibly considered factors not listed in the statute. It concluded that in reaching its decision that there was a reasonable probability that, if the applicant were released, he would not live and remain at liberty without violating the law, and that his release was not compatible with the welfare of society and would deprecate the seriousness of his crime as to undermine respect for the law, the Board had taken the relevant statutory factors into account. Among the factors the Board considered, the court found, were the serious nature of petitioner's crimes, his criminal history, including his failure to comply with conditions of probation, his disciplinary history, his positive program accomplishments, his post-release plans, his sentencing minutes and his COMPAS results that indicated a low risk of felony violence or arrest upon reentry but a high risk of substance abuse.

The petitioner argued that the Board improperly questioned him about what had led him to commit the crimes and why he initially failed to accept responsibility for those crimes. These questions related to factors, the petitioner argued, that were not included among the factors that the Board is required to consider.

The court rejected the petitioner's argument. "While the Board may not consider factors outside of the scope of the applicable statute . . ." the court wrote, "it can consider factors – such as remorse and insight into the offense – that are not enumerated in the statute but nonetheless are relevant to an assessment of whether [an applicant for parole release] presents a danger to the community." As the Board's questions were related to petitioner's remorse, his acceptance of responsibility and his insight into the crimes, the court concluded that they were not improper. Based on this analysis, the court affirmed the lower court's decision denying petitioner's request for parole release.

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Timothy Payne represented himself in this Article 78 proceeding.

Appellate Court Reverses Finding That Petition Was Untimely

In April 2017, Roberto Torres's application for parole release was denied. In December 2017, after the denial was administratively affirmed, Mr. Torres submitted an Article 78 petition to the Supreme Court, Albany County. The respondents moved to dismiss the petition as untimely and the court granted the motion. In addition, the court noted that the petitioner had not preserved the issue that he was raising in his petition – that the appeals unit relied on inaccurate information regarding his criminal history in affirming the Board's denial of parole.

On appeal, in *Matter of Torres v. Stanford*, 173 A.D.3d 1537 (3d Dep't 2019), the respondents conceded that the lower court had erred when it granted the respondents' motion to dismiss for untimely filing. According to the appellate court, the error that the petitioner made – failing to purchase an index number and request for judicial intervention – was subsequently corrected by petitioner. That correction, and the absence of prejudice to the respondents, should have resulted in the lower court excusing the error and deeming the petition timely filed.

Normally, following such a finding, the court would remit the petition to the lower court to allow it to determine the merits. However, in this case, the court, finding that the record adequately allowed the court to determine the merits of the issues briefed by the parties, decided that in the interests of judicial economy, the appellate court would decide the petition.

The court and respondents agreed that the issues raised by the petitioner were adequately preserved because an error introduced by the administrative appeals unit could not have been raised on administrative appeal. Turning to that issue, the appellate court found that the appeals unit had indeed inaccurately reported that petitioner had murdered six, rather than four, people. The court held that "because of the likelihood that such error may have affected the decision to affirm the Board's denial of petitioner's request for parole release, proper administrative review is required." For this reason, the court reversed the judgment of the lower court and remitted to the matter to the Board of Parole for further proceedings.

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Roberto Torres represented himself in this Article 78 proceeding.

Court Dismisses Challenge by Victim's Representative to Parole Release Decision

In April 2018, the Supreme Court, Albany County dismissed an Article 78 filed by the widow of a crime victim which challenged the Parole Board's decision to release Herman Bell to parole supervision. Mr. Bell had been incarcerated following his 1975 conviction for the murder of two police officers. He was serving a sentence of 25 years to life. Mr. Bell had been denied parole 7 times before the Parole Board, following his 8th appearance, granted him release to parole supervision. Prior to Mr. Bell's release, the wife of one of the victims asked the Board of Parole to suspend Mr. Bell's release and conduct a parole rescission hearing. When the Board did not do so, the victim's wife filed an Article 78 proceeding seeking to compel the Board to vacate its release decision and conduct a new hearing. The lower court dismissed the petition due to lack of standing.

On appeal, in *Matter of Piagentini v. NYS Board of Parole*, 2019 WL 3948173 (3d Dep't Aug. 22, 2019), the appellate court noted that the petitioner had first claimed that the Board failed to have and consider her victim impact statement as is required by Executive Law §259-j. After the respondent's answer showed that in fact the Board had considered her statement, the petitioner shifted her argument, contending that the Board "virtually ignored" and "payed little or no heed" to her statement. The appellate court characterized this as an argument that the Board, when rendering its determination, did not accord proper weight to the content of her statement. Essentially, the court found, petitioner abandoned her argument based on a statutory violation – that the Board had failed to consider her statement – and was focusing instead on her claim that the Board's decision was irrational bordering on impropriety, that is, that the Board's discretionary decision releasing Mr. Bell to parole supervision demonstrated irrationality bordering on impropriety.

