# Pro Se

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## Court Reverses Habeas Relief Granted to Medically Vulnerable Senior

On June 4, the Third Department reversed the first COVID-19 related habeas petition granted to an incarcerated individual in state custody. The decision in *People ex rel. Nora Carroll o/b/o Jalil Muntaqim, a/k/a Anthony Bottom v. William Keyser*, 2020 WL 2950820 (3d Dep't June 4, 2020), found that because the petitioner had not shown that the respondent had been deliberately indifferent to Mr. Muntaqim's serious medical issues – that is, the petitioner had not produced evidence to show that the respondents had violated his 8th Amendment rights – he was not entitled to the relief that he was seeking. The court did not reach the issue of whether, where a state prisoner proves a constitutional violation, they are legally entitled to habeas relief.

Jalil Muntaqim is a 68 year old black man housed at Sullivan C.F. The petition alleges that his advanced age, race and underlying medical conditions leave him in significant danger of serious illness and death if he becomes infected with COVID-19. It argues that because the risk of infection at Sullivan C.F. is high and DOCCS officials are not protecting him from that risk, his continued detention violates the 8th Amendment's ban on cruel and unusual punishment.

The respondents argue that the petition should have been dismissed for failure to state a claim and failure to exhaust administrative remedies.

When it granted the petition, the lower court held that although DOCCS had "done nothing wrong," the Department was not able to eliminate the health risks to which Mr. Muntaqim was exposed while in custody during the pandemic. The court then ordered his release to home custody to serve his sentence.

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## Also Inside . . .



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# PEACE, EQUALITY, JUSTICE & FREEDOM IN OUR TIME

**A Message from the PLS Executive Director, Karen L. Murtagh**

I recently read a message from Anne Wojcicki, the CEO and co-founder of the genomics and biotechnology company 23andMe, which contained the following quote:

> "... all of us are linked by a shared thread - DNA - that we are genetically 99.5% the same. We share so much in common, yet black and brown skin means you will disproportionately experience injustices and prejudice that can put lives on completely different trajectories."

Then, quite coincidentally, a friend sent me a quote from another CEO, the original "chairman of the board":

> "If you don't know the guy on the other side of the world, love him anyway because he's just like you. He has the same dreams, the same hopes and fears. It's one world, pal. We're all neighbors." – Frank Sinatra

Kismet?

Facts are facts, plain and simple. We humans are genetically and temperamentally linked – a brotherhood and sisterhood that has more in common than what divides us.

Sadly, that fact runs up against current headlines that greet us every day.

Because of that, I wanted to dedicate a portion of my message this month to the important words of others. Whatever your religion or philosophy, one thing is certain: we need to listen more than talk if we are ever to bring peace and equality to this world. During this time of great unrest and upheaval, it's especially important to recall and heed the words of some of the greatest peacemakers of this or any generation:

> "Darkness cannot drive out darkness; only light can do that. Hate cannot drive out hate; only love can do that." – Martin Luther King
>
> "You must be the change you wish to see in the world." – Mahatma Gandhi
>
> "Not one of us can rest, be happy, be at home, be at peace with ourselves, until we end hatred and division." – John Lewis
>
> "Peace cannot be kept by force. It can only be achieved by understanding." – Albert Einstein
>
> "Peace is a daily, a weekly, a monthly process, gradually changing opinions, slowly eroding old barriers, quietly building new structures." John F. Kennedy
>
> "When the power of love overcomes the love of power the world will know peace." – Jimi Hendrix
>
> "It isn't enough to talk about peace. One must believe in it. And it isn't enough to believe in it. One must work at it." – Eleanor Roosevelt
>
> "The life my people want is a life of freedom. I have seen nothing that a white man has, houses or railways or clothing or food, that is as good as the right to move in the open country and live in our fashion." – Sitting Bull

We clearly have much work to do.

I also wanted to provide our readership with an update on the following recent changes to DOCCS protocols in light of the COVID-19 health crisis:

**VISITATION**

At the present time, the temporary suspension of visitation will be extended. It is anticipated that the suspension will continue until such time as all regions have been approved for Phase 3 of re-opening under NY FORWARD.

DOCCS acknowledges the importance of family and visitation and notes that it will continually re-evaluate this temporary suspension. In so doing, DOCCS also points out that it must ensure continued protection of both correctional staff and the incarcerated within all DOCCS facilities and, to that end, when visitation is restored, it will be done with the following new procedures in place:

- Visiting rooms will be re-configured to reduce the capacity by half to practice social distancing. Facilities with outside visiting areas will utilize such areas, if weather permitting;
- All visitors, incarcerated individuals and staff will be required to wear a mask during processing and during the visit. If a visitor does not have a mask, the visit will be denied;
- Visitors will be screened with the questionnaire and temperature check prior to being allowed to visit;
- There will be no physical contact between incarcerated individuals and the visitors until further notice;
- Visiting will be divided into specific segments of the population (i.e. alpha by name or numeric by DIN) to ensure access for the entire population;
- Visitors will have to pre-register with the facility and obtain a confirmation that the visit has been scheduled;
- Each visit will be limited to two visitors with a maximum duration of two hours, with no cross visiting allowed;
- All movement in the visiting area will be controlled by staff to ensure social distancing;
- A minimum of one porter will be assigned to the area to disinfect each table as the visit is complete, as well as the vending machines and child area;
- The child area will be off-limits on the re-opening of visiting, but this restriction will be evaluated after 30 days; and
- The Family Reunion Program will remain closed, but this will be periodically reevaluated

**ONGOING EFFORTS TO PROTECT DOCCS FACILITES, BUREAUS AND OFFICES**

DOCCS also will maintain the following health protocols in all facilities:

- Wash your hands frequently with soap and water for at least 20 seconds;
- Avoid touching your eyes, nose or mouth with unwashed hands, especially before you eat;
- Avoid close contact with people who are sick;
- Cover your cough or sneeze;
- Avoid sharing food and utensils;
- Report any symptoms promptly; and
- Again, wear your mask.

