Pro Se

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Court Holds DOCCS' "Correction" of Illegal Sentence Is Unconstitutional

"We cannot countenance a system whereby prison officials implement a sentence in a manner that deviates from the sentence pronounced by the sentencing court on the basis of unchecked conclusions [made by non-lawyers] about the legality of the pronouncement."

In 2006, Byran Francis pled guilty to a state drug charge and to a federal gun possession charge. At the state sentencing, which took place before the federal sentencing, the court imposed a 1½ to 3 year term to be served concurrently with the yet un-imposed federal sentence. Roughly two months later, the federal court imposed a 10 year term and did not state how its sentence related to the previously imposed state sentence. Mr. Francis went directly from local custody to the Bureau of Prisons (federal custody). Although he tried to resolve the issue of serving his state time concurrently with his federal time while he was in federal prison, he was unsuccessful. When Mr. Francis had finished serving the federal sentence, he was transferred to New York State custody to serve his state sentence where DOCCS personnel informed him that he would not receive any credit toward his state sentence for the time that he spent in federal custody.

Mr. Francis remained in NYS DOCCS custody for 4 months until he was able to get the state court that had imposed the state sentence to run concurrently to re-sentence him. The new state sentence allowed for his immediate release from state custody.

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Also Inside . . .

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HUNDREDS OF INCARCERATED NEW YORKERS UNJUSTLY PUNISHED FOR FALSE POSITIVE DRUG TEST RESULTS

A Message from the Executive Director, Karen L. Murtagh

Prisoners' Legal Services of New York (PLS) and Emery Celli Brinckerhoff & Abady LLP (ECBA) have filed a class action lawsuit on behalf of hundreds of incarcerated New Yorkers who were punished for false positive drug test results in 2019.

The lawsuit is filed in the Eastern District of New York. The complaint alleges that the false positives were the result of a systemic problem with new urinalysis analyzers (Indiko Plus machines) installed in New York prisons at the end of 2018 pursuant to a contract with Defendant Microgenics Corporation.

Microgenics was responsible for providing, installing, maintaining, and training correction officers on the new Indiko Plus urinalysis analyzers. Microgenics is the subsidiary of Defendant Thermo Fisher Scientific, Inc., a publicly traded company that markets itself as the manufacturer of the Indiko Plus machines.

The complaint alleges that due to Microgenics' negligent failure to ensure that the urinalysis analyzers generated accurate results, hundreds of incarcerated New Yorkers tested positive for Suboxone/buprenorphine even though they had not consumed Suboxone/buprenorphine or any other prohibited substance.

Based on false positive test results generated by the Indiko Plus machines, DOCCS subjected class members to discipline, including weeks or months of solitary confinement or keeplock, loss of family visitation, and loss of other privileges. In some cases, individuals who had open dates for conditional or parole release were held in prison months beyond their scheduled release dates because of the faulty test results.

Many of the individuals who received false positives, including Plaintiff Nadya-Steele Warrick, were participating in the DOCCS's Family Reunification Program, a program that allows incarcerated individuals with excellent behavioral records to spend time with their families.

After Ms. Steele-Warrick received a false positive drug test result, she was removed from the Family Reunification Program and denied the opportunity to spend time with her husband and six-year old son. She was also sentenced to time in keeplock, removed from preferred housing, and lost recreation, commissary, packages, and other privileges. Prior to her false positive result, Ms. Steele-Warrick had a pristine disciplinary record, served as a teacher's assistant, and taught gym classes for other women in her prison.

DOCCS is conducting an investigation into the wrongdoing.

If DOCCS reversed a determination that you used Suboxone/buprenorphine between December 1, 2018 and August 31, 2019 and you would like to know more about the lawsuit, please contact Nicole Jolicoeur in our Albany office. The address for the Albany office is on page 16 of this issue.

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Following his release from DOCCS' custody, Mr. Francis filed a lawsuit in the Northern District of New York, claiming that by holding him in state custody rather than releasing him upon the expiration of his federal sentence, four DOCCS employees had violated his Fourteenth Amendment rights. The district court agreed that the defendants' conduct had violated the Fourteenth Amendment and rejected the defendants' claim that they were entitled to qualified immunity. The defendants appealed both conclusions to the Court of Appeals for the Second Circuit.

In *Frances v. Fiacco,* 2019 WL 5876504 (2d Cir. Nov. 12, 2019), the Second Circuit first set forth the facts of the case and then analyzed the issue of whether the defendants had violated the plaintiff's Fourteenth Amendment rights and the issue of qualified immunity. [The Court also considered several other legal issues which are not reported here, including whether the defendants conduct violated the Eighth Amendment].

Facts

Mr. Francis (the plaintiff) first pled guilty in the Supreme Court of Erie County to a drug possession charge and was sentenced to 1½ to 3 years. At the time of the sentencing, the court knew that there were related federal charges pending against the plaintiff and therefore stated that the state sentence was to run concurrently to the yet to be imposed federal sentence. Soon after his sentencing, Mr. Francis went into federal custody to be sentenced in the Federal District Court for the Western District of New York. Roughly two months after Mr. Francis had been sentenced in state court, the federal court sentenced him to 120 months (10 years) and 5 years supervised release. The plaintiff was then transferred to federal prison to begin serving the federal sentence.

The federal court judge did not direct that the federal sentence run concurrently to the state sentence, thereby making the federal sentence consecutive to the state sentence as a matter of law. See 18 United States Code Annotated §3584(a). Section 3584(a) provides that "[m]ultiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently."