Turning to the petitioner's argument that she was in a position to challenge the Parole Board's decision, the court found that in fact, petitioner did not have standing to challenge the decision. In general, the court noted, standing is conferred on those who have suffered an "injury in fact that is different in kind and degree from the community generally and where the interest at stake is within the zone of interest sought to be protected by the statute involved." Petitioner argued that she had standing because statues require the Board to give victims an opportunity to make statements regarding the potential parole release of an inmate and the Board is required to consider those statements when rendering a parole release determination. See, Executive Law §259-i(2)(c)(A)(v).

With respect to the petitioner's standing arguments, the court found that in fact the legislature, by only requiring the production of a transcript and a decision when the Board denies release, had established a statutory scheme whereby only incarcerated individuals who were denied parole release were in a position to sue. The absence of a requirement that the Board produce a transcript and a decision when it grants parole indicates, the court wrote, that "the Legislature did not envision the possibility of challenges being raised to determinations granting parole." As the inmate/parolee would not be hurt by a decision granting parole, and no one else has standing to challenge a grant of parole, it makes sense that the Legislature did not require a written record and decision when parole is granted.

Based on its analysis of the statute and regulations, the court concluded that the statute does not anticipate a situation in which a challenge could be brought to a determination granting parole by anyone other than an individual who has been denied parole release. As the petitioner did not have standing to prosecute this challenge to the Board's determination granting parole to Mr. Bell, the court affirmed the Supreme Court's dismissal of the petition.

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Robert Boyle represented Herman Bell, whom the court granted permission to intervene in the appeal of this Article 78 proceeding.

Court of Claims

Court Awards Damages for Wrongful Confinement

On January 6, 2017, the Supreme Court, Albany County, sentenced Clarence Delaney, Jr. to a two to four year term of imprisonment to be executed as a sentence of parole supervision. On February 20, Mr. Delaney was transferred to DOCCS custody where he remained until March 9, when he was transferred to Willard Drug Treatment Center (Willard DTC). Thus, over 30 days passed between the date that the sentence was imposed and the date upon which he arrived at Willard DTC. In addition, more than 10 days passed between when Mr. Delaney went into DOCCS custody and when he was transferred to Willard. DTC.

Criminal Procedure Law §410.91 requires that an individual whose sentence is to be executed as a sentence of parole supervision to remain in a DOCCS reception center for no more than ten days before he or she is transferred to Willard DTC. On February 8, Mr. Delaney notified the staff at Downstate in writing that his sentence was imposed to be executed as a sentence of parole supervision. When he did not get transferred, Mr. Delaney filed a grievance seeking a transfer to Willard DTC. The grievance was denied. Mr. Delaney then filed a petition for a writ of habeas corpus. The court in Seneca County (where Willard DTC is located) found that Mr. Delaney was being illegally detained because he had not been transferred to Willard DTC within 30 days of the judgment imposing the sentence to be executed as a sentence of parole supervision and granted his petition. Mr. Delaney was released on May 11.

After his release, Mr. Delaney filed a claim in the Court of Claims, seeking damages for his wrongful confinement. In *Clarence Delaney v. State of New York*, UID No. 2019-029-034129720 (Ct. Clms. May 22, 2019), the court made the following findings of fact and conclusions of law.

A trial was held at which Mr. Delaney represented himself. Mr. Delany introduced into evidence the decision granting his habeas petition. The decision found that Mr. Delany was judicially sentenced in Albany County on July 12, 2018 to complete the Willard program. He was received by DOCCS on February 20 and transferred to Willard DTC on March 9.

Mr. Delaney also submitted the Sentence and Commitment Order proving that he was sentenced "on January 6, 2012 to 2 to 4 years as a predicate non-violent felony offender/sentence of parole supervision pursuant to CPL §420.91." While this sentence appears in the remarks section at the bottom of the Sentence and Commitment Order, the court found that it constituted the court's sentencing order regardless that above it, in a separate section, no check mark was placed in the box appearing next to the words, "Execute as a sentence of parole supervision (CPL §410.91). Nonetheless, DOCCS personnel incorrectly concluded that Mr. Delaney's sentence was 2 to 4 years, without reference to his sentence of parole supervision.

The court also found that Mr. Delaney properly brought the mistake to the attention of DOCCS personnel but got no relief.