**PROGRAMS FOR INCARCERATED INDIVIDUALS**

With respect to restarting various programs DOCCS will:

- Gradually reintroduce mental health programming in the Regional Mental Health Treatment Units, Intermediate Care Programs and other similar programs, with both staff and the incarcerated population required to wear masks;
- Gradually reintroduce Step-Down Programs, with both staff and the incarcerated population required to wear masks;
- Gradually reintroduce staff led programs such as: Sex Offender Counseling Treatment, ASAT, Facility Orientation and Transitional Services, with both staff and the incarcerated population required to wear masks; and
- Continue the suspension of academic and vocational programming through the summer, as we evaluate plans for re-opening classes in the fall in a safe manner.

**INTERNAL MOVEMENT OF INCARCERATED INDIVIDUALS**

Regarding internal movements and transfers, DOCCS will:

- DOCCS will slowly resume the internal movement and transfer of incarcerated individuals, on or about June 1, 2020, while instituting social distancing on transportation vehicles, with both staff and the incarcerated population required to wear masks; and
- DOCCS will transfer all adolescent offenders from Adirondack AO Facility to Hudson AO Facility, and subsequently transfer to Adirondack, incarcerated individuals age 65 and older, who meet the medical and OMH level.

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After the lower court ruled, the court imposed a stay until the appeal was decided. While the appeal was pending, Mr. Muntaqim was diagnosed with COVID 19 and hospitalized.

The appeals court held that the petitioner had failed to show Mr. Muntaqim's incarceration was illegal. Because of this finding, it did not reach the question of whether habeas corpus lies to challenge the conditions of confinement of individuals in Mr. Muntaqim's position.

To show an 8th Amendment violation, a prisoner must show 1) they are objectively incarcerated under conditions posing a substantial risk of serious harm and 2) prison officials showed deliberate indifference, i.e., they consciously disregarded the risk of harm.

The court held that the petitioner had failed to produce any evidence of what was being done at Sullivan C.F. to combat the spread of COVID-19 or to protect prisoners at high risk from the disease. The respondents, the court found, submitted their protocols. The Court found that the protocols showed that the respondents had not disregarded the risks posed by COVID-19. Thus, the court held, the petitioner had not demonstrated that the respondents had consciously disregarded the risk of harm.

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Nora Carroll of the NYC Legal Aid Society represented Jalil Muntaqim in this Article 70 proceeding.

# Protect Yourself and Your Facility from COVID-19

by Michael D. Cohen, M.D.

In the first article in this series of articles on COVID-19, published in ***Pro Se***, Vol. 30, No. 3, I discussed the nature of the disease called COVID-19 (COrona VIrus Disease-2019) and ways to protect yourself and your facility through personal cleanliness, social distancing and environmental cleanliness. This month I will continue those themes and also give suggestions about how to take care of yourself if you get sick.

## Higher Risk for Severe Disease

The most common risk factors for severe disease have been older age, hypertension, diabetes, and heart disease. But anyone, at any age, even without existing chronic illness, can get very sick. Be extra careful to protect yourself from infection if you have any chronic medical condition. Here is some more information about HIV infection and heart disease.

- **Inadequately treated HIV infection:** All HIV patients should be tested for viral load (counts of viruses in the blood) and CD4 lymphocyte count (a special type of white blood cell). Viral load tells whether the person with HIV is infectious to others. CD4 count is a measure of the immune system's ability to fight infections. The normal CD4 count is above 500 cells per cubic millimeter. It appears that people with HIV taking effective treatment who have no viruses in their blood and normal CD4 counts are not at greater risk for severe COVID-19 disease. However, if the CD4 lymphocytes count is less than 200 the immune system is weakened and there is very high risk for severe COVID-19 disease.
- **Heart disease**: Experience treating COVID-19 has shown that even people with stable heart disease are at higher risk for severe disease. For example, people who have no heart pain or other symptoms after having stents inserted to open up partially blocked heart arteries are still at higher risk.

## Personal Cleanliness

- **Hand washing:** Public health programs have encouraged people to use a particular approach to hand washing that is most effective. Wash with soap and warm water for at least 20 seconds (the alphabet song takes about 20 seconds). Wash the palm and the back of the hand. Wash the thumb and each finger one at a time so all 10 are well washed all over. Wash wrists, too. If you don't have hot water, use the water you have. If you have push button taps on your sinks you may need a buddy to hold the water on for you while you wash.
- **Protect your lungs:** Smokers are at higher risk for severe disease. Stop smoking if you can. Avoid second-hand smoke as much as possible. Avoid dust and fumes that irritate the lungs.
- **Strengthen your resistance:** Eat well. Do aerobic exercise to strengthen the heart and lungs. Try to sleep and rest before you are tired out. Reduce stress if you can by doing the things that help you relax like listening to music, thinking of loved ones, or meditating. Don't drink bootleg alcohol. Exercise regularly. Take vitamin D supplements if you can get them (2000 units per day is a good maintenance dose). Go out in the sunshine daily if you can. Sunshine makes vitamin D in the skin. Stay normally hydrated by drinking 2 to 3 quarts of water or other clear fluids a day.

**Social Distancing (perhaps better named Physical Distancing)**

- **Head-to-foot sleeping in dorms**: In crowded dormitories it may be helpful to increase the distance between your face and the faces of the people sleeping next to you or above and below you in bunk beds. This is because some of the infectious droplets that are expelled from one person settle out of the air over a distance of six feet. Rather than sleeping with everyone's heads lined up at the same end of the bed, rearrange yourselves so your head is next to your neighbor's feet. This increased separation may reduce disease transmission.

**Environmental Cleanliness**

- **Ventilation of public spaces:** One way to reduce disease transmission is to move old air out of a room and bring in new fresh air from outside. This is particularly effective at removing infectious droplets that are so small they stay floating in the air instead of settling out onto the floor. Proper ventilation requires an inlet for new air and an outlet for old air. Open two windows on opposite ends of the room. Use two fans if you can: one blows new air in, one blows old air out. If there are no windows to open, at least make sure nothing is blocking the supply and return vents of the HVAC system. The returns are taking the old air out while the supply vents are blowing new air in.