The New York State Penal Law §70.30(2-a) provides that state courts do not have the **authority** (power) to direct that a state sentence run concurrently with a sentence from another jurisdiction unless the sentence from the other jurisdiction has already been imposed. While Mr. Francis was in federal prison, due to the requirements of New York State Penal Law §70.30(2-a), the defendants made the decision to ignore that portion of the state sentence that required the state sentence to run concurrently to the federal sentence, computed the state sentence to run consecutively to the federal sentence and to operationalize that decision, filed a detainer with the Bureau of Prisons so that when the plaintiff was released, he would go into New York State custody.

When in 2007, the plaintiff learned that DOCCS had filed the detainer, he wrote to Defendant Fiacco asking that the detainer be removed. She did not respond to his letter. Two years later, the plaintiff wrote the state sentencing court about the issue. The court's attorney responded that the court could not help him in the absence of a formal motion or petition and that he should make a motion or file a petition seeking "specific relief" and upon his release from federal prison, he could "challenge [his] detention in the appropriate court." (With respect to this advice, the *Francis* court noted that the New York Penal Law gives sentencing court's the inherent power to correct an illegal sentence).

In 2010, the plaintiff again asked the state defendants to lift the detainer, enclosing his state sentencing minutes with the request. A state defendant responded that it was the Department's policy to run such sentences consecutively when there is no previously imposed sentence with which the new sentence can run concurrently: "The Penal Law does not allow a sentence to run concurrently with a term of imprisonment that has not yet been imposed," and noted, "Your state sentence will not commence until you are received by [DOCCS] . . ."

In 2012, the plaintiff filed a motion pursuant to NYS Criminal Procedure Law Article 440 to have his sentence set aside. Section 440.20(1) provides

that a sentence can be set aside when it is unauthorized, illegally imposed or otherwise invalid as a matter of law. The motion was denied because Mr. Francis had failed to allege that the sentence was illegal or unauthorized. The court suggested that Mr. Francis bring an Article 78 or Article 70 (Habeas) proceeding if he is placed into DOCCS custody after completing his federal sentence. The plaintiff twice sought relief from the state defendants after his 440 motion was denied but did not receive a response.

In 2013, the plaintiff was released from federal custody and transferred to NYS DOCCS custody. DOCCS computed his maximum expiration date as November 26, 2015.

Immediately upon entering DOCCS custody, the plaintiff, now represented by counsel, sought resentencing. The sentencing court acknowledged that the originally imposed sentence was not authorized and, by changing the term of the sentence and setting the date upon which the sentence began to run after the date upon which the federal sentence was imposed, succeeded in giving the plaintiff a sentence that ran concurrently with the federal sentence. When DOCCS recalculated the plaintiff's sentence, his maximum expiration date was July 29, 2009; he was immediately released from DOCCS' custody. Six months later, he filed this lawsuit against four DOCCS employees, seeking compensatory and punitive damages.

The Law and Its Application

Fourteenth Amendment Claim

The Court first considered whether the plaintiff had a liberty interest in being released in accordance with the terms of the state sentence. According to *Calhoun v. NYS Division of Parole Officers*, 999 F.2d 647, 653 (2d Cir. 1993), "[A]n inmate has a liberty interest in being released upon the expiration of his maximum term of imprisonment." "The general liberty interest in freedom from detention," the Court wrote, "is perhaps the most fundamental interest that the Due Process Clause protects." Thus, in addition to when he is convicted or sentenced, a prisoner's liberty interest in freedom from detention **implicates** (involves) the Due Process Clause of the Fourteenth Amendment when prison officials interpret and implement the sentence.

In *Francis*, because the sentence imposed was not authorized by New York law, the defendants, in computing the sentence, did not use the sentence originally imposed. The defendants' decision to compute the sentence in a manner that differed from the sentence imposed by the court implicated a liberty interest of the highest order. For this reason, the Court continued, the Due Process Clause required them to provide certain procedural protections to safeguard the plaintiff's liberty interest in avoiding future incarceration.

What Does the Due Process Clause Require in these Circumstances?

In *Matthews v. Eldridge*, 424 U.S. 319 (1976), the U.S. Supreme Court ruled that once an individual has been determined to have a liberty interest in a certain status – here release when a properly imposed sentence expires – to determine how much process he or she is due before that liberty interest can be altered, the court must consider three factors. The factors are:

1. The private interest that will be affected by the official actions;
2. The risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and
3. The government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedures would entail.

The private interest at stake in this case was the plaintiff's interest in timely release from prison. This interest, the U.S. Supreme Court stated in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), is "the most elemental of liberty interests." On this basis, the *Francis* Court found that the liberty interest at stake was "an interest of the highest order."

The Court then considered the risk of mistakenly depriving the plaintiff of his liberty interest in timely release from prison using the procedures that DOCCS admitted to having used and the value of adding other steps to the process. Here, given the complexity of the sentencing laws, the number of non-lawyers within DOCCS who interpret those laws, and the Department's practice

of placing the understanding of non-lawyers' interpretation of the law above the sentences imposed by judges, the Court found that the risk of error was unacceptably high. "We cannot countenance a system," the Court wrote, "whereby prison officials implement a sentence in a manner that deviates from the sentence pronounced by the sentencing court on the basis of unchecked conclusions about the legality of the pronouncement."

Turning to the final consideration – whether the process in place was adequate to protect the interest that was at stake – the defendants argued that the process was adequate. They had notified the plaintiff that they could not implement the state court's order to run the sentences concurrently and the plaintiff had acted on the information that they gave him, i.e., he contacted the state court judge. The Court rejected this argument, writing, "[A]s the facts above make clear, the mere provision of notice to a prisoner is grossly inadequate to safeguard his liberty under these circumstances." The Court went on to point out that the plaintiff contacted the sentencing judge but instead of reviewing his situation, the court responded by erecting a "Kafkaesque sequence of roadblocks and pre-requisites to consideration of his claim." The Court found that notifying a prisoner that his liberty might be in jeopardy and placing on him the burden of navigating the legal system from his prison cell without a lawyer does not satisfy the requirements of the due process clause.

