

# Pro Se

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## Court Limits Exclusion of Court Ordered Participants from Shock

The Shock Incarceration Program is an intensive “boot-camp” style therapeutic treatment program within DOCCS. According to Correction Law §865(2), Shock participants engage in “rigorous physical activity, intensive regimentation and discipline and rehabilitation therapy and programming” at a designated shock incarceration correctional facility. Seven NYCRR §1800.2 provides that the Shock program gives “selected young inmates a special six-month program . . . stressing a highly structured routine of discipline, intensive regimentation, exercise and work therapy, together with substance abuse workshops, education, prerelease counseling and self-improvement counseling.” Those participants who successfully complete the six-month program are also immediately eligible for release consideration. If participants are serving indeterminate sentences, then they are eligible to be considered for release to parole. If they are serving determinate sentences, they are eligible for conditional release. *See*, Correction Law § 867(4); Executive Law §259-i(2)(e); 9 N.Y.C.R.R. § 8010.2.

As originally enacted in 1987, the Shock program did not include any court-ordered placement, but instead only involved discretionary screening and admission by prison officials of individuals who would apply to participate. In 2009,

however, as part of the Drug Law Reform Act (DLRA), the legislature adopted a new law allowing judges to order participation in Shock as a component of a sentence in certain drug cases. Penal Law §60.04(7) and Correction Law §§865 and 867, read together, require DOCCS to admit a person who was judicially sentenced to Shock into the program when he or she becomes time-eligible for admission. The only exception to this requirement is for individuals who have disqualifying “medical or mental health condition[s].” Even then, the Penal Law further specifies that where “an inmate designated by

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**CORONAVIRUS PANDEMIC – NEW PROTOCOLS**  
**A Message from the PLS Executive Director, Karen L. Murtagh**

On March 7, 2020, Governor Cuomo declared a State of Emergency in New York State. At that time, there were only 89 diagnosed cases of COVID-19 in New York State. On March 20, the Governor issued Executive Order 202.8, mandating that all non-essential businesses statewide close in-office personnel functions effective at 8 PM on Sunday, March 22. As of March 22, there were 15,000 diagnosed cases in New York State.

These are extraordinary times. From cancelling or temporarily suspending all events that involve large gatherings, including the NBA, MLB, NCAA tournament, LPGA and PGA, to shutting down Broadway, closing businesses, colleges and schools across the country and prohibiting any flights from Europe to the United States, the virus is impacting every aspect of life. Here is some basic information that may help you get through this experience.

According to the Centers for Disease Control and Prevention (CDC), coronavirus is a respiratory pathogen spread by coughing that can cause an illness ranging from mild to severe. The virus causes a disease called COVID-19 and can lead to fever, cough and shortness of breath.

People who are at a higher health risk from COVID-19 include:

- Adults over 65 years of age, and
- People who have serious chronic medical conditions like:
  - Heart disease
  - Diabetes
  - Lung disease

While there is currently no vaccine for COVID-19, the CDC has published the following guidance to help reduce the risk of infection including urging individuals to do the following:

- Avoid close contact with people who are sick
- Take everyday preventive actions
  - Clean your hands often.
  - **Wash your hands often with soap and water for at least 20 seconds**, especially after blowing your nose, coughing, or sneezing, or having been in a public place.
  - If soap and water are not available, use a hand sanitizer that contains at least 60% alcohol.
  - To the extent possible, avoid touching high-touch surfaces in public places – elevator buttons, door handles, handrails, handshaking with people, etc.
  - Use a tissue or your sleeve to cover your hand or finger if you must touch something.
  - Wash your hands after touching surfaces in public places.
  - Avoid touching your face, nose, eyes, etc.
  - Clean and disinfect your surroundings to remove germs: practice routine cleaning of frequently touched surfaces (for example: tables, doorknobs, light switches, handles, desks, toilets, faucets, sinks & cell phones)
  - Avoid crowds, especially in poorly ventilated spaces. Your risk of exposure to respiratory viruses like COVID-19 may increase in crowded, closed-in settings with little air circulation if there are people in the crowd who are sick.

**PLS's medical consultant has informed us that the gold standard for removing the virus from your hands is to wash your hands with soap and water. Only where soap and water are not available is there a need for hand sanitizer.**

In an effort to stem the spread of the disease, thousands of companies and organizations are adopting measures to decrease exposure of employees to the virus, including “work from home policies.” Along those lines, Prisoners’ Legal Services (PLS) has adopted a hybrid policy: We will alternate staff in our offices so as to decrease exposure to the virus. *Although there may be a slight delay in our response time, it is our intention to respond to all requests for assistance and to continue working on the cases we have accepted. While the State of Emergency is in effect, we may have to restrict our case acceptance guidelines to issues related to the virus and, to a limited extent, conditions of confinement, other emergency health matters, and entitlement to immediate release claims. With respect to other concerns you may have, we ask that if the problem about which you wrote continues beyond the end of the State of Emergency, please write to us again at that time.*

In response to COVID-19 and in an attempt to protect the health and welfare of the incarcerated population, as of **Saturday, March 14, 2020 at 5 PM, DOCCS suspended all visitation at all correctional facilities until April 11, 2020.**

Below is a reprint of DOCCS’ notice regarding its new visiting protocol:

**“In December 2019, a new respiratory disease called Coronavirus Disease 2019 (COVID-19) was detected in China. COVID-19 is caused by a virus (SARS-CoV-2) that is part of a large family of viruses called coronaviruses. Recently, community-wide transmission of COVID-19 has occurred in the United States, including New York where the number of both persons under investigation and confirmed cases are rapidly increasing.**

**“The Department of Corrections and Community Supervision (DOCCS) is responsible for the safety, health, rehabilitation, and supervision of nearly 44,000 incarcerated individuals and over 35,000 individuals on community supervision through the tireless efforts of nearly 30,000 employees. The Department’s greatest concern is the safety and well-being of our employees and individuals within our care, custody, and supervision, particularly during this developing public health emergency. To that end, the Department must swiftly impose restrictions and precautions to prevent additional spread of infectious viral transmission of COVID-19 in both correctional facilities and the community at large.**