Also, be aware that a single fan blowing air around in the room may actually make it worse. That is just air circulation, not ventilation. You may feel cooler, but it is just moving the infectious droplets around the room more vigorously, not clearing the air. It moves the larger droplets and prevents them from settling out of the air. It moves the smaller droplets more widely around the room putting more people at risk because it defeats the beneficial effects of social distancing in that room.

**Take care of yourself if you get sick**

- **Symptoms:** The U.S Centers for Disease Control (CDC) defines typical COVID-19 symptoms of fever, dry cough and shortness of breath. But some people have none of these at first and other initial symptoms may occur, including headache, nausea, abdominal pain or diarrhea. In an epidemic like this, any new illness, especially with fever, could be COVID-19.
- **Testing for infection:** People with symptoms should be tested for the presence of the virus in their nose or saliva. These tests are not widely available in the free world yet except for people who are hospitalized, so incarcerated people probably will not get tested. If you have symptoms, assume you have it.

***Isolate yourself***: If you are sick, isolate yourself as much as possible. Some correctional systems have started quarantine units where sick people are gathered together to separate them from the rest of the population. Other systems want sick people to stay in their cell. Stay isolated if possible to protect others from exposure to your disease. Wear a mask all the time if you can.

***Rest***: Get as much rest as possible when you are sick. Do not undertake vigorous activities.

***Hydration****:* Maintain normal hydration while you are sick, that is 2 to 3 quarts of water or clear fluids a day. More fluid intake is needed if you have fever or sweats.

***Symptom control***: While it is not necessary to treat symptoms, control of symptoms helps you feel better while you are ill. Use acetaminophen (Tylenol brand, for example) for control of fever, body aches, and headache. The usual dose is 650 milligrams (mg) every 4 hours, but never more than 3000 mg per 24 hours. In general, people with active liver disease should not take acetaminophen at all. If you have active liver disease and cannot

take acetaminophen, then aspirin, ibuprofen (Motrin brand, for example), or naproxen (Alleve brand, for example) also provide symptom relief.

***Breathing exercises****:* Shortness of breath and cough are common symptoms of COVID-19 disease. These symptoms may not occur at first and sometimes show up late in the course of the illness after it seems to be getting better. The most severe COVID-19 lung disease occurs when the lungs fill up with fluid (mucus).

The following breathing exercises were adapted from the website of the Cystic Fibrosis Foundation. **Don't do these breathing exercises in a public place. The exercises can expel infectious droplets into the air. Wear a mask to limit this if you can.**

Cystic fibrosis (CF) is the most common inherited disease of European Americans, but it is uncommon among other ethnic groups. Excess fluid in the lung is a common symptom of CF. Breathing exercises are used by CF patients to clear fluid out of their lungs. Similar breathing exercises are used by people with other chronic lung diseases like emphysema, chronic bronchitis or severe asthma.

The exercises use **"abdominal" breathing**. This is breathing that makes the belly swell up rather than the chest. If you relax and let your belly swell as you breath in (inhale) you are doing abdominal breathing. On the other hand, if the chest expands more when inhale you are not doing abdominal breathing.

The exercises use **"pursed lip" breathing**. The easiest way to understand this is to breath out (exhale) in such a way that your cheeks puff out. When you do this the mouth is partially closed with the lips fairly close together so that pressure builds up in the mouth and air passages in the lungs as you exhale. This increased pressure in the air passages helps keep them open.

Everyone knows what a cough is. In these breathing exercises **"huff"** means expelling air forcefully with the mouth open, as you might do when trying to fog up eyeglasses to clean them, but stronger.

*Cystic Fibrosis Foundation Airway Clearance Technique:*

a. Controlled Breathing: Slowly breathe in through the nose using abdominal breathing and breath out slowly through your mouth with minimal force through pursed lips. **Do this six times.**

b. Chest Expansion: Breathe in deeply expanding the chest this time, hold your breath for three seconds, let the breath out slowly without forcing it.

c. Repeat Controlled Breathing for another cycle of six breaths

d. Forced Expiration: Sit up. Breathe in until not quite fully inflated. Hold breath for two or three seconds. Breathe out with mouth open (huff) forcefully but slowly and continuously. **Do this two more times.**

e. Cough: Take a deep breath and cough to move fluids out of the airways into the mouth. Spit it out into a tissue and dispose of it safely in the toilet.

Repeat the whole cycle (a. to e.) again to make sure you removed as much lung fluid as you could. After successful breathing exercises you may feel less short of breath.

- When to seek medical care: You need health professional assessment when you feel short of breath, are breathing too fast, have trouble catching your breath, or get winded easily with minimal activity. If your fingernails look gray instead of pink, you have waited too long and need care urgently. Normal, relaxed adults breath 12 to 16 times per minute. Count your breathing for a full minute by a clock or watch. If the count is 20 or more that is too fast. Take notice if you are panting or breathing heavily without doing any physically strenuous activity. Stopping to catch your breath after walking a short distance or climbing one flight of stairs is not normal for an otherwise healthy adult.

Other symptoms that may indicate the need for medical care include persistent pain or pressure in the chest and confusion or difficulty waking up.

At the clinic, medical staff will assess your condition. They should take a complete set of vital signs (temperature, heart rate, breathing rate and blood pressure). They also should assess your lung function with a pulse oximeter. This device clips onto the end of a finger and shines a bright red light on the fingertip to measure how much oxygen is being carried in the blood. In a healthy person breathing room air the blood is over 95% saturated. Extra oxygen is needed if it is 90% or less. People with chest pain or confusion need additional assessments too such as an electrocardiogram (EKG) to assess the heart and assessment of level of consciousness and awareness of your surroundings.