The Court found that the value of additional procedural safeguards was high.

The Court ruled that upon noticing the issue with the plaintiff's sentence, the DOCCS officials should have notified the sentencing judge, the District Attorney and the defendant's criminal defense attorney about the sentencing irregularities. The Court held that using these procedures would have no fiscal or administrative impacts on the government because Correction Law §601-a already requires DOCCS to notify the sentencing court, the prisoner's defense counsel and the district attorney of the county in which the sentencing took place when it appears that the prisoner has been erroneously sentenced.

Qualified Immunity

Qualified immunity is a legal principle that protects defendants from financial liability for conduct that is later held to be unconstitutional. A court will find that a defendant is qualifiedly immune when the law that a plaintiff alleges the defendant violated was not clearly established at the time that the defendant engaged in the challenged conduct. "[Q]ualified immunity," the Court wrote, "gives government officials breathing room to make reasonable but mistaken judgments about open legal questions and protects all but the plainly incompetent or those who knowingly violate the law.

To defeat a claim of qualified immunity, the plaintiff must plead facts showing that:

(1) the [state defendant] violated a federal statutory or constitutional right; and

(2) that the right was 'clearly established' at the time of the challenged conduct.

Here, in the first part of the decision, the Court found that the state defendants had violated the plaintiff's Fourteenth Amendment right to due process of law. The next question that the Court was required to address was whether there were U.S. Supreme Court or Second Circuit decisions establishing the illegality of the defendants' conduct, such that they knew when they engaged in the conduct, that they were violating the plaintiff's rights.

The Court pointed to two decisions which had bearing on the issue of state actors who interfered with sentencing decisions. In the first, *Hill v. U.S. ex rel. Wampler*, 298 U.S. 460 (1936), the court's sentence included fines and costs, to which the court clerk added that the defendant would remain in custody until the payment of the fines and costs. The Court struck the condition added by the clerk because it had been imposed by the clerk and not by the court. In doing so, the Court commented, "[t]he only sentence known to the law is the sentence or judgment entered upon the records of the court."

In the second decision, *Earley v. Murray*, 451 F.3d 71 (2d Cir. 2006), DOCCS added a term of 5 years of post-release supervision to the 6 year sentence imposed by the court. In finding that the

defendants had unlawfully added the term of post-release supervision, the Court concluded that *Wampler* stood for the proposition that "the only cognizable sentence is the one imposed by the judge," and that "[a]ny alterative to that sentence, unless made by a judge at a sentencing procedure is of no effect."

The *Francis* court ruled that for two reasons, the *Wampler* and *Earley* decisions did not clearly establish the unconstitutionality of the state defendants' conduct with respect to the plaintiff's sentence. First, the Court wrote, these decisions concerned the administrative addition of elements to a defendant's sentence that were not in the sentence imposed by the court. In *Francis*, the state defendants did not add any conditions; rather, the defendants refused to honor the court's direction as to the relationship of two sentences – that the state sentence should run concurrently to the yet to be imposed federal sentence – because that relationship was invalid as a matter of law.

The second reason that the illegality of the defendants' conduct was not clearly established by the *Wampler* and *Earley* decisions was that in neither of those cases was the court considering the relationship between two sentences, one state sentence and one federal sentence. This arrangement, the Court wrote, may involve consideration of issues of federalism. Thus, the *Francis* court held, "whatever *Wampler* and *Earley* establish with respect to the administrative alteration of sentences, they do not speak clearly to a situation like this one, which presented DOCCS with complicated considerations not addressed in those prior cases.''

Finally, the Court pointed to the decision in *Sudler v. City of New York*, 689 F.3d 159 (2d Cir. 2012). In *Sudler*, the plaintiff pleaded guilty in state court and the court imposed a 9 month sentence to run concurrently with a pre-existing felony sentence. After the plaintiff served 9 months in local custody, he was transferred to state custody to serve the remainder of his previously imposed felony sentence. DOCCS refused to reduce the time owed on the felony sentence by the 9 months that the plaintiff had served on the sentence relating to the new conviction. In *Sudler*, the Second Circuit held that the defendants were entitled to qualified immunity because "neither *Earley* nor *Wampler* addresses a situation . . . involving not one sentence but the relationship between one sentence and another sentence imposed by a different judge in a separate proceeding."

Based on its reading of *Wampler*, *Earley* and *Sudler*, the Court held that it could not say that "every reasonable official would interpret [*Wampler* and *Earley*] to establish the unconstitutionality of the State Defendants' conduct in this case." For this reason, the Court found that the state defendants were entitled to qualified immunity.

Brian Quinn of Tabner, Ryan & Keniry, LLP, Albany NY, represented Byran Francis in this Section 1983 action.

NEWS & NOTES

Pro Se Now Available on Your Tablet

We have recently learned that the October 2019 issue of Pro Se is on your tablets. It is our understanding that the December issue will also soon be placed on your tablets. Please let us know if you are able to view Pro Se on your tablets and what you think of this system for distributing our newsletter. Send your comments to Betsy Hutchings, Editor, Pro Se, Attn: Pro Se on Tablet, 114 Prospect Street, Ithaca, NY 14850.

LETTERS TO THE EDITOR

Dear *Pro Se* Editors,

I have been reading *Pro Se* for almost twenty years. Sometimes it's the only mail I get. Recently, I won an award for the first time in the NYS Court of Claims. It was a modest amount, but I am proud of it because it was the most that I could have legally received.