**“As this public health emergency rapidly develops, the Department will closely monitor the situation and extend these restrictions as necessary.**

**“Visitation Suspended at All Correctional Facilities.** *While this suspension of visitation will be temporary, the Department recognizes the immediate impact on incarcerated individuals throughout the correctional system. However, the current situation demands this significant action to safeguard the health and safety of all incarcerated individuals, employees, as well as their families and communities. While in-person visitation will be impossible to replace, the Department will provide the following benefits to encourage individuals to keep in contact with their family and friends during this temporary suspension:*

- *Five (5) free stamps per week for use in accordance with Directive #4422, “Inmate Correspondence Program”;*
- *Two (2) free secure messages per week via electronic tablet; and*
- *One (1) free phone call per week in accordance with Directive #4423 “Inmate Telephone Calls”.*

*“This suspended visitation also applies to family reunion programs. However, legal visits will not be impacted by this visitation suspension. Legal visits will be conducted as non-contact (i.e. no physical contact allowed), as requests are submitted, and that option remains available within the facilities.*

*The Department takes seriously its duty to ensure the safety and well-being of those who work, visit and live in our correctional facilities, as well as those who supervise or are supervised in the greater community of New York. During this difficult time, the Department is appreciative of everyone’s patience and understanding as we continue to face this virus together.”*

We are reminded every day that we are all in this together. That said, we at PLS remain resolute in our appreciation that the concerns faced daily by incarcerated individuals are *uniquely* challenging – warranting attention, review and, where possible, remediation – and we remain steadfast in our mission to carry your voices and that message to the halls of state government.

**REMEMBER - YOU ARE NOT ALONE**

Along those lines, please write to PLS if you believe you, or someone you know in prison, may be infected with COVID-19 and need medical attention. We will advocate to ensure that the incarcerated population is given the testing and treatment needed to fight this virus along with the legal support necessary to continue addressing critical issues related to conditions of confinement.

On behalf of the entire staff and board of PLS, we will continue to do everything we can to advocate full bore for your health, safety and legal rights with DOCCS, Parole and our governmental leaders throughout these uncertain times.



*...Continued from Page 1*

court order for enrollment in the shock incarceration program requires a degree of medical care or mental health care that cannot be provided at a shock incarceration facility, the department . . . shall . . . provide a proposal describing a proposed alternative-to-shock-incarceration program.” As an alternative, DOCCS often offers participation in ASAT.

Despite these clear statutory provisions and mandates, DOCCS took the position that they retained the authority to exclude people from court ordered Shock for acts of misbehavior that they engaged in while waiting to become time-eligible for admission. In *Matter of Matzell v. Annucci*, \_\_\_ A.D.3d \_\_\_, 2020 WL 930433 (3d Dep’t 2/27/20), a recent decision in a case brought by Prisoners’ Legal Services (PLS), the Appellate Division, Third Department has held that DOCCS has no such authority.

In the June 2019 issue of *Pro Se*, we reported on the lower court decision in *Matzell* after the Albany County Supreme Court granted Mr. Matzell’s Article 78, and ordered his admission into the Shock program. While waiting to become time-eligible for admission to Shock, Mr. Matzell had incurred several drug-related misbehavior charges.

Based on the related disciplinary hearings, DOCCS denied him admission to Shock. As a result, he lost not only the potential therapeutic benefits of the program, he was also denied the opportunity for early release which his sentence to Shock provided.

In the *Matzell* lawsuit, DOCCS officials asserted they had full discretion and authority to preclude Mr. Matzell’s participation in the program on the basis of the misbehavior. The lower court squarely rejected these arguments and DOCCS appealed, leading to the Appellate Division’s recent decision.

When DOCCS appeals an Article 78 decision, because it is a state agency, it is granted an automatic stay of a Supreme Court’s order. Here, when PLS moved to vacate the stay pending appeal, the Third Department granted the motion and Mr. Matzell was promptly admitted to the program. He successfully completed the program in December 2019 during the pendency of the appeal and was thereupon conditionally released from DOCCS’ custody.

The Appellate Division heard this case in January 2020. In its recent decision, the court first held that due to Mr. Matzell’s completion of Shock and subsequent release from custody, the issue before the court was rendered “moot” (the matter

presented was no longer a “live” controversy). However, the court went on to hold that it could still decide the case because all three of the well-recognized exceptions to the mootness doctrine are present:

- (1) the issue is likely to recur, either between the parties or other members of the public;
- (2) the issue is substantial and novel; and
- (3) the issue will typically evade review in the courts.

The court then went on to affirm lower court’s decision, agreeing that the statute very clearly provides that DOCCS’ participation is “expressly limited to its administration of the program, i.e., the completion, discipline, and removal of an inmate from the program.” The court agreed as well that DOCCS’ interpretation of the statute, which the court noted “is not reasonable and is inconsistent with the purposes of the statutory scheme,” also contradicts the Criminal Procedure Law in that it “would permit it [DOCCS] to administratively modify a criminal sentence, rendering the Legislature’s grant of judicial authority under the statute meaningless and hamper the purpose of the statute under the DLRA.”

There is good reason to believe that DOCCS has engaged in the unlawful practice of improperly excluding court-ordered individuals from the program for many years, possibly even since the 2009 DLRA. There is also reason to believe that there are many individuals presently still in DOCCS custody who have been wrongfully denied admission to the Shock program, and whom DOCCS should now take prompt steps to admit to the program.

Individuals who have been harmed by this unlawful practice may have legal claims for damages based on DOCCS’ and prison officials’ violation of and unlawful interference with a duly-imposed sentence mandating admission to Shock and for the resulting delay or denial of early release. There may also be individuals who are presently being immediately and adversely affected by this unlawful practice and who should be promptly admitted to the Shock program (or to the alternative

program if warranted by a disqualifying medical or mental health condition).