Many prison infirmaries can give extra oxygen by face mask or through plastic tubes that fit into the nose. Sometimes they can give oxygen under low pressure with a tighter fitting face mask. Improvement of the pulse oximeter reading into the normal range above 95% indicates that the oxygen treatment is working. However, the patient must be closely monitored while on oxygen treatment because COVID-19 patients can get much worse very fast. When the pulse oximeter starts going down in spite of oxygen treatment, the patient's lungs are failing. Patients should be transferred to a hospital for more advanced care *before* there is a life-threatening breathing crisis.

Please continue to practice personal cleanliness, social distancing, and environmental cleanliness to the best of your ability. Try to enlist the cooperation of the correctional officers to make a safer facility for everyone. Watch out for each other to make sure people who get sick and have trouble breathing get the medical attention they need. Hospital transfers are necessary for adequate treatment of more severe COVID-19 disease. Working together we can get through this.

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*Michael Cohen was the Medical Director for the New York State juvenile justice system for 20 years and previously provided medical care for incarcerated adults at the New York City Rikers Island jail and at Greene C.F. in Coxsackie NY.*

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## News and Notes

# Nicholas Phillips Joins *Pro Se* Writing Staff

***Pro Se*** welcomes Nicholas Phillips as writer. Mr. Phillips is an immigration appellate attorney in the Buffalo office of Prisoners' Legal Services of New York. He has represented incarcerated persons in the Bedford Hills, Downstate, and Ulster Immigration Courts (located inside New York State correctional facilities) as well as before the Board of Immigration Appeals and Second Circuit Court of Appeals.

Mr. Phillips is a 2014 graduate of the Benjamin N. Cardozo School of Law and a former judicial law clerk for the Honorable Frederic Block of the Eastern District of New York. He will be writing articles on developments in immigration law and practice. His first article appears on page 17 of this issue. We know you join us in welcoming him to the ***Pro Se*** team!

## People in Custody Who are Deaf or Who Have Hearing Impairments

Violations of the portions of Directive 2612, Inmates with Sensorial Disabilities, which govern the provision of reasonable accommodations to individuals who are deaf or have hearing impairments are considered by the court to be violations of the *Clarkson* decree. See, *Clarkson v. Goord*, 2020 WL 1941873 (S.D.N.Y. April 22, 2020). As such, if you are deaf or have a hearing impairment and are denied the accommodations to which you think you are entitled, after you exhaust your administrative remedies, you can file a contempt motion in the *Clarkson v. Goord*, 91-cv-1792, in the United State District Court for the Southern District of New York.

## Prisoners' Legal Services Opens an Office in Newburgh, New York

Prisoners' Legal Services is pleased to announce that we have opened a new office in Newburgh, New York. The Newburgh Office handles requests for assistance from Downstate, Fishkill and Green Haven Correctional Facilities. Staffing the Newburgh Office are Managing Attorney Marie-Ann Sennett, Law Graduate Gabriel Fulmore, and Secretary Christine Culbreth. Also working in the Newburgh Office is Immigration Unit Staff Attorney Yuriy Pereyaslavskiy. The address of the office is: 10 Little Britain Road, Suite 204, Newburgh, N.Y. 12550.

## PRO SE VICTORIES!

***Matter of Gary Glen Goad v. Jeff Hale,*** **Index No. 1368-19 (Sup. Ct. Albany Co. Mar. 6, 2020).** In December 2019, the court in this action ruled in Gary Glen Goad's favor, finding that under the Freedom of Information Law (FOIL), Mr. Goad was entitled to a number of records generated after an unusual incident that the respondents had refused to produce. (We reported on this December 2019 decision in Volume 30, No. 1). Following his victory, Mr. Goad moved for an award of attorneys' fees and costs and for the court to order the respondents to provide him with paper copies of the documents that the court had ordered be produced over the respondents' objections. (The respondents had only allowed Mr. Goad to view the documents; they would not allow Mr. Goad to possess the records.)

Turning to the question of whether Mr. Goad was entitled to attorneys' fees, costs and disbursements, the court held that *pro se* litigants are not entitled to attorneys' fees. Pursuant to Public Officers Law (POL) §89(4)(c)(i), a petitioner is entitled to fees and costs under FOIL when they substantially prevailed and the court determines that the agency had no reasonable basis for denying access. [This attorneys' fees and costs provision applies only to FOIL litigation]. The court found that Mr. Goad had substantially prevailed with respect to the non-disclosure of the Accident/Investigation/Injury Reports and Employee Accident Reports because pre-existing caselaw established that they were subject to disclosure and thus there was no reasonable basis to claim that they were exempt from disclosure. It found that the respondents made reasonably good faith and partially successful arguments for finding that withholding two pages of records and making redactions on 26 pages was proper. Based on these findings, the court awarded Mr. Goad $250.00 in costs and disbursements.

The court found that Mr. Goad had not made his application to hold the respondents in contempt in a procedurally correct manner. Therefore, the court held, it could not consider Mr. Goad's request to hold the respondents in contempt for only allowing Mr. Goad to inspect but not to copy the records that the court had ordered the agency to produce. However, the court noted that Public Officers Law §87(2) requires an agency to make available for inspection ***and copying*** all records disclosable pursuant to FOIL. Thus, the court stated, Mr. Goad is entitled to have the records made available for copying as well as inspection. [Typically, when responding to a FOIL request,

DOCCS provides copies of the requested records to the person who requested them].

***Matter of Eduardo Ramirez v. James P. Thompson*, Index No. 2019 000124 (Sup. Ct. Albany Co. Feb. 2, 2020)**. Eduardo Ramirez filed an Article 78 challenge to a Tier II hearing that was held at Collins C.F. Due to the inability of the respondent to produce a transcript of the hearing because the recording was inaudible, the respondent conceded that the hearing should be expunged.

***Jessie Barnes v. David L. Rock*, Index No. 13 cv. 00164 (N.D.N.Y. Mar. 10, 2020)**. The court appointed counsel for Mr. Barnes, assigning counsel the responsibility for preparation of pre-trial submissions and conducting the trial. Absent extraordinary circumstances, the court ruled, *pro bono* counsel will not conduct any further discovery. The trial was scheduled to begin on June 1, 2020. Due to COVID-19, the trial date was adjourned.