I want you to know that *Pro Se* has always had an impact in my life. Reading *Pro Se* from cover to cover over the years has helped me understand a lot about the criminal justice system. Most importantly, however, it taught me that I don't always have to inhabit a fixed position in the legal process. I can also be a vehicle for change if I should so choose. The victory I achieved [see article in **Pro Se Victories** column], is not a big one in terms of monetary value. However, in terms of morale and mettle, this is a shining moment because it marks a turning point for me; one where I change from viewing myself as an object in a self-perpetuating cycle of negativity to realizing my agency. Fighting for what I believe in and what's right has such a transformative effect. Through high regard for the law I was elevated by a sense of dignity. Indeed, I owe a great debt to all of you at *Pro Se* who are fighting the good fight. Thank you so much for your motivation. Now, back to work!

Yours,

Conrad (Marhone)

To Whom It May Concern:

I recently received a reversal and expungement of a Tier II hearing that was written against me. The ticket accused me of mouthing off to an officer when he ordered that I get on the wall for a pat frisk. My lawyer filed an Article 78 challenge for me. The matter did not make it to a judge because DOCCS decided to reverse and expunge before the judge could rule.

I just want to say to all litigants, do not give up the good fight even when it appears the deck is stacked against you. I was hit at the parole board specifically because of this ticket. Now I'm looking forward to a *de novo* hearing.

Sincerely,

Ronald Clark
Woodbourne C.F.

Letters to the editor should be addressed to: ***Pro Se***, 114 Prospect Street, Ithaca, NY 14850, ATTN: Letters to the Editor.

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

PRO SE VICTORIES!

***Conrad Marhone v. State of New York*, Claim No. 127175 (Court of Claims August 27, 2019). After a bench trial, the court found that the negligence of DOCCS employees resulted in the loss of the claimant's television and awarded him the cost of the television, reduced by depreciation.** At his trial, Mr. Marhone proved the following. In 2013, Mr. Marhone bought a 13 inch television for $147.00. Roughly a year later, after he was found guilty at a Tier III hearing, Mr. Marhone went to SHU for six months and his television was placed in storage. When he was released from SHU, Mr. Marhone paid $9.45 to ship the television to the prison where he was then living. A month after he arrived at the new prison, he received a television sent to him from Attica C.F, but it had a different serial number than the television that Mr. Marhone had purchased and it was broken. Mr. Marhone filed an institutional claim, seeking the purchase price of the television and the postage that he paid to ship it. After he exhausted his administrative remedies, he filed a claim in Court of Claims.

At trial, Mr. Marhone testified that his television was six months old and in "pristine" condition. The court found that in fact Mr. Marhone had had the television for nine months and accepted his testimony regarding the condition of the television. The State acknowledged that it had lost Mr. Marhone's television. The court awarded Mr. Marhone $137.00 for the television and $9.45 for the postage he paid to send the television to his new prison. In addition, the court ordered that the State reimburse Mr. Marhone if he paid a filing fee

***Conrad Marhone v. State of New York*, Claim Number 128684 (Court of Claims. Oct. 9, 2019). At a trial relating to allegations of improper deductions from Conrad Marhone's commissary account, Mr. Marhone entered several contradictory responses from DOCCS staff concerning why $83.25 had been deducted from his account. The court, noting that the contradictory responses had the "clumsy appearance of malfeasance," found that the defendant had not complied with its own Directives with respect to the deduction and held that the $83.25 had been improperly deducted from the claimant's account.** The court noted that at the trial, the claimant was "organized, articulate and polite."

***Matter of David Davey v. Anthony Annucci*, Index No. 2161-19 (Supreme Court, Albany Co. __/__/____). In this Article 78 action, David Davey successfully challenged a Tier III hearing due to the hearing officer's failure to call witnesses.** After he served the respondent and the Attorney General, the Assistant Attorney General responsible for the case notified the court that the respondent would not be submitting an answer because the hearing had been administratively reversed.

***Matter of Bernabe Encarnacion v. Anthony J. Annucci*, Index No. 19-957 (Supreme Court, Ulster Co. July 26, 2019). After Bernabe Encarnacion filed and served an Article 78 challenge to a Tier III hearing and the respondent notified the court that it was unable to produce a complete record of the hearing, the court ordered the hearing annulled as the petitioner had already served the penalty imposed at the hearing.** The court did not allow the respondent to hold a re-hearing. After the issuance of the decision, the Director of the Office of Special Housing/Inmate Discipline issued a memo requiring the expungement of all references to the hearing.

***People v. Cesar Bernacet*, Indictment No. 18-218 (County Court, Greene Co. Aug. 12, 2019). Indictment dismissed with leave to re-present due to DA's failure to allow Cesar Bernacet to testify before the grand jury.** While Cesar Bernacet was at Greene C.F., he was indicted for promoting prison contraband in the first degree, a class D felony. At his arraignment, Mr. Bernacet stated that he wanted to represent himself. After questioning Mr. Bernacet, the court ruled that he could proceed pro se. Mr. Bernacet then moved to dismiss the indictment because he was not afforded an opportunity to testify before the grand jury. In support of this motion, he submitted copies of two letters advising the DA that he wanted to testify before the grand jury. He testified that he had sent the letters to the Greene County District Attorney. The DA denied ever having received the letters, whereupon Mr. Bernacet proposed getting legal mail logs from DOCCS.