If you believe the court’s decision may immediately affect you—if you were court-ordered to Shock but denied admission for a reason other than a disqualifying medical or mental health reason—we suggest that you to contact the following individuals and request immediate processing and admission into Shock:

- Your Offender Rehabilitation Counselor (ORC);
- The Superintendent and the Deputy Superintendent for Programs at your facility; and
- Jeffrey McCoy, Deputy Commissioner for Programs at DOCCS Central Office in Albany.

Remember to keep copies of these requests so that you have documentation of your efforts to be promptly placed in the program. You may also wish to file a grievance, and appeal it all the way to CORC, in order to not only help facilitate your placement into the program, but to exhaust your administrative remedies which is a prerequisite for pursuing a federal claim for damages.

If you have been affected or are still being affected by DOCCS’ unlawful Shock exclusion practice, you may also write to the PLS office that is responsible for investigating legal issues in the prison where you are confined. See the back page of *Pro Se* for a list of offices and addresses and the prisons associated with each office.

## **False Positive Urinalysis Putative Class Action Update**

As many readers know, in 2019 DOCCS began using new urinalysis drug testing devices in its facilities. The new devices are known as the Indiko Plus urinalysis analyzers. At some point in 2019, DOCCS discovered that the test results from the Indiko Plus urinalysis analyzers were unreliable. As a result, in September 2019, DOCCS reversed all 2019 positive drug test results for Suboxone and buprenorphine, together with all related disciplinary

dispositions. DOCCS took further steps to remedy the collateral adverse consequences of these false positive test results, including the restoration of open dates for early release to parole supervision and conditional release.

On November 20, 2019, Prisoners' Legal Services of New York (PLS) and the law firm of Emery Celli Brinckerhoff & Abady (Emery Celli) filed a lawsuit in the United States District Court for the Eastern District of New York, alleging negligence claims against the companies that provided DOCCS with the Indiko Plus urinalysis testing devices. These companies are Microgenics Corporation and Thermo Fisher Scientific, Inc. The case is known as *Nadya Steele-Warrick v. Microgenics Corp. and Thermo Fisher Scientific, Inc.*, Index No. 19 Civ. 6558 (E.D.N.Y.).

As some readers may also be aware, since the case was filed, DOCCS discovered that the Indiko Plus devices provided false positive and unreliable test results for a variety of other controlled substances, including other opioids, synthetic cannabinoids (AB Pinaca, K2 and K3), and marijuana and THC. DOCCS has again taken steps to reverse all disciplinary dispositions related to these substances and to mitigate their adverse collateral consequences. In early March 2020, PLS and Emery Celli filed an amended complaint in this case, among other things adding claims relating to the false positive and unreliable test results for these other substances.

Presently, the parties are engaged in discovery. Discovery is the process of gathering and exchanging information and evidence relating to the claims and defenses in the case. This process will take place over the next 6-9 months.

*Warrick-Steele v. Microgenics* was filed as a class action. However, the plaintiff's attorneys have not yet made a motion for class certification and this case is therefore referred to as a "putative" (in name) class action. In the coming months, discovery will continue and motions likely filed, including a motion for class certification.

We ask our readers, and in particular interested and affected individuals and their families, to please remain patient and look for periodic updates on the case here in *Pro Se*. Both PLS and Emery Celli

have been receiving a great many calls and other inquiries seeking updates and information about *Warwick-Steele v. Microgenics*. Please know that it is not possible for PLS or Emery Celli to provide individual responses to these numerous inquiries. Please also bear in mind that this case is in the very early stages and will take many, many months to litigate. It is very likely the case will be nowhere near resolution for at least another year.

A final note. In late February, the State of New York/DOCCS filed a separate lawsuit against Microgenics and Thermo Fisher Scientific. This lawsuit involves a variety of state law claims, including breach of contract, and was filed in Albany County Supreme Court.

## NEWS & NOTES

### PRO SE ON THE TABLETS

For the last 35 years, we have mailed our subscribers paper copies of *Pro Se*. Beginning with the October 2019 issue, DOCCS began placing *Pro Se* on the tablets that are available to individuals in general confinement (fully loaded tablets). In addition to adding issues as they are published, DOCCS has agreed to keep the current and preceding five issues of *Pro Se* on the tablets. Readers will not be required to pay to have *Pro Se* uploaded to their tablets. When an issue of *Pro Se* is published, it will be placed on an individual's tablet the next time that they go to the kiosk.

Producing paper copies of *Pro Se* is expensive. We have roughly 6,000 incarcerated subscribers and publish six issues of *Pro Se* each year. In 2018, in an effort to reduce costs, we stopped sending paper copies of *Pro Se* to many of the non-incarcerated subscribers on the mailing list. These former subscribers now access *Pro Se* on the PLS website. In spite of reducing our subscriber list, last year our combined annual printing and mailing costs were \$26,000.00.

In addition to cutting costs, by publishing *Pro Se* on the tablets, we can now reach everyone who has access to a fully loaded tablet—roughly 41,000 individuals. Given this inexpensive and comprehensive distribution, we cannot justify the expense of producing paper copies for people who have access to fully loaded tablets. For these reasons, we have decided that we will no longer provide paper copies of *Pro Se* for readers who have access to fully loaded tablets unless they are visually impaired and unable to read *Pro Se* on a tablet screen. This will be the last paper copy of *Pro Se* that people who have access to fully loaded tablets will receive.

**What about Readers Who Do Not Have Access to Fully Loaded Tablets or People Who Have Visual Impairments and Are Unable to Read on the Tablet Screen?**

People who do not have access to fully loaded tablets or who have visual impairments and cannot read the tablet screen can get paper copies of *Pro Se*. If you do not have access to a fully loaded tablet or you cannot read the tablet screen, you can write to *Pro Se* and ask to be sent paper copies. People whose access to the fully loaded tablets is temporarily restricted can receive paper copies of *Pro Se* until they again are able to access a fully loaded tablet. In addition, the law library at each facility will be sent paper copies of *Pro Se* as each issue is published. People who do not have access to fully loaded tablets or have visual impairments that limit tablet screen reading can also request a copy of *Pro Se* from the law library. Law library copies must be returned to the law library.