In order to establish a prima facie case of wrongful confinement, a claimant must show:

1. The defendant intended to confine the claimant;
2. The claimant was conscious of the confinement;
3. The claimant did not consent to the confinement; and

4. The confinement was not otherwise privileged.

The court found that Mr. Delaney proved that the defendant intended to confine him, that he was conscious of the confinement, that he did not consent to the confinement and for 92 days his confinement was not privileged. In reaching these conclusions, the court noted that DOCCS is conclusively bound by the terms of the Sentence and Commitment Order that imposed a sentence of parole supervision and ordered that Mr. Delaney be sent to Willard DTC within 30 days of the January 12, 2017 judgment. Mr. Delaney was not sent to Willard until March 9 – 56 days after the judgment – in violation of the Sentence and Commitment Order. This violation, the court found, was the basis for the Seneca County Supreme Court's decision and judgment granting Mr. Delaney's habeas petition. Thus, the claimant submitted prima facie evidence establishing by a preponderance of the evidence that every day of Mr. Delaney's detention after February 11, 2017 – the 30th day – constituted an illegal detention. As he was not released until May 22, the court found that he was illegally detained for 88 days, from February 12 through May 10. In reaching this result, the court rejected the defendant's argument that the detention was privileged because DOCCS relied on the Sentencing and Commitment Order as DOCCS interpreted it. The court found that the Albany County Court had stated plainly in it's Remarks section of the Sentence and Commitment Order that the sentence was to be executed as a sentence of parole supervision. Further, the claimant's evidence showed that beginning with his letter of February 8, the claimant repeatedly informed DOCCS of the terms of the Sentence and Commitment Order.

The court assessed damages for wrongful confinement in the amount of $40.00 per day for a total of $3,520.00.

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Clarence Delaney, Jr. represented himself in this Court of Claims action.

Court Had Jurisdiction to Award Damages for Past and Future Lost Wages

In *Donahue v. State of New York*, 174 A.D.3d 1549 (4th Dep't 2019), the court was confronted with the issue of whether the trial court had improperly ordered the defendant to pay damages for past and future lost wages. The factual context in which the claim arose was as follows.

David Donahue filed a claim against the State of New York after he was injured in a mandatory role playing activity that took place at Cape Vincent C.F. Mr. Donahue claimed that as a result of the negligent supervision of DOCCS employees, during that activity, he sustained injuries to his shoulder, bicep, and elbow. The trial court ruled in favor of Mr. Donahue and granted him damages for past and future lost wages.

On appeal, the defendant argued that the Court of Claims lacked subject matter jurisdiction to award damages for past and future lost wages because the claimant failed to set forth that category of damages in his Claim.

Section 11(b) of the Court of Claims Act provides that a claim must state the time when and place where the claim arose, the nature of the claim and the items of damage or injuries claimed to have been sustained. In *Demonstoy v. State of New York*, 130 A.D.3d 1337 (3d Dep't 2015), the court interpreted this requirement to mean that what is required is not absolute exactness, but simply a statement made with sufficient definiteness to enable the

defendant to investigate the claim promptly and to ascertain its liability under the circumstances. The requirements of Section 11(b) are substantive conditions upon the State's waiver of sovereign immunity such that non-compliance with the statute renders a claim jurisdictionally defective.

Applying this law to the claimant's filings, the court found that it did not lack subject matter jurisdiction over the claim for damages for past and future lost wages because the facts alleged by the claimant were sufficient to apprise the defendant of the general nature of the claim and to enable it to investigate the matter.

In rejecting the defendant's argument, the court noted that the statute requires the claimant to specify the items of damage or injury claimed to have been sustained, and, as relevant to this case, *except in actions to recover damages for personal injury*, the total sum claimed. The natural reading of this statute, the court wrote, requires a claimant to specify the items of damage to property or injuries to person for which the claimant seeks compensation. In this case, the court continued, the claimant sufficiently specified the nature of the claim, the time when and place where the claim arose, and the injuries claimed to have been sustained. Inasmuch as this was an action for damages, the court concluded that the claimant was not required to specify, in total or itemized by category, his claimed items of damage. Damages sought by a claimant for claimed medical expenses or lost wages are matters for the bill of particulars.

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Michael O'Neill of Hodgson Russ LLP, Buffalo, NY represented David Donahue in this Court of Claims action.

Appellate Court Reverses Verdict Finding State Medically Negligent

In 2018, after a **bench trial** (a trial at which the judge, rather than a jury, has the authority to find facts and render a verdict), the trial court found that following an assault by another incarcerated individual, DOCCS was medically negligent with respect to treating Grant Talley's injuries when it did not obtain x-rays of his injured ankle until 17 days after the incident. The appellate court, in *Grant Talley v. State of NY*, 175 A.D.3d 1078 (4th Dep't 2019), ruled that the trial court should have dismissed the claim because the claimant had failed to present expert medical evidence.