After the court appointed counsel, Mr. Barnes wrote the court objecting to the deadlines set in the trial order and requesting that the **witnesses be sequestered** (kept separate or apart, typically so the witnesses cannot listen to each other's testimony). In response, the court labelled the letters "improper correspondence" and forwarded the letters to Mr. Barnes' counsel "to take whatever action he saw fit." When a party is represented by counsel, with few exceptions, only their lawyer is authorized to communicate directly with the court. The court also denied Mr. Barnes' motion to appoint new counsel.

***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

## Challenge to Drug Test Results Fails

After Lance Booker's urine tested positive for opioids and THC, he was charged with and found guilty of using a controlled substance. The determination of guilt was affirmed on administrative appeal, following which Mr. Booker filed an Article 78 challenge to the hearing determination, asserting that the determination of guilt was not supported by substantial evidence and that his rights to due process of law were violated when the urine sample had been left unattended in a room for 2½ hours – thereby allowing it to become contaminated – before it was placed in a freezer.

In *Matter of Booker v. Venettozzi*, 2020 WL 369576 (3d Dep't Jan. 23, 2020), the court first found that the determination of guilt was supported by substantial evidence. Turning to the question of whether the sample might have been contaminated during the period of time that the sample was unrefrigerated, the court noted that the officer who tested the sample testified that the sample was placed in a locked office to which only he had access. Further, the court wrote, there was no evidence that leaving the sample at room temperature for 2½ hours could result in a false positive. Based on these conclusions, the court found that the sample had been maintained in a secure location at all times and therefore denied the petition.

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Lance Booker represented himself in this Article 78 proceeding.

## Court of Claims

# Brutal Attack Not Within Scope of CO's Employment

In 2010, Correction Officer Wheby assaulted Jose Rivera, punching him in the face and head and stomping on him. Following the initial assault, when Mr. Rivera was in restraints, Officer Wheby slammed his radio into Mr. Rivera's head and he and two other officers punched, kneed and kicked Mr. Rivera in the head until he was unconscious. Following the assault, the officers wrote reports stating that the injuries were the result of a seizure. As a result of the assault, Mr. Rivera suffered serious injuries.

The DOCCS Inspector General's Office (IG) – now known as the Office of Special Investigation – investigated the assault. The IG found that the statements from the officers were not believable and concluded that Officer Wheby and another officer had engaged in an inappropriate use of force and that all three officers had provided false statements to the IG. The officers were fired and Wheby was criminally prosecuted.

Mr. Rivera filed assault and battery claims in the Court of Claims. Claims filed in this court seek to impose liability on the State of New York. The actual state employees responsible for the conduct are not defendants.

Finding that the officers' conduct was outside the scope of their employment, the trial court granted summary judgment to the defendant. The Appellate Division, Third Department affirmed the trial court decision as did the Court of Appeals in *Rivera v. State of New York*, 34 N.Y.3d 383 (2019).

At the heart of this decision is the principle that the State cannot be held liable for conduct that is outside the scope of a state employee's employment. *See, Riviello v. Waldron*, 47 N.Y.2d 297 (1979). The basis for limiting the employer's responsibility for the conduct of their employees is found in tort law. (A tort is a civil wrong that causes a claimant to suffer loss or harm, resulting in legal liability for the person who committed the tortious act). In tort law, the doctrine of *respondeat superior* permits an employer to be held liable for the torts committed by employees – whether intentionally or negligently – where the conduct is a foreseeable and a natural incident of the employment. However, where employees, to advance their own interests, depart from the line of duty to the point that their acts can be said to be an abandonment of their service, the employer is not liable.

To determine whether an employee acted within the scope of employment, the *Rivera* Court noted that the following factors should be considered:

- the connection between the time, place and occasion for the act;
- the history of the relationship between the employee and the employer as shown in actual practice;
- whether the act is one commonly done by such an employee;
- the extent of the departure from normal methods of performance; and
- whether the act was one that the employer could reasonably have expected.

After considering these factors, the *Rivera* Court concluded that the State had met its burden of showing that the officers' conduct – assault of an incarcerated person – was not within the scope of the officers' employment. The Court acknowledged that the time, place and occasion factor was satisfied because the officers were on duty and the assault occurred at the prison where Wheby supervised the incarcerated population. Consideration of the other factors, however, did not support *respondeat superior* liability. The brutal beating (the Court's characterization) was neither an irregular performance of duty nor a mere disregard of instructions. It was, in fact, not in furtherance of any employer related goal whatsoever.

"[B]ased on the uncontested facts," the Court found that, "it is evident that claimant's injuries were not caused by actions taken within the scope of

employment and thus there were not triable issues of fact as to the State's vicarious liability for assault and battery."

The *Rivera* decision reminds us that when DOCCS employees use unnecessary or excessive force, unless they justify their conduct, for example, by claiming that it was necessary to subdue an out-of-control or assaultive individual, the State may be able to defend an action for damages in the Court of Claims by arguing that the conduct was outside the scope of their employment.

In such cases, an alternate basis for tort liability in the Court of Claims could be that the State is responsible for the injuries because DOCCS was negligent in the training, retention, or supervision of the employees who assaulted the claimant. Facts which might support such a claim include a number of complaints which put the supervisory staff on notice that the employee was acting outside of the scope of employment. *See, e.g., Anna O. v. State of New York*, 2011 WL 6957587 (Ct. Clms. Oct. 19, 2011)

Negligent supervision requires a claimant to show that an employer knew or should have known – had the supervision been adequate – of the employee's propensity for the type of conduct that injured the victim. *See Shantelle S. v. State of New York*, 2006 WL 1141199 (Ct. Clms. Feb. 22, 2006). Negligent retention requires a claimant to establish that the employer knew or should have known of the employee's propensity for the sort of conduct that caused the injury. *Id.* In a negligent retention cause of action, the employer's negligence arises from its "... having placed the employee in a position to cause foreseeable harm, harm which would most probably have been spared the injured party had the employer taken reasonable care in making decisions respecting the ... retention of his employees." *Detone v. Bullit Courier Service, Inc.*, 140 A.D.2d 278, 279 (1st Dep't 1988).