The court resolved the issue in Mr. Bernacet's favor, finding that "the defendant's demeanor and his desire to have DOCCS log books or records scoured for corroborative evidence" convinced the court that Mr. Bernacet had sent notice of his desire to testify before the grand jury. The court therefore ordered the indictment dismissed, with leave to re-present. The court also ordered that if the DA re-presents the matter to the grand jury, the Office of the Greene County Public Defender be appointed to advise the defendant about his decision to testify. Finally, the court authorized the public defender to be present with Mr. Bernacet, in a manner consistent with Criminal Procedure Law Article 190, should he decide to testify before the grand jury. Criminal Procedure Law §190.52 authorizes witnesses in grand jury proceedings to be advised by their attorneys; §192.52 prohibits the attorney from having any other role during the grand jury proceedings.

***Matter of Rafael Martinez v. Superintendent of Green Haven C.F.*, Index No. 613/2019 (Supreme Court Dutchess County Oct. 4, 2019). Court orders petitioner re-admitted to Earned Housing Unit (EHU).** Following the decision to remove Rafael Martinez from EHU, Mr. Martinez appealed the decision to the Superintendent. Not having received a response to his appeal, Mr. Martinez appealed to the Central Office Review Committee (CORC), which upheld the Superintendent's decision based on "the reasons stated" in the original decision. Mr. Martinez then filed an Article 78 challenge to the removal decision arguing that the determination was arbitrary and capricious and an abuse of discretion.

The respondent, pointing to the Directive 4023(iii)(D)(4) argued that the Superintendent can remove inmates from EHU in his or her discretion because assignment to EHU is a privilege not a right.

Whether a decision is arbitrary and capricious, the court wrote, is based on whether there is a sound reason for the determination made in consideration of the facts. It is well settled that administrative acts that have a disproportionate result so as to shock one's sense of fairness constitute an abuse of discretion.

Here, the court found, the respondent provided no factual basis for removing the petitioner from the EHU other than the assertion that the removal was within the Superintendent's discretion. Thus, there was nothing for the court to review. Based on these facts, the court wrote, it appears that petitioner was removed from the EHU because removal was possible and not because it was necessary.

Placement in EHU, while a privilege, is an earned privilege, the court wrote, "as the inmates must make every effort to keep an outstanding record, adhere to all program directives, etc., to even be considered for EHU." Given the effort that must be made to become eligible for EHU, the decision to allow someone into the unit should not be reversed without a factual basis. Here, the petitioner had been in the EHU since January 2013 without any problems. To be removed after four years without a stated reason, simply because the Superintendent has the authority to do so, the court found, is disproportionate. Further, the court wrote, decisions made without a sound reason, without consideration of the facts are arbitrary and capricious. Here, given that no facts were considered as a basis for the exercise of the Superintendent's decision, "the Courts deem the determination to also be an abuse of discretion."

Based on this analysis, the court granted the petition and directed the respondent to reinstate petitioner to the EHU "upon the date of this Decision and Order."

***Bernard Patterson v. State of New York*, Claim No. 132364 (Court of Claims April 25, 2019). Court finds that as alleged by the claimant, the defendant was responsible for losing Claimant's property and awards damages.** While residing at Elmira C.F., Bernard Patterson was transported to the outside hospital and then to SHU. Upon his admission to SHU, he noticed several items of property were missing and filed a claim. The claim was denied, as was Mr. Patterson's appeal from the denial. He then filed a claim in the Court of Claims, followed by a motion for summary judgment that the defendant opposed.

To his motion for summary judgment, Mr. Patterson attached an affidavit detailing that when he entered SHU, his television, radio, adaptor, headphones and a hotpot were missing from his property. He included copies of permits for the items, receipts indicating the purchase price and date, and an Elmira Proof of Ownership Form listing a radio, headphones, a Hot Pot, an adaptor, a television set and an extension cord. He also attached the documents showing that he had exhausted administrative remedies. Based on his submissions, the court found that Mr. Patterson had met his burden of establishing entitlement to judgment as a matter of law.

The court then turned to the defendant's opposition papers. The defendant argued that the claimant's I-64 form supported a finding that the items that the claimant said were lost or stolen were actually inventoried and placed in his property bag. However, the court found, the I-64 form that the defendant submitted did not document the claimant's property. Rather, it pertained to the property of another individual whose last name was Patterson, but who had a different DIN. Because the supporting evidence "[was] clearly not related to claimant," the court did not consider it or the defendant's position that some of the claimant's purported lost property was not missing.

As claimant's assertions that his property was in his cell when he was transported to the hospital and was thereafter missing had not been contradicted by anyone with personal knowledge of the facts or by any relevant documentary evidence the court ruled in favor of the claimant.

The court reviewed the value of the missing property and awarded the claimant $200.00 plus interest from September 18, 2018, the date on which

the claimant became aware that the property was missing.

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 & Administrative Segregation Hearings

Hearing Officer's Denial of Witnesses Leads to Re-Hearing

According to a Misbehavior Report filed by a female correction officer, after Marquis Parker three times over the course of one afternoon initiated inappropriate contact with her, she charged him with interfering with an employee, harassment, refusing a direct order, stalking and being out of place. She alleged that Mr. Parker first left the law library to talk to her in the media center about personal matters. She advised him to return to the law library. A few minutes later, he returned to her desk and commented on her hair. The officer again told him to leave. He returned a third time to ask about her birthday.

At the hearing concerning the charges, Mr. Parker requested as witnesses the two individuals who were in the cells on either side of his cell. Mr. Parker argued that these individuals would testify that he was in his cell on the date and at the time that the officer alleged he had been harassing her. The hearing officer denied the request, finding that the testimony of the proposed witnesses would not be relevant. The hearing officer found Mr. Parker guilty of the charges. On administrative appeal, the Office of Special Housing and Inmate Discipline dismissed the charge of refusing a direct order. Following the Department's decision of his administrative appeal, Mr. Parker filed an Article 78 proceeding, asserting that the determination of guilt was not supported by substantial evidence and that the hearing officer had violated his right to call witnesses. Because the petition raised an issue of substantial evidence, the proceeding was transferred to the Appellate Division for judicial review.