**To get a paper copy of *Pro Se* when you lose access to a fully loaded tablet or have visual issues that prevents reading *Pro Se* on the tablets, write to *Pro Se* at the address at the bottom of this notice. If your inability to access a fully loaded tablet is temporary, please advise us of the date upon which you will again have access to a fully loaded tablet. If you do not inform us of your anticipated return to fully loaded tablet status, we will send you two issues of *Pro Se* and then remove you from the mailing list.**

If you receive additional disciplinary determinations that result in the extension of the time that you will not have access to a fully loaded tablet, contact the *Pro Se* office and let us know the date when you will again have access to a fully loaded tablet. Similarly, if you get a time cut, let the *Pro Se* office know so that we can stop sending you paper copies of *Pro Se*.

**What if I Need to Read an Article from an Issue That Is No Longer on the Tablet?**

If you need a copy of an article from *Pro Se*, you can request it from the PLS *Pro Se* Office. If you can provide an approximate date when the article appeared in *Pro Se*, it would be appreciated. Please note on the envelope that you are writing to *Pro Se* and the nature of your request. The address is:

*Pro Se*  
Attn: Distribution, Articles and Copies of Cases  
Prisoners' Legal Services of NY  
114 Prospect Street  
Ithaca, NY 14850

**PRO SE VICTORIES!**

***People v. Antoine Parris*, 153 A.D.3d 1673 (4<sup>th</sup> Dep't 2017). In 2017, Michael Joshua Henderson, an incarcerated person, working on behalf of Antoine Parris, prepared a writ of error coram nobis which was filed in the Appellate Division, Fourth Department. The motion was successful. As a result of the court's decision on the motion, the Fourth Department considered the issue of whether Mr. Parris's appellate counsel had been ineffective when he failed to raise the issue that the People submitted insufficient evidence to convict the defendant of depraved indifference murder.**

In 2003, a jury had convicted Mr. Parris of depraved indifference murder and acquitted him of intentional murder. (The jury also convicted Mr. Parris of some lesser charges). In 2006, the Appellate Division, Fourth Department, rejected appellate counsel's arguments regarding the trial

court's *Sandoval* ruling and its decision to impose consecutive sentences with respect to various offenses and affirmed the conviction. *See People v. Parris*, 30 A.D.3d 1108 (4<sup>th</sup> Dep't 2006).

In 2017, Michael Henderson drafted the motion for a *writ of error coram nobis*, arguing that Mr. Harris's appellate counsel had been ineffective when he failed to argue that the evidence did not support a finding that Mr. Parris was guilty of depraved indifference murder.

Following the decision granting the motion for *writ of error coram nobis*, the defendant, now represented by counsel, presented the argument of evidentiary insufficiency. In *People v. Parris*, 175 A.D.3d 1853 (4<sup>th</sup> Dep't 2019), the court held that the facts supported only the conclusion that Mr. Parris had intentionally murdered the victim. The court therefor vacated his conviction for murder in the second degree. Because the jury had acquitted the defendant of intentional murder and the facts did not support a verdict of guilty of depraved indifference murder, Mr. Parris was required only to serve the 10 year aggregate sentence for the other crimes that he had been convicted of. At the time that the decision was issued, Mr. Parris had already served 16 years. For this reason, he was released from prison on June 6, 2019.

***Matter of Salvatore Dagnone v. Rachael Seguin*, Index No. 1089-19 (Sup. Ct. Albany Co. Dec. 16, 2019). Court orders CORC to issue decision on appeal of grievance denial within 30 days.** Petitioner filed a grievance on January 25, 2018 asserting that DOCCS had failed to provide him with sufficiently warm clothing for outdoor exercise. The Inmate Grievance Resolution Committee (IGRC) recommended that the grievance be granted. Although the petitioner did not appeal, the Superintendent denied the grievance and petitioner appealed to the Central Office Review Committee (CORC), noting that he had not received the IGRC decision. On January 4, 2019, CORC acknowledged receipt of the appeal and advised the petitioner that the appeal was still pending. When, in March 2019, CORC had not yet issued the decision, petitioner commenced an Article 78 asking the court to order CORC to issue a decision.

The respondent argued that the 30-day time limit for deciding appeals was only directory and therefore petitioner was not entitled to the relief that he was seeking. Petitioner responded that CORC's failure to issue a decision for over a year denied him access to the courts and caused **irreparable harm** (harm that cannot be fixed) because he has a constitutional right to exercise out of doors and without warm clothing, he is unable to do so.

The court found that it was undisputed that over a year and three months had passed since petitioner submitted his appeal and CORC had not yet decided it. The court characterized petitioner's claim as in the nature of a mandamus to compel CORC to issue a final determination. Citing to the practice commentary of Civil Practice Law and Rules 7801, the court defined mandamus to compel as "a judicial command to an officer or board to perform a specified ministerial act that is required by law to be performed." To be entitled to a writ of mandamus, the court wrote, the petitioner must show a clear legal right to the requested relief.

Citing 7 NYCRR 701, the court found that the petitioner had a right to a determination of his grievance and that the respondent was required by law to provide it. While the court noted that delays of a few days or even months have been overlooked by the courts in the Third Department, a delay of over 15 months is "**inordinate**" (exceeds reasonable limits). The court noted that in violation of 7 NYCRR 701.1, the respondent has denied the petitioner an "orderly, fair and expeditious resolution of his grievance." The effect of this violation prevented the petitioner from exhausting his administrative remedies and having access to the court.

Based on this analysis, the court agreed to exercise its mandamus power, granted the petition, and ordered CORC to issue its decision within 30 days.