In a medical malpractice claim, the trier of fact must decide whether the treatment provided by the defendant deviated from the accepted medical practice. Here, the appellate court wrote, the evidence established that after the claimant was assaulted, he received medical attention and was provided with anti-inflammatory medication and ice. He was later evaluated by a physician and eventually, x-rays were ordered. In the absence of expert medical evidence to show that the treatment that he received deviated from acceptable medical practice, the court ruled, the claim must be dismissed.

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Grant Talley represented himself in this Court of Claims action.

Miscellaneous

Mental Hygiene Law and Regulations Control Service Requirements for Individuals at CNYPC

Mark Marsillett was a patient at Central New York Psychiatric Center when he was served with a complaint and later, when he failed to file an answer, with a motion for a default judgment. A default judgment is appropriate where the defendant has been properly served but fails to answer. After the court granted a default judgment in favor of the plaintiff, the defendant successfully moved to reopen and vacate the judgment, alleging improper service of the complaint.

The regulations of the Office of Mental Health provide that **when a patient in an OMH facility is named as a defendant in a lawsuit, he or she has more protections with respect to the service of law suits than do people who are not living in an OMH facility**. Title 14 N.Y.C.R.R. §§22.2 (a), 22.2(b) and 22.2(c) provide:

(a) The director or officer in charge of a facility shall not permit the service of any legal process upon any patient except upon an order of a New York State court of record or of a Federal court, which order shows that the court had notice of the fact that the person sought to be served was on the date of the order a patient in such facility. The foregoing rule shall not apply to service of the following legal papers, which may be made upon patients without court order:

(1) citations issued by the Surrogate's Court for probate of wills, letters of administration and for final accounting; and for appointment of guardians for mentally-retarded persons;

(2) notice of petition for appointment of a committee or conservator, and notice of final accounting of committee or conservator.

(b) At the time of the service of any process upon a patient, the director or one of his assistants or the officer in charge shall be present and a descriptive note must be entered in the patient's case record. A copy of the process served, together with a copy of the court order, must be filed in the patient's record and an additional copy of such papers must be given to each of the following:

(1) the committee, conservator, or guardian of the patient or, if there be none, to the nearest relative or friend, together with an explanatory letter;

(2) the Mental Health Information Service;

(3) in the case of a State facility, to
(i) the patient resource agent for the facility; and,
(ii) the Department of Law.

The director or officer in charge is responsible for distribution of the legal papers served upon the facility and/or the patient.

(c) In order to comply with the foregoing requirements, the process server shall provide six copies when he makes service on a patient in a State facility and four copies when he makes service on a patient in a private facility.

In *John Peana v. Mark Marsillett*, Index No. CA2017-001290 (Sup. Ct. Oneida Co. July 31, 2019), the court found that when the defendant was served, a director, assistant or officer was not present. Nor did the individual

who served the complaint distribute a copy of the complaint to the defendant's conservator, committee or guardian, the defendant's nearest relative or friend, the Mental Health Information Service, the patient resource agent for the facility or the Department of Law. In addition, the individual who served the complaint did not provide six copies of the complaint to the director to distribute as required 14 NYCRR §2.2(b).

The plaintiff argued that CNYPC did not fall within the Mental Hygiene Law definition of "facility" and therefore the individuals who served Mr. Marsillett did not have to comply with the enhanced service requirements. Title 14 NYCRR §22.1 defines a "facility" as: "a hospital, school, or alcoholism facility, as such terms are defined in the Mental Hygiene Law. Mental Hygiene Law §1.03(10) defines hospital, in relevant part, as: the in-patient services of a psychiatric center under the jurisdiction of the office of mental health . . ."

The court agreed with the defendant that in serving the defendant, the plaintiff was required to comply with 14 NYCRR §22.2. A plain reading of the name of the facility where the defendant resides, the court wrote, demonstrates that this facility falls the definition of a facility as set forth in 14 NYCRR §22.1.

Thus, the plaintiff was required to give 6 copies of the claim to the director or his/her assistant at the time of service so that the facility could document the pending lawsuit. The rules regarding the service of individuals in psychiatric hospitals are intended to ensure that individuals located in these facilities are properly informed of the action and can seek proper legal assistance. Accordingly, the court found, the failure to deliver six copies of the complaint to the director of the facility or his/her assistant constitutes a failure to properly serve the defendant.