In *Matter of Parker v. Annucci*, 175 A.D.3d 1682 (3d Dep't 2019), the court found, with the agreement of the respondent, that substantial evidence did not support the charge of interfering with an employee or stalking. The court also found that the charges of refusing a direct order and harassment were supported by substantial evidence. Because Mr. Parker had already completely served the penalty imposed at the hearing, the court directed that the two determinations of guilt that it found were not supported by sufficient evidence be reversed and all references to the charges be expunged from Mr. Parker's prison records.

The court also held, and again the respondent agreed, that the hearing officer's denial of Mr. Parker's proposed witnesses violated his right to call witnesses. In so holding, the court found that the potential testimony of the two witnesses highly relevant to petitioner's defense that he was in his cell at the time of the incident. However, because the hearing officer had given a "good faith" reason for denying the testimony, the court found that the remedy was to remit the case for a new hearing on the two remaining charges.

Marquis Parker represented himself in this Article 78 proceeding.

Sting Operation Leads to Misbehavior Report for Smuggling and Possessing Contraband

A DOCCS investigator received information that Otis Caine, a porter involved in cleaning Family Reunion Program (FRP) trailers, was involved in a plan to smuggle DVD movies from an FRP trailer into the prison. After finding DVDs

under a bed in one of the trailers, the investigator charged Mr. Caine with smuggling, possessing contraband and violating FRP procedures.

At the hearing, the investigator testified that he had spread a substance on the floor under the bed where he had found DVDs. A chemical in the substance glows when exposed to ultraviolet light. The investigator testified that after the contraband had been removed and the substance put on the floor, he interviewed Mr. Caine and that his arm glowed under the ultraviolet light, indicating that he had tried to retrieve the contraband. The hearing officer found Mr. Caine guilty of the smuggling and possessing contraband but not guilty of violating FRP procedures.

After exhausting his administrative remedies, Mr. Caine filed an Article 78 proceeding asserting that the respondent had failed to fully record the hearing, that the hearing was not supported by substantial evidence and the charges were retaliatory.

In *Matter of Cain v. Lee*, 175 A.D.3d 1702 (3d Dep't 2019), the court ruled that the transcript of the hearing indicated that there were only minor inaudible portions and they were not so significant as to preclude meaningful review. The court found that the investigator's testimony, the misbehavior report and the related documentation were sufficient evidence to support the determination of guilt. The court held that the question of whether the charges were retaliatory was a question of credibility which was within the hearing officer's discretion. Based on its analysis, the court confirmed the determination of guilt and dismissed the petition.

Otis Caine represented himself in this Article 78 proceeding.

Failure to Serve Petition As Directed in OSC Results in Dismissal of Action

In *Matter of Simpson v. Annucci*, 175 A.D.3d 1694 (3d Dep't 2019), the petitioner appealed from a lower court order dismissing his Article 78 challenge to a Tier III hearing. In this case, the Supreme Court, Albany County, issued an order to show cause directing the petitioner to serve the signed order to show cause, the petition exhibits and any supporting affidavits on the respondent and the Attorney General. The respondent moved to dismiss, asserting that the petitioner had failed to properly serve him. Petitioner opposed the motion, asserting through affidavits that he had mailed a copy of the order to show cause in the materials mailed to the respondent.

Faced with conflicting affidavits on the issue of proper service, the court ruled that it would hold a hearing on the issue of whether the petitioner had properly served the respondent unless the respondent waived the hearing and consented to an extension of time for petitioner to complete service. The respondent consented to the extension of time and the court ordered the petitioner to serve the respondent with a copy of the order to show cause by a certain date, and within 10 days of that date, to submit an affidavit of service to the court.

Roughly a month later, not having received the affidavit of service, the court contacted the parties. After receiving responses, the court dismissed the petition due to petitioner's failure to serve the respondent as directed in its order.

On appeal, the Third Department first noted that "it is well established that failure of an inmate to comply with the directives set forth in an order to show cause will result in dismissal of the petition unless the inmate demonstrates that imprisonment presented obstacles beyond his or her control which prevented compliance. It found that the affidavit of service filed by the petitioner stated that on June 27, 2019, he had served the respondent "Affidavit/Affirmation with exhibits." The petitioner had filed nothing in response to the court's second order with respect to service (issued following the respondent's waiver of hearing).

In the absence of any indication that incarceration presented an obstacle beyond the petitioner's control that prevented him from complying with the court's orders, the Third Department found that the petition was properly dismissed.

Theodore Simpson represented himself in this Article 78 proceeding.

Sentencing & Jail Time

Court Rejects Article 78 Challenge to Sentence Calculation

In 1987, Ajamu Olutosin was convicted of two counts of murder in the second degree (intentional and felony murder), one count of attempted murder in the second degree, and two counts of robbery in the first degree. The court imposed the following sentences:

- Murder in the second degree, 2 counts: 25 years to life on each count;
- Attempted Murder: 8 to 25 years;
- Robbery in the first degree, 2 counts: 12½ to 25 on each count.

The court imposed the two murder sentences to run concurrently. All of the other sentences were consecutive to the murder sentences and to each other.

Because Mr. Olutosin had a maximum term of life, the consecutive nature of the sentences only effected his minimum term. Pursuant to the original sentence, his minimum term was 58 years.

In 2003, the appellate court ruled that the sentences for the two robbery convictions had to run concurrently with the felony murder conviction but that the sentences for the attempted murder conviction and both robbery convictions could run consecutively to each other and to the sentence for the intentional murder conviction. This ruling did not change the aggregated minimum term of Mr. Olutosin's sentence.