Unlike actions in the Court of Claims, which are against the State of New York, actions brought pursuant to Section 1983 are against the state actors who are responsible for the conduct that injured the plaintiff. Thus, in a case involving unnecessary force, the court presiding over a Section 1983 action has the authority to hold liable the corrections officers and, where the facts show a failure to supervise or train, their supervisors.

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Stacey Van Malden, of counsel to Goldberger & Dubin, P.C., represented Jose Rivera in this Court of Claims action.

## Miscellaneous

## Father's Right to Participate Via Phone in Custody Hearing

Vincent F., whose child lives in New York, is incarcerated in Pennsylvania. In 2017, the mother of the child left the child with the mother's cousin. The cousin then began a custody proceeding. The child's parents were notified of the proceeding and told to appear in court to answer the petition. A Pennsylvania DOCS employee contacted the court on Vincent F.'s behalf, advising the court that Vincent F. could appear by telephone. At the hearing, the court denied Vincent F.'s request to participate by phone and awarded temporary custody to the mother's cousin.

Following an investigation into the cousin's suitability and the circumstances of the child's coming into the cousin's house, the court held a second hearing. At the hearing, the court stated that it lacked jurisdiction over Vincent F. and awarded custody to the cousin.

On appeal, the Third Department, in *Matter of Starasia E. v. Leonora E. and Vincent F.*, 179 A.D.3d 1328 (3d Dep't 2020), reversed the lower court's decision, finding that the court had violated the father's right to be heard – a right that the appellate court wrote "is fundamental to our system of justice." "Even an incarcerated parent has a right to be heard on matters concerning [his or her] child," the court continued, "where there is neither a willful refusal to appear nor a waiver of appearance." Here, because the record showed that the father had not been given an opportunity to participate in the proceedings, the

court reversed the decision and sent the case back for a new hearing.

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Matthew C. Hug, of Hug Law PLLC, represented Vincent F.

## Court Says Prison Wages Are Consistent with Wages Paid to Slaves

In *People v. M^cTerrell*, 66 Misc.3d 1210(A) (Sup. Ct. Kings Co. Jan. 15, 2020), the court rejected the defendant's application for a deferral of payment of the mandatory surcharge, finding that the defendant had failed to offer any credible and verifiable information showing that the surcharge would work an unreasonable hardship beyond the ordinary hardship suffered by other indigent inmates. The court then suggested that the legislature "may wish to consider paying inmates a wage less consistent with that paid by plantation owners to their slaves, so as to enable them to pay such surcharges."

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Sean M^cTerrell represented himself in this Article 78 proceeding.

## Failure to Properly Serve Leads to Petition's Dismissal

Justo Estevez-Rodriguez wanted to challenge the Department's failure to credit him with parole jail time. To do this, he submitted an Article 78 petition to the Albany County Supreme Court, with an Order to Show Cause setting forth the court's instructions with respect to service of the petition on the respondent and the Attorney General. Following service, the respondent moved to dismiss the petition, based on the petitioner's failure to serve the Attorney General in accordance with the Order to Show Cause. The Supreme Court granted the respondent's motion and the petitioner appealed.

In *Matter of Estevez-Rodriguez v. Stanford*, 179 A.D.3d 1370 (3d Dep't 2020), the court noted that although the petitioner was required to serve a copy of the signed Order to Show Cause on the Attorney General (in addition to the Notice of Verified Petition, the Verified Petition, exhibits and any supporting affidavits), the petitioner had failed to include a copy of the signed order to show cause in the papers that he served on the Attorney General. The court acknowledged that the petitioner had properly served the respondent with all of the papers that the Order to Show Cause required him to served.

Quoting from *Matter of Adams v. Annucci*, 175 A.D.3d 1687, 1687-1688 (3d Dep't 2019), the court wrote, "An inmate's failure to serve papers in accordance with the directives set forth in an order to show cause will result in dismissal, unless the inmate can demonstrate that imprisonment presented an obstacle to compliance." In this case, the court found, the petitioner did not assert that he was unable to comply with the service requirements. Rather, his position was that he had served the signed Order to Show Cause on the Attorney General. However, one of the three affidavits of service filed with the court indicated that the signed order to show cause had not been served on the Attorney General until after the deadline for service had passed. Based on these facts, the court found that the petitioner had not proved that he had served the papers on the Attorney General in accordance with the Order to Show Cause nor had he raised a question of fact sufficient to warrant a **traverse hearing** on that issue. A traverse hearing is a hearing into the issue of whether a respondent has been properly served. Based on these findings, the appellate court ruled that the lower court had properly dismissed the petition.

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Justo Estevez-Rodriguez represented himself in this Article 78 proceeding.

## Request to Add Wife to FRP Leads to Denial of FRP Visits

In 2015, Christopher Shapard applied to have his wife added to the people with whom he could participate in the Family Reunion Program (FRP). This application led to a "full cycle" review. Due to Mr. Shapard's prior escape from a jail in Connecticut and his status as a Central Monitoring Case (CMC), his application was also subject to the "special review" process. Following these reviews, DOCCS denied Mr. Shapard's FRP application based on:

- The nature of his convictions (multiple counts of first-degree robbery and burglary and second-degree assault);
- Disciplinary determinations of guilt—and a criminal conviction—for assaulting correction officers;
- The escape; and
- A violent disciplinary history.

Mr. Shapard's administrative appeal was denied. In 2017, Mr. Shapard filed another application to participate in the FRP with his mother and stepfather. This application was also denied, as was Mr. Shapard's administrative appeal of the 2017 denial.