***Matter of Jessie J. Barnes v. Michelle L. Liberty*, Index No. 2019-454 (Sup. Ct. Franklin Co. Feb. 18, 2020). In Article 78 proceeding in which Jessie Barnes was the prevailing party, the court awarded costs in the amount of \$23.80 to cover the cost of the filing fee (15.00) and postage (\$8.80) for serving the respondents and sending the papers to the court for filing.**

*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

#### HO Insufficiently Questioned Officer About Confidential Info

In *Matter of Muller v. Fischer*, 120 A.D.3d 1452, 1453 (3d Dep’t 2014), the Appellate Division, Third Department, wrote that at a Tier III hearing, hearsay evidence in the form of confidential information **may** be substantial evidence of guilt. When confidential information is presented by an officer at a prison disciplinary hearing, the hearing officer is required to assess whether the information is reliable and credible. More specifically, as stated in *Matter of Belliard v. NYS DOCCS*, 144 A.D.3d 1301, 1203 (3d Dep’t 2016), “Where the hearing officer obtains [confidential information] through the testimony of a correction officer who has interviewed a confidential informant, the questioning must be thorough and specific to allow an adequate basis to gauge the informant’s knowledge and reliability.” If the hearing officer finds that the confidential information is reliable and credible, he or she can base a determination of guilt on information to which the accused individual does not have access. On judicial review, the court will determine whether the information was sufficiently detailed such that the hearing officer was able to make an independent assessment of its reliability and credibility.

In *Matter of Barber v. Annucci*, 176 A.D.3d 1557 (3d Dep’t 2019), a confidential source told a DOCCS investigator that the Petitioner Cornell Barber had sold several packs of cigarettes to another incarcerated individual. The deal between the two, according to the informant, was that the buyer would pay Mr. Barber back. When the buyer failed to repay Mr. Barber, the confidential informant stated, Mr. Barber threatened the buyer and doubled the debt. After receiving this information, the investigator wrote a misbehavior report charging Mr. Barber with threats, violent conduct, unauthorized exchange and extortion.

At Mr. Barber’s hearing, the hearing officer:

- Reviewed the investigator’s professional experience;
- In a  **cursory** (not detailed) manner, confirmed that the investigator had obtained confidential information;
- Asked whether the information was received under **duress** (pressure) or by **coercion** (threats);
- Asked whether the investigator thought the information was reliable and **credible** (believable); and
- Asked whether the informant was promised anything for the information.

The investigator did not give, nor did the hearing officer request, a summary of the informant’s statements nor did the hearing officer seek any information from the investigator to assist the hearing officer in determining whether the informant was reliable and credible.

In assessing the hearing officer’s review of the confidential information that supported the determination of guilt made at Mr. Barber’s hearing, the court commented that “while the hearing officer reviewed the confidential documentation and solicited brief testimony from the investigating officer, which, on its face did not reflect that ‘there was [a]ny reason to think that the [confidential] informant was motivated by a promise of reward from the prison officials or a personal **vendetta** [grudge] against the petitioner,’ ” the questions were not “thorough and specific” enough to allow him to assess the informant’s knowledge and reliability. Further, the

court noted, the investigator failed to explain why he found the informant reliable and credible.

A hearing officer, the court wrote, citing *Matter of Muller v. Fischer*, 120 A.D.3d at 1453, “may not base his or her conclusion solely upon the correction officer’s assessment of the confidential informant’s truthfulness.” In this case, the hearing officer failed to remedy the investigator’s inadequate testimony with respect to the informant’s reliability and credibility either by asking the officer additional questions or by questioning the informant.

Based on the hearing officer’s failure to properly ascertain the reliability and credibility of the informant, the court found that determination of guilt was not supported by substantial evidence and must be annulled.

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Cornell Barber represented himself in this Article 78 proceeding.

## **Briefly Argumentative Conduct Not a Sufficient Basis for Exclusion**

After Jahmel Clark refused to provide a urine sample, he was given a Misbehavior Report charging him with violating urinalysis testing procedures. At his hearing, he asked that the hearing officer **recuse** himself (step down as hearing officer) because Mr. Clark, who had filed a complaint against the hearing officer, believed that the hearing officer would not conduct the hearing in an impartial manner. Generally speaking, a judge is required to recuse himself from a specific proceeding because of conflict of interest. Recusal, or the judge’s act of disqualifying himself or herself from presiding over a proceeding, is based on the rule that judges are charged with a duty of impartiality in administering justice. Where the judge is unable to hear the case in an impartial manner, he or she must step down and allow an impartial judge to preside over the case.

The hearing officer denied the request, stating that the complaint would not interfere with his ability to conduct the hearing in an **impartial** (unbiased) manner. Mr. Clark disagreed with the hearing officer’s ruling and then twice interrupted the hearing officer to complain that the hearing

officer had become hostile. The hearing officer ordered Mr. Clark to stop interrupting and warned him that if he continued, the hearing officer would have him removed from the hearing. The hearing officer asked that Mr. Clark **acknowledge** the warning, that is, tell the hearing officer that he understood the warning. Mr. Clark refused to do so, saying that the warning lacked any basis and that he was only trying to participate in the hearing. The hearing officer then removed Mr. Clark from the hearing. At the close of the hearing, the hearing officer found Mr. Clark guilty of the charge. DOCCS denied Mr. Clark’s administrative appeal.

Mr. Clark’s Article 78 petition asserted that the hearing officer had violated Mr. Clark’s right to attend the hearing. The Third Department, in *Matter of Holmes v. Drown*, 23 A.D.3d 793, 794 (3d Dep’t 2005), held that an inmate can be excluded from a prison disciplinary hearing only where his or her behavior threatens institutional safety or correctional goals.