After the court resentenced him, Mr. Olutosin challenged DOCCS' calculation of his sentence, asserting in an Article 78 proceeding that the Sentence and Commitment Order did not reflect the sentence that the court actually imposed in 2003.

In *Matter of Olutosin v. Annucci*, 174 A.D.3d 1262 (3d Dep't 2019), the court affirmed the Supreme Court's dismissal of the petition. In support of its ruling, the court wrote, citing *Middleton v. State of New York*, 54 A.D.2d 450 (3d Dep't 1976), "DOCCS is conclusively bound by the contents of commitment papers accompanying a prisoner and cannot add or detract from them." Thus, the court continued, citing *Matter of Jackson v. Fischer*, 132 A.D.3d 1038 (3d Dep't 2015), "In order to effectuate a change in the commitment papers, petitioner must pursue an appropriate proceeding before the sentencing court.

_____

Ajamu Olutosin represented himself in this Article 78 proceeding.

Court Rejects Challenge to Second Felony Offender Status

In 2016, the defendant in *People v. Thomas*, 175 A.D.3d 1614 (3d Dep't 2019), pled guilty to attempted assault in the second degree. He was sentenced as a second felony offender. On appeal, the defendant argued that his guilty plea was not knowing, voluntary and intelligent. The appellate court found that the during the plea **allocution** (proceeding at which the defendant admits guilt to each element of the crime), the County Court "promptly corrected any mis-statements about the terms of the plea agreement" and held that the defendant had not preserved the claim that he was raising by moving to withdraw his guilty plea prior to sentencing although he had ample opportunity to do so.

Further, the court wrote, the record did not reflect any material deficiency in the plea allocution and the defendant did not make any statements that negated his guilt or called into question the voluntariness of his plea.

The court went on to address the defendant's claim that he had been wrongfully sentenced as a second felony offender. First, the court found, the County Court had made clear that the plea agreement required that he be sentenced as a second felony offender and the defendant had agreed to that term. While the defendant argued that his prior convictions were wrongful, he acknowledged that with the exception of a habeas petition, he had completed all of the possible avenues for challenging those convictions. At the plea allocution, the County Court advised the defendant that he could bring a habeas petition and, if he were successful, those

convictions would be overturned and he could return to the County Court to be resentenced as a first felony offender. The defendant then accepted the terms of the plea agreement, pleaded guilty and admitted the noticed predicate convictions.

In apparent response to an argument made by the defendant, the court stated that the County Court had no obligation to advise the defendant that he had a right to challenge the constitutionality of the prior convictions.

As defendant had not requested a hearing or objected to being sentenced as a second felony offender, the court ruled, the County Court appropriately sentenced him as a second felony offender without holding a hearing.

Based on this analysis, the court found that the record established that the defendant understood and accepted the terms of the plea agreement, including being sentenced as a second felony offender, and held that his guilty plea would not be disturbed.

Aaron Louridas represented Sheldon Thomas in this criminal appeal.

Parole

Failure to Comply with OSC Leads to Dismissal

In *Matter of Radtke v. Stanford*, 2019 WL 5058621 (Sup. Ct. Albany Co. Oct. 2, 2019), the petitioner filed an Article 78 petition challenging the Parole Board's denial of his application for parole release. The court issued an Order to Show Cause (OSC) directing the petitioner to serve the respondent and the Attorney General by ordinary first class mail. Instead, the petitioner sent the documents to the respondent by depositing them in DOCCS internal mail system. The respondent raised the issue of the petitioner's failure to comply with the service requirements set forth in the OSC by filing a motion to dismiss. Although it appears that the respondent received the documents and that the petitioner properly served the Attorney General, the court dismissed the petition based on the petitioner's failure to comply with the terms of the OSC. In doing so, the court noted that the Third Department has held that "an inmate's failure to comply with the service requirements set forth in an order to show cause will result in dismissal of the petition unless the inmate demonstrates that obstacles presented by his or her incarceration precluded compliance." The mode of service, the court wrote, citing *Matter of Jones v. Dennison*, 30 A.D.3d 952 (3d Dep't 2006), provided for in the OSC is jurisdictional and must be literally followed. The court acknowledged that Petitioner Radtke is *pro se* and incarcerated and thereby limited in his ability to serve but found that it was nonetheless bound by **precedent** [decisions issued by higher level courts]. Further, the court noted, the petitioner had not submitted any opposition to the respondent's motion to dismiss or otherwise argued that his incarceration prevented him from complying with the court's order.

Based on these findings, the court granted the respondent's motion to dismiss the petition.

Jason Radtke represented himself in this Article 78 proceeding.

Court of Claims

When Does a Claim Accrue? When Does a Claim Arise?

Shawn Green filed a claim seeking damages for unlawful confinement relating to two misbehavior reports. Rather than answer the claim, the defendant moved to dismiss, arguing that the claim did not state when the claim accrued. In *Green v. State of New York*, 2019 WL 4855222 (Ct. Clms. Aug. 2, 2019), the court began its analysis of the defendant's argument by reviewing Section 11(b) of the Court of Claims Act. This section provides: "The claim shall state the time when and the place where the claim arose, the nature of the same, the items of damage or injuries claimed to have been sustained." The court went on to note, citing *Heisler v. State of New York*, 78 A.D.2d 767 (4th Dep't 1980), that "what is required is not absolute

exactness, but simply a statement made with sufficient definiteness to enable the State to be able to investigate the claim promptly and to ascertain its liability under the circumstances." Thus, the court concluded, while absolute exactness is not necessary, the statement required by the Court of Claims Act §11(b) should be sufficiently definite to allow the State to promptly investigate its potential liability under the circumstances."