In *Matter of Shapard v. Annucci*, 177 A.D.3d 1048 (3d Dep't 2019), the court first found that the challenge to the 2015 denial of his FRP application was moot because of the subsequent submission of the 2017 application. That is, the court would not consider whether the 2015 application had been improperly denied because the decision currently affecting Mr. Shapard was the 2017 decision.

The court found that the denial of the 2017 application was neither arbitrary and capricious nor an abuse of discretion. In doing so, the court first noted, citing *Matter of Loucks v. Annucci*, 175 A.D.3d 775 (3d Dep't 2019), that "[p]articipation in the family reunion program is a privilege not a right and the decision whether an inmate may participate is heavily discretionary and, as such, will be upheld if it has a rational basis." The court then reviewed the factors considered in denying the application, i.e., the violent conduct that led to his criminal convictions and disciplinary determinations of guilt. Citing *Matter of Marshall v. NYS DOCCS*, 167 A.D.3d 1115 (3d Dep't 2018), the court noted that successful past participation in FRP visits is not a guarantee that future applications will be granted.

"In sum," the court wrote, "Reliance on the nature of the petitioner's convictions, previous escape, history of assaultive and uncooperative conduct with correction officers and violent disciplinary history provides a rational basis for denial of [Mr. Shapard's] application."

Based on the above facts and analysis, the court affirmed the lower court's dismissal of Mr. Shapard's Article 78 petition.

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Christopher Shapard represented himself in this Article 78 proceeding.

# Federal Decisions

## Administrative Segregation Claims Survive Motion for Summary Judgment on Due Process and Eighth Amendment Grounds

In 2017, Plaintiff Imhotep H'Shaka filed a lawsuit in the Northern District of New York, *H'Shaka v. O'Gorman, et al*., Case No. 9:17-cv-00108 (NDNY 2017). At that time, Mr. H'Shaka had spent over 21 continuous years housed in the Special Housing Unit (SHU), since 1996, first under disciplinary sanctions and then under Administrative Segregation Status. Mr. H'Shaka first served 14 years in the Special Housing Unit (SHU) for charges which included assault on staff and attempted escape. These incidents occurred when he was between the ages of 23 and 26 years old. After receiving discretionary time cuts for good behavior, he was placed under Administrative Segregation status and continued to be held in the SHU.

The complaint alleged that certain individuals in DOCCS and OMH violated the U.S. Constitution's Eighth Amendment prohibition on cruel and unusual punishment. The Eighth Amendment claims included claims related to the conditions of his prolonged isolated

confinement, the disproportionate punishment without a legitimate penological interest, and the failure to ensure appropriate mental health treatment and care. The complaint also alleged that certain individuals in DOCCS, both in the facility and in Central Office conducting the Ad Seg reviews, violated the U.S. Constitution's Fourteenth Amendment guarantee to due process by failing to conduct meaningful periodic reviews of his confinement status.

Although DOCCS officials conducted periodic reviews for Mr. H'Shaka's confinement in the SHU during his Ad Seg confinement, the lawsuit alleged that the reviews were not meaningful because they failed to provide Mr. H'Shaka with notice of what he could do to get released from Ad Seg. This included DOCCS' misleading notice that he could be released from Ad Seg by maintaining "positive" behavior, which he had often done for years at a time, and by making a predetermination that Mr. H'Shaka would stay in Ad Seg. Infrequent and nonviolent disciplinary infractions were often cited in his periodic reviews for his continued isolated confinement.

After several years of discovery, defendants filed a motion for summary judgment, seeking to dismiss all of Mr. H'Shaka's claims. On March 12, 2020, the Northern District of New York partially denied defendants' motion. *H'Shaka v. O'Gorman, et al*., 2020 WL 1188075 (N.D.N.Y. Mar. 12, 2020). Defendants argued in their motion that Mr. H'Shaka was not in "solitary confinement" because the SHU block he was in for a number of years had open bars through which he could talk to staff and other prisoners.

In its decision, the Court dismissed Mr. H'Shaka's medical deliberate indifference claim for mental health care treatment. Although the Court found the OMH Unit Chief and CNYPC Executive Director were personally involved in his mental health care, the Court decided that his care was adequate.

However, the Court found that Mr. H'Shaka's claims relating to the following survived: (1) cruel and unusual punishment related to the conditions of his confinement in the form of keeping him in administrative segregation indefinitely; and (2) denial of procedural due process and meaningful review related to his continued confinement in administrative segregation.

In discussing Mr. H'Shaka's due process rights, the Court stated:

> The Due Process Clause requires, among other things, that prison officials periodically review whether an inmate who is confined in Ad Seg continues to pose a threat to the facility in order to ensure that Ad Seg is not used as a pretext to keep the inmate in the SHU indefinitely. *Proctor v. LeClaire*, 846 F.3d 597, 601 (2d Cir. 2017) (citing *Hewitt v. Helms*, 459 U.S. 460, 477 n.9 [1983]). The purpose of periodic reviews "is to ensure that the state's institutional interest justifying the deprivation of the confined inmate's liberty has not grown stale and that prison officials are not using Ad Seg as a pretext for indefinite confinement of an inmate." *Proctor*, 846 F.3d at 609 (quoting *Hewitt*, 459 U.S. at 476-77 & n.9).

The Court decision found that a reasonable fact finder (members of the jury or the judge trying the case without a jury) could conclude that Mr. H'Shaka's violent behavior from over twenty years ago was a pretext to continue to punish him by placing him in administrative segregation. The Court also discussed the efforts the defendants made to make it look as if their periodic reviews were meaningful, when in fact they were not. For example, the review committee noted in some reviews that Mr. H'Shaka was a strong candidate for transition out of Ad Seg because of his good behavior for the previous two years, but provided no explanation as to the duration of the period of the period of good behavior he was required to show. The Court was, "troubled by the complete absence of any meaningful indication by DOCCS of when and

under what circumstances Plaintiff might be released from Ad Seg." (Decision at 13).

At the time of the decision, Mr. H'Shaka had recently been released off Ad Seg status after spending 23 years in SHU.