In *Matter of Clark v. Lieutenant Jordan*, 178 A.D.3d 1190 (3d Dep’t 2019), the court found that it appeared that the hearing officer had excluded the petitioner from the hearing because he had refused to acknowledge the hearing officer’s warning. It further found that the record did not show that petitioner’s briefly argumentative behavior rose to the level that would justify his removal for the entire hearing or that his conduct jeopardized institutional safety and correctional goals. Further, the court noted, although there were several adjournments on the day that the hearing officer excluded Mr. Clark, the hearing officer did not bring him back to the hearing. Because there were insufficient reasons for excluding Mr. Clark from the hearing, the court granted the petition, ordered the hearing annulled and directed the expungement of all references to the charges from Mr. Clark’s institutional records.

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Jahmel Clark represented himself in this Article 78 proceeding.

## Petitioner Did Not Have Standing to Challenge Mail Review

In *Matter of Drake v. Annucci*, 178 A.D.3d 1189 (3d Dep't 2019), the court addressed the question of whether the petitioner, who was not the person whose name was listed in the return address on an outgoing letter that was found to be suspicious by DOCCS mailroom staff, had standing to assert that the Superintendent had not followed proper procedures before opening and reading the letter.

In this case, the administrative record of the hearing showed that mailroom staff became suspicious when they saw an outgoing letter on which the name of the sender was misspelled and the individual's DIN was incorrect. The Superintendent gave the staff permission to open the envelope. Inside were two smaller envelopes, each addressed to different individuals at different prisons. The letters inside of the smaller envelopes allegedly discussed gang activities.

An investigation into the correspondence resulted in a misbehavior report naming petitioner as the person who had sent the letter that had aroused the mailroom staff's suspicions. He was found guilty of impersonation, violating correspondence rules and possessing gang related materials. The determination of guilt was affirmed on appeal.

In his Article 78 proceeding, the petitioner asserted that the respondent had not followed the proper procedures for opening out-going legal mail. Seven NYCRR 720.3 sets forth the DOCCS regulation controlling the opening of outgoing mail by DOCCS staff. This regulation provides that no outgoing mail shall be opened without the facility Superintendent's "express written authorization." It further provides that the Superintendent shall not authorize the opening of outgoing mail unless there is a reason to believe that:

- A DOCCS Directive, rule or regulation has been violated;
- An applicable state or federal law has been violated; or

- The mail being examined threatens the safety, security or good order of a facility or the safety or wellbeing of any person.

In addition, the regulation requires that where a superintendent determines that inspection is warranted, the written authorization must set forth the specific facts forming the basis for his or her conclusion.

In this case, the court's decision does not state the basis for the petitioner's assertion that the respondent had not followed the proper procedures when the mailroom staff opened the letter with the name in the return address spelled incorrectly. The court did not reach the merits of that issue. Instead, the court found because the petitioner's name and DIN were not on the envelope, he did not have standing to raise the issue of whether the respondent had properly followed the required procedures prior to opening the envelope. Standing is a term that relates to whether the person who raises an issue has a stake in the outcome. Here, because the petitioner's name was not in the return address, the court ruled that he was not in a position to challenge the procedures that DOCCS used to reach the decision to open the envelope and inspect the contents.

Based on this analysis, the court dismissed the petition.

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Wallace Drake represented himself in this Article 78 proceeding.

## Routine Incident Reports Do Not Fall Within FOIL Exemptions for Intra-Agency or Law Enforcement Exemptions

In December 2018, Prisoners' Legal Services (PLS) submitted a Freedom of Information Law (FOIL) request to Hudson Correctional Facility for records related to a use of force by staff. The FOIL request sought seven categories of records concerning the incident and related events:

- 1) use of force reports;
- 2) unusual incident reports;

- 3) misbehavior reports;
- 4) To/From memoranda;
- 5) photographs;
- 6) videos; and
- 7) all additional writings of any kind.

The facility denied the request in full, claiming that the records were exempt from FOIL disclosure under Public Officers Law (POL) §87(2)(g) because they were part of an ongoing investigation, and were therefore *intra-agency, non-final, deliberative records*. Public Officers Law §(2)(g) provides, in relevant part:

2. Each agency shall . . . make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof that: (g) are inter-agency or intra-agency materials which are not (i) statistical or factual tabulations or data.

Thus, in its initial denial, DOCCS asserted that the records were responsive to PLS's request—many of which Hudson C.F. had forwarded to the Office of Special Investigation—were not factual data. The Third Department, in *Matter of Humane Soc. of U.S. v. Brennan*, 53 A.D.3d 909 (3d Dept. 2008), for the purposes of Freedom of Information Law, defines factual data as “objective information, rather than opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making.”

PLS appealed the FOIL decision to DOCCS' Office of Counsel, arguing that the records were factual accounts of the incident and therefore did not fall within the exemption under POL §87(2)(g). The appeal was denied. The appeal decision stated that even if the records PLS sought were not exempt under the inter/intra-agency materials exemption (POL §87(2)(g)), they were exempt from FOIL disclosure on two additional grounds. First, DOCCS claimed the records could be withheld under the law enforcement exemption (POL §87(2)(e)), because, if disclosed, they would interfere with law enforcement investigations. Second, DOCCS claimed the records could be withheld under New York Civil Rights Law §50-a, which makes personnel records of DOCCS employees confidential, and therefore exempt from disclosure under FOIL (*see also* POL §87(2)(a), exempting records which are specifically exempted by state).

The FOIL appeal decision did not explain why any of these exemptions applied to the requested records.

PLS filed an Article 78 action in Supreme Court, Albany County challenging DOCCS' denial of the FOIL request. In answering the lawsuit, DOCCS argued that the records were part of an ongoing investigation by the Office of Special Investigations (OSI), and therefore could be withheld under several FOIL exemptions.

In addition to the grounds it had already raised in its appeal decision, DOCCS argued that the records could be withheld because their disclosure would pose an unwarranted invasion of the personal privacy of confidential witnesses (*see* POL §87(2)(b)), and could therefore endanger the witnesses' life or safety (*see* POL §87(2)(f)).

PLS filed a reply stating that 1) the routine incident records were not exempt under the law of enforcement exemption (POL §87(2)(e)) because they had not been *created* for a law enforcement investigation, even if OSI did eventually review the records; and 2) DOCCS was barred from raising new arguments for the first time in the Article 78 proceeding.