The court then turned its attention to Mr. Green's claim, noting that the claim and its attachments provide the following:

1. Mr. Green was confined to his cell for six days as a result of two separate disciplinary proceedings;

2. Neither Misbehavior Report, one issued on 12/18/18 and the other issued on 2/2/19 provided adequate notice of the charges;

3. The disciplinary hearings commenced on 12/24/18 and 2/19/19, were conducted by biased hearing officers;

4. The hearings concluded on 1/1/19 and 2/19/19;

5. The attachments to the claim identify the officers involved and the hearing officers who presided over the hearings; and

6. The claimant was an inmate at Clinton C.F. where he received the Misbehavior Reports and the hearings took place.

Turning to the defendant's argument that the claim is fatally deficient because it does not state the accrual date of the wrongful confinement claim, the court responded that the statute requires the date the claim arose – not the date the claim accrued. ***The date the claim arose, the court found, is the date upon which the claimant was moved from general confinement to restricted confinement***.

A claim accrues, the court wrote, on the date that the wrongful confinement ends, that is, the date that the claimant is released from restrictive confinement. Section 10 of the Court of Claims Act requires that a claim be filed and served upon the attorney general within 90 days after the accrual of the claim. Thus, the accrual date is relevant to the timeliness of the filing of the claim; it is not relevant to the sufficiency of the contents of the claim.

Based on this reading of the statute, the court found that Court of Claims Act §11(b) expressly requires that the claimant state the date upon which the claim arose while §10 requires that the claim be filed and served within 90 days after the accrual of such claim. Thus, the court ruled, the claimant's failure to put the accrual date in the claim was of no consequence, the claim satisfied the requirements of the Court of Claims Act with respect to when the claim arose, and was sufficiently definite to allow the State to promptly and specifically investigate its potential liability. The court denied the motion to dismiss.

Shawn Green represented himself in this Court of Claims action.

Miscellaneous

Before Filing CPL 440 Motions, Make Related FOIL Requests

In 1991 William Figueroa was convicted of depraved indifference murder in the second degree. After Mr. Figueroa exhausted his state court appeals, he filed a motion to vacate the judgment pursuant to Criminal Procedure Law Article 440. While that motion was pending, in 2018, Mr. Figueroa made a Freedom of Information Law (FOIL) request for records relating to his criminal prosecution addressed to the Kings County District Attorney's Office (DA's Office). The DA's Office denied the request on the basis that disclosure of the records while litigation relating to the criminal prosecution was pending would interfere with the handling of the judicial proceeding as well as any further investigation that might be necessary. After appealing and getting a final administrative decision, Mr. Figueroa filed an Article 78 challenge to the denial of his FOIL request.

In *Matter of Figueroa v. Gonzalez*, 64 Misc.3d 959 (Sup. Ct. Kings Co. July 15, 2019), the court first noted that the issue before it was controlled by Public Officers Law §87(2)(e)(i). This section of the Public Officers Law provides:

"Each agency shall in accordance with its public rules, make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof that are compiled for law enforcement purposes and which, if disclosed would . . . interfere with law enforcement investigations or judicial proceedings . . ."

This section of the law, the court noted, has been used to support denials of requests for information relating to criminal prosecutions while the charges are pending, see *Matter of Legal Aid Society v. NYC Police Dep't.*, 274 A.D.2d 207 (1st Dep't 2000), and during the criminal appeal process and any subsequent proceeding within the same prosecution, see *Matter of Moreno v. NY County District Attorney's Office*, 38 A.D.3d 358 (1st Dep't 2007).

In the petitioner's case, the court wrote, there was no dispute that prior to making the FOIL request, the petitioner had made a motion pursuant to Criminal Procedure Law §440.10 to renew his 1991 motion to vacate his conviction. This motion was pending at the time that petitioner made the FOIL request, appealed the denial and filed the Article 78 proceeding. Based on the holdings in *Matter of Moreno* and *Matter of Lesher v. Hynes*, 19 N.Y.3d 57 (2012) (a decision relating to a FOIL request for records in a prosecution where the charges were still pending), the court ruled that the Kings County District Attorney had properly denied petitioner's FOIL request pursuant to Public Officers Law §87(2)(e)(i).

William Figueroa represented himself in this Article 78 proceeding.

FEDERAL COURT DECISIONS

Court Orders Prisoner Plaintiff to Pay Defendants' Costs

In January 2019, following a trial, the jury decided Jason Brisman's First Amendment retaliation claim in favor of the correction officer defendants. The defendants then sought an award of costs pursuant to Rule 54(d) of the Rules of Federal Civil Procedure seeking $1,474.24.

Rule 54(d)(1) states that "unless a federal statute, these rules or a court order provide otherwise, costs . . . should be allowed to the **prevailing** [winning] party." In relation to the application of this rule to cases involving prisoners, the Second Circuit Court of Appeals, in *Whitfield v. Scully*, 241 F.3d 264, 270 (2d Cir. 2001), has held that the losing party has the burden of showing that costs should not be imposed.

In *Brisman v. McCabe*, 2019 WL 4917946 (N.D.N.Y. Oct. 4, 2019), the defendant sought the award in relation to witness fees, copies and the transcript of the plaintiff's deposition. The plaintiff asked the court to exercise its discretion and deny the request for an award of costs because "the Plaintiff brought a non-frivolous meritorious claim and is indigent and proceeding *in forma pauperis*."

The court noted that a district court can deny costs based on the losing party's indigency, but that "indigency *per se* does not automatically preclude an award of costs." Here, the court found, the plaintiff had not submitted evidence showing that he lacks the financial resources to pay what the court calls the "modest" bill of costs at the rate set by DOCCS Directive 2788.

Syracuse University Office of General Counsel represented Jason Brisman in opposing the imposition of costs post trial.

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