Based on this analysis, the court ordered that defendant's motion to reopen and vacate the default be granted.

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Mark Marsillett represented himself in this action for damages.

Court Upholds FRP Denial

In *Matter of Robert Loucks v. Anthony Annucci*, 175 A.D.3d 775 (3d Dep't 2019), the petitioner challenged the Central Office decision to deny his application to participate in the family reunion program (FRP). The case began when the petitioner, who is serving a sentence of 45 years to life for among other offenses, murdering his pregnant girlfriend with whom he was living while he was separated from his wife, applied to participate in the FRP. The application was approved at the facility level. However, pursuant to DOCCS Directive 4500 §IV(C)(3)(7) – which requires a special review if the individual applying for the FRP has been convicted of a heinous or unusual crime – due to the **heinous** (evil) nature of his crimes, Mr. Loucks' application was subject to special review in the DOCCS Central Office. Following the review, petitioner's application was denied. Petitioner appealed the denial and received a decision upholding the denial due to the nature of his underlying crimes, his history of domestic violence, and the instability of his marriage prior to his incarceration. Petitioner than filed an Article 78 proceeding which was dismissed based on the court's finding that the denial of the FRP application was rational.

On appeal, the court first noted that participation in the FRP is a privilege not a right and that the decision as to whether an individual may participate in the FRP is heavily discretionary and will be upheld if it has a rational basis. Here, the court found that the nature of petitioner's crimes, his history of domestic violence and the legitimate safety concerns raised by this history provided a rational basis upon

which to deny the petitioner's request to participate in the FRP.

Accordingly, the court affirmed the Supreme Court's judgment dismissing the petition.

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Robert Loucks represented himself in this Article 78 proceeding.

Substantive Due Process Challenge to Sexual Assault Reform Act Fails

After Fred Johnson was convicted of persistent sexual abuse, he was adjudicated (found by a court) a risk level 3 sex offender. Mr. Johnson's offenses involved adult women. Nonetheless, when he was eligible for parole release, pursuant to the Sexual Assault Reform Act (SARA), Mr. Johnson's status as a level 3 sex offender barred him from having a residence that was located within 1,000 feet of a school. Unable to find an acceptable residence, Mr. Johnson remained confined to a correctional facility. As Mr. Johnson's offenses did not involve children, he sought release through a habeas corpus petition, arguing that the mandatory condition imposed by SARA violates his right to substantive due process. After the Supreme Court, Essex County dismissed his petition, Mr. Johnson appealed the dismissal to the Appellate Division, Third Department.

Addressing Mr. Johnson's argument, the Appellate Division, in *People ex rel. Johnson v. Superintendent*, 174 A.D.3d 992 (3d Dep't 2019), first noted that a convicted felon has no federal or state constitutional right to be released to parole supervision before serving his or her entire sentence. Nonetheless, the court wrote, citing *Matter of Russo v. NYS Board of Parole*, 50 N.Y.2d 69, 73 (1980), Mr. Johnson's open parole release date affords him a "legitimate expectation of early release from prison that cannot be taken away without due process of law." "Parole release," the court continued, "nevertheless remains a statutory grant of a restricted form of liberty prior to the expiration of a sentence . . . and reasonable residential restriction may be imposed as a **condition precedent** (an event or state of affairs that must occur before something else will be required to occur; here the existence of a home that is not within 1,000 feet of a school boundary line). Thus, the court ruled, it was "unpersuaded" that Mr. Johnson has a further liberty interest or fundamental right . . . to be free from special conditions of Parole with respect to his residence.

Where an individual does not have a fundamental right to be free from a special residence condition of parole, the mandatory condition imposed by Executive Law §259c(14) [that individuals convicted of certain specified offenses cannot live within 1,000 feet of a school] satisfies substantive due process when it is rationally related to any conceivable legitimate state purpose. Here, the court found, Executive Law §259-c(14) is intended to protect children from the risk of recidivism by certain convicted sex offenders. This purpose, the court wrote, is furthered by requiring that Level 3 sex offenders not reside within 1,000 feet of a school. The legislature could have limited the prohibition to sex offenders who were convicted of offenses that involved children but had not done so. The court ruled that this was rational because there is a lack of certainty in making the assessment of how likely it is that someone who was convicted of an offense involving an adult will victimize a child. Based on this finding, the court held that Mr. Johnson had not satisfied the heavy burden of showing that Executive Law §259-c(14) is so unrelated to the achievement of any combination of legitimate purposes as to be irrational.

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Denise Fabiano of the Criminal Appeals Bureau of the NYC Legal Aid Society represented Fred Johnson in this Article 70 habeas corpus proceeding.

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