In *Matter of Prisoners' Legal Services of New York v. Annucci (PLS v. Annucci I)*, Index No. 3232-19 (Sup. Ct. Albany Co. September 23, 2019), the court issued an initial decision rejecting the majority of DOCCS' arguments. First, the court held that DOCCS could not rely on the personal privacy or life and safety exemptions (POL §§87(2)(b) and (f)) because it had not **invoked** (raised) those grounds in its own administrative decision (citing *Matter of Rizzo v. New York State Div. of Hous. And Community Renewal*, 6 N.Y.3d 104, 110 (2005)). Second, as to the unusual incident reports, use of force reports, misbehavior reports, photographs, and video, the court found that the inter/intra-agency materials exemption under POL §87(2)(g) did not apply because the records were “written **memorializations** [factual accounts] of events” as opposed to non-final discussion of policy issues.

The court's decision in *PLS v. Annucci I* thus relied on and extended the analyses used by a recent Appellate Division case that also addressed

DOCCS' attempts to withhold routine incident records under the exemption for correction officer personnel records. In *Matter of Prisoners' Legal Services of New York v. New York State Department of Corrections and Community Supervision (PLS v. DOCCS (2019))*, 98 N.Y.S.3d 677 (3d Dep't 2019), the Appellate Division, Third Department held that unusual incident reports, use of force reports, and misbehavior reports are not "personnel records" and therefore cannot be withheld under Civil Rights Law (CRL) §50-a or POL §87(2)(a). The *PLS v. Annucci I* court used the Third Department's finding that those categories of records are primarily factual accounts to reject DOCCS' reliance on the interagency materials exemption (POL §87(2)(g)). Thus, the court rejected the Department's claims that the requested records were exempt either because they were personnel records or intra-agency deliberative records because the records at issue were factual accounts.

Third, the court in *PLS v. Annucci I* again cited *PLS v. DOCCS (2019)* to conclude none of the routine records PLS sought regarding the Hudson C.F. incident—including unusual incident reports, use of force reports, misbehavior reports, photographs, or video—were personnel records. Such records therefore could not be withheld under CRL §50-a or POL §87(2)(a).

The final question addressed in *PLS v. Annucci I* was whether the law enforcement exemption under POL §87(2)(e) allowed DOCCS to withhold the records PLS sought. The court decided that DOCCS had not been specific enough in explaining why the records fell within the law enforcement exemption and ordered the department to submit the routine incident records for the court's *in camera* (private) review so it could further assess whether POL §87(2)(e) applied.

Before it submitted records for *in camera* review, however, DOCCS advised that OSI had concluded its investigation. The department voluntarily provided PLS with unusual incident reports and photographs, and stated that no use of force reports or videos existed. DOCCS then submitted the records it continued to withhold from PLS to the court, along with a "privilege log" that explained its reasons for withholding.

In *Matter of Prisoners' Legal Services of New York v. Annucci (PLS v. Annucci II)*, Index No. 3232-19 (Sup. Ct. Albany Co. December 17, 2019), the court issued a second decision on DOCCS' claimed FOIL exemptions. First, the court reversed course from *PLS v. Annucci I* and, citing *Matter of Rose v. Albany County District Attorney's Office*, 111 A.D.3d 1123, 1125 (3d Dep't 2013), found that DOCCS was not **precluded** (barred) from relying on exemptions that it had not raised at the administrative level. The court held that the FOIL safety exemption (POL §87(2)(f)) could be raised as a basis for withholding the identities of the witnesses.

Turning to its review of the *in camera* records, the court found that the privilege log showed that DOCCS had indeed reviewed videos of events at or around the time of the Hudson C.F. incident, and that such videos may be responsive to PLS' FOIL request. Next, the court cited *PLS v. DOCCS (2019)* to conclude that DOCCS was required to produce the factual portions of To/From memoranda that it had withheld. Third, citing *Matter of Leshner v. Hynes*, 19 N.Y.3d 57, 68 (2012), the court found that the law enforcement exemption under POL §87(2)(e) presumes that a law enforcement investigation is ongoing, and that the exemption generally "ceases to apply after the law enforcement investigation and any ensuing ... proceedings have run their course [...]." Because DOCCS stated that the OSI investigation had concluded, and failed to mention any expected further proceedings, the court found that the Department had failed to show that the requested records "[fell] squarely within the law enforcement exemption." The court concluded that DOCCS did not establish there was any danger of interference with ongoing law enforcement investigations or proceedings and therefore could not rely on the law enforcement exemption to withhold records.

In sum, the court in *PLS v. Annucci II* ordered DOCCS to provide PLS with an updated response to its FOIL request in light of the changed circumstances (i.e., the end of the OSI investigation), and to disclose routine factual reports and responsive videos relative to the incident, subject to any necessary **redactions**

[deletions] properly allowed by the various FOIL exemptions.

The Albany Office of Prisoners' Legal Services litigated this Article 78 proceeding.

## **To Avoid Deportation, Court Vacates Plea 15 Years After It was Entered**

In 2002, Antonio Feliz Rodriguez, who was then 38 years old and had been in the United States since he was 6 years old, was charged with endangering the welfare of a minor, a Class A misdemeanor. Mr. Rodriguez was not a citizen of the United States. The charge arose from an officer's observation of Mr. Rodriguez smoking marijuana while he held a child on his lap. After consulting with an attorney, and having been reassured by the attorney that pleading guilty to this offense would not lead to his deportation, Mr. Rodriguez pleaded guilty.

Fifteen years later, the Department of Homeland Security began a removal proceeding against Mr. Rodriguez based upon the 2002 guilty plea.

Upon learning of removal proceedings against Mr. Rodriguez, an attorney from the PLS Immigration Unit filed a motion pursuant to Criminal Procedure Law §440.10(1)(h) seeking an order vacating Mr. Rodriguez's plea on the ground that "the judgment was obtained in violation of a right of the defendant under the constitution of this state or the United States." The People opposed the motion.

In his moving papers, the defendant asserted that at the time that he entered the plea, his attorney did not advise him that there was a collateral consequence of pleading guilty to a crime against a child under the immigration law. Although he had asked his attorney about the immigration consequences of the plea, the attorney had said there were none. In fact, endangering the welfare of a child is considered a crime against the child under the immigration law and is a deportable offense.

In *People v. Rodriguez*, City Ct. No. 02-9533 (City Ct. Hudson City, Nov. 7, 2019), the defendant argued that the failure of the defense counsel to find out the defendant's immigration status and correctly advise him about the immigration consequences of his guilty plea constituted ineffective assistance of counsel under the 6<sup>th</sup> Amendment to the United States Constitution. The defendant also argued that under the circumstances of his conviction, deportation was cruel and unusual punishment and was a disproportionate consequence for a misdemeanor conviction, thereby violating the 8<sup>th</sup> Amendment to the United States Constitution.

In deciding the motion, the court first addressed the issue of ineffectiveness of counsel, noting that "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." It is undisputed, the court went on, that in 2002, defense counsel did not routinely advise defendants of the immigration consequences of pleading guilty. In any event, the court continued, under *Strickland v. Washington*, 466 U.S. 668 (1984), the defendant has the burden of showing that his defense counsel provided substandard assistance. Here, the defendant was unable even to identify the lawyer who represented him, much less show what was discussed prior to the plea. Thus, the court found that the defendant had not met his burden with respect to showing ineffectiveness.

In addition, the court wrote, in 2013, in *Chaidez v. United States*, 568 U.S. 342 (2013), the Supreme Court held that the landmark decision in *Padilla v. Kentucky*, 559 U.S. 356 (2010)—holding that criminal defense attorneys must advise noncitizen clients about the deportation risks of a guilty plea—did not apply retroactively to convictions, like Mr. Rodriguez's, that on the date that *Padilla* was decided, were already final on direct review.

Turning to the 8<sup>th</sup> Amendment argument, the court noted that this amendment to the federal constitution, as well as Article I, Section 5 of the New York State Constitution, prohibit cruel and inhuman punishment. The court went on to note, citing *Fong Yue Ting v. United States*, 149 U.S. 698 (1893), that the federal courts have long held that

immigration removal is not considered punishment for the purpose of the 8<sup>th</sup> Amendment. This is because the purpose of deportation is not to punish past crimes but rather to put an end to a continuing violation of the immigration laws.

The court was not willing to adopt the *Fong Yue Ting* logic and reasoning with respect to the issue of whether removal in the defendant's circumstances would violate the New York State Constitutional prohibition on cruel and unusual punishment. With respect to this point, the court noted, "New York Courts can exercise their independent judgment and are not bound by a decision of the Supreme Court of the United States limiting the scope of similar guarantees in the U.S. Constitution," citing as examples, *People v. Barber*, 289 N.Y. 378 (1943) and the dissent in *People v. McCray*, 23 N.Y.3d 193 (2014).

The court noted that there is a **dearth** (lack) of decisions applying the protections of Article I, §5 (the NYS constitutional provision prohibiting cruel and unusual punishment) to immigration removal. The court nonetheless decided that in the case before it, "the combined elements of the severity of the punishments and the inordinate delay in the imposition of the deportation create a de facto punishment which is cruel and unusual to the degree that it is unconstitutional under Article I, §5 of the New York State Constitution."

Based on this finding, the court granted the defendant's motion to vacate his guilty plea on the grounds that consequence of deportation 17 years after entering a guilty plea to a class A misdemeanor is, *de facto*, cruel and unusual punishment and thus violative of the defendant's rights under the 8<sup>th</sup> Amendment as well as in violation of the defendant's rights under Article I, §5 of the New York State Constitution.

The Prisoners' Legal Services Immigration Unit represented Antonio Feliz Rodriguez in this Criminal Procedure Law Article 440 proceeding.

## Notices

### Have You Been in Ad Seg for 10 or More Months?

PLS is interested in hearing from individuals who have been held in Administrative Segregation for 10 or more months. If you are one of those individuals, please write to: Betsy Hutchings, Prisoners' Legal Services, 114 Prospect Street, Ithaca, NY 14850. Please provide us with details of your administrative segregation status and any paperwork you may have regarding such status. When you respond, please also let us know:

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Those individuals released from prison, or their families, can view *Pro Se* on our website at [www.plsny.org](http://www.plsny.org).

**Pro Se  
114 Prospect Street  
Ithaca, NY 14850**

**PLS Offices and the Facilities Served**

Requests for legal representation and all other problems should be sent to the local office that covers the prison in which you are incarcerated. Below is a list identifying the prisons each PLS office serves:

**ALBANY, 41 State Street, Suite M112, Albany, NY 12207**

**Prisons served:** Bedford Hills, CNYPC, Coxsackie, Downstate, Eastern, Edgecombe, Fishkill, Great Meadow, Greene, Green Haven, Hale Creek, Hudson, Marcy, Mid-State, Mohawk, Otisville, Queensboro, Shawangunk, Sing Sing, Sullivan, Taconic, Ulster, Wallkill, Walsh, Washington, Woodbourne.

**BUFFALO, 14 Lafayette Square, Suite 510, Buffalo, NY 14203**

**Prisons served:** Albion, Attica, Collins, Gowanda, Groveland, Lakeview, Orleans, Rochester, Wende, Wyoming.

**ITHACA, 114 Prospect Street, Ithaca, NY 14850**

**Prisons served:** Auburn, Cape Vincent, Cayuga, Elmira, Five Points, Southport, Watertown, Willard.

**PLATTSBURGH, 24 Margaret Street, Suite 9, Plattsburgh, NY 12901**

**Prisons served:** Adirondack, Altona, Bare Hill, Clinton, Franklin, Gouverneur, Moriah Shock, Ogdensburg, Riverview, Upstate.

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