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The Ithaca Office of Prisoners' Legal Services and the law firm of Amini LLC represented Mr. H'Shaka in this Article 78 proceeding.

## Does 17 Days of Confinement Beyond an ME Date Violate the 8th Amendment?

Once again, a federal court refuses to answer the question: How many days of confinement beyond an individual's maximum expiration date does it take to violate the 8th Amendment's prohibition on cruel and unusual punishment? In *Goldring v. Davidson*, 2020 WL 1547464 (S.D.N.Y. April 1, 2020), the plaintiff alleged that the defendants' failure to release him on his maximum expiration date violated his rights under the 8th and 14th Amendments. The defendants moved to dismiss the complaint. The court found that it was not clearly established at the time of the alleged violation that 17 days of incarceration past the expiration of an individual's sentence is sufficiently serious to violate the 8th Amendment.

In 2012, the plaintiff was sentenced to 7 years. In 2016, he was re-sentenced to 2 to 4 years. At sentencing, the court stated that Mr. Goldring should be released immediately as he had already served roughly 5 years prior to the resentencing.

Following the resentencing, on September 28, the plaintiff was transferred to Downstate C.F. In October, he wrote to the defendants four times advising them he was being held past his maximum expiration date. The day after he sent his fourth letter, and 17 days after he had been returned to DOCCS custody with an expired sentence, the plaintiff was released.

The court found that with respect to the 8th Amendment claim, the defendants were qualifiedly immune from liability for civil damages. Qualified immunity is a doctrine that protects state actors, like DOCCS employees, from having to pay damages when either 1) the defendant's conduct did not violate clearly established law or 2) the defendant's belief that his action did not violate clearly established law was objectively reasonable.

A court can consider a motion to dismiss on the ground of qualified immunity, the court wrote, "as long as the defense is based on facts appearing on the face of the complaint."

The Second Circuit has held that "detention beyond that authorized by law ***may*** violate the Eighth Amendment." *See, Sudler v. City of New York*, 689 F.3d 159, 169, n. 11 (2d Cir. 2012), *citing Calhoun v. New York State Division of Parole Officers*, 999 F.2d 647 (2d Cir. 1993) (emphasis added). In *Goldring*, the court stated, "to prove an Eighth Amendment claim, the plaintiff must show "1) a deprivation that is objectively, sufficiently serious . . . and 2) a sufficiently culpable state of mind on the part of the defendant official, such as deliberate indifference to inmate health or safety."

The court held, *without deciding whether being confined 17 days after the expiration of an individual's ME date*, that the defendants were entitled to qualified immunity because it was not clearly established in September through October, 2016, that continued detention for 17 days after the expiration of a sentence violates the 8th Amendment. Relying on *Calhoun*, the court wrote, "A delay of a few days beyond the expiration date of a sentence does not constitute a 'sufficiently serious' deprivation of liberty to give rise to an Eighth Amendment claim.

The court turned next to the issue of whether the defendants had violated the plaintiff's 14th Amendment right to due process of law when they held him beyond his ME date. It noted that in *Calhoun*, the Second Circuit had recognized that "an inmate has a liberty interest in being released upon the expiration of [their] maximum term of imprisonment." Further, the court noted, "due process requires [ . . . ] an opportunity to be heard at a meaningful time and in a meaningful way." The court also commented, citing *Akande v. U.S. Marshall Service*, 2018 WL 1383397 (D. Conn. Mar. 19, 2018), "[a] violation of procedural due process

may occur when a person is deprived of [their] liberty for a period of time that would not support an Eighth Amendment claim.

The plaintiff argued that his right to due process of law was violated by the defendants' inadequate procedures for reviewing an amended sentence and commitment order that accompanies an individual who had previously been in DOCCS custody and is now returning. Specifically, the plaintiff argued that DOCCS was aware of the vacated sentence when they transferred the plaintiff to NYC custody and therefore needed a proper procedure in place to review his amended sentence when he returned. The court found that this claim required further factual development regarding what procedures existed when the plaintiff was returned to DOCCS custody.

The court ruled that having alleged a claim upon which relief could be granted, i.e, the 14th Amendment due process claim: "Plaintiff has at this stage sufficiently alleged that he was incarcerated beyond his maximum sentence, that he informed the defendants of his extended incarceration on four occasions, and that the procedures used by DOCCS when he was returned were inadequate. For this reason, the court denied the defendants' motion to dismiss the 14th Amendment claim.

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Nicole Bellina of Stoll, Glickman & Bellina represented Robert Goldring in this Section 1983 action.

## IMMIGRATION MATTERS

In this column, I will survey notable immigration decisions from the federal courts and the Board of Immigration Appeals, with a particular focus on cases that may be relevant to incarcerated non-citizens in deportation proceedings as a result of criminal convictions. In my first column, I will detail *United States v. Scott*, 954 F.3d 74 (2d Cir. 2020), a major statement by the Second Circuit Court of Appeals on what constitutes a "violent felony" under federal law.

In *United States v. Scott*, the Second Circuit considered whether a conviction for manslaughter in the first degree under New York Penal Law ("NYPL") §125.20(1) is a "crime of violence" under the Armed Career Criminal Act ("ACCA"), a federal statute which enhances a defendant's sentence based on prior violent felony convictions. The ACCA crime of violence definition is important in the immigration context because the Immigration and Nationality Act ("INA") – the statute which governs immigration cases – defines a variety of aggravated felonies that bar a non-citizen from most forms of relief from deportation. One kind of aggravated felony is a crime of violence as defined by the ACCA. Thus, *Scott* also impacts whether a New York first-degree manslaughter conviction would constitute an aggravated felony under the INA.

To constitute a crime of violence under the INA or the ACCA, a criminal offense must have "as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. §16(a); 18 U.S.C. §924(e)(2)(B)(i). To determine whether a particular conviction meets that criteria, courts employ what is known as the "categorical approach," which stems from a line of Supreme Court cases considering whether prior convictions warrant federal sentencing enhancements. *See, e.g., Taylor v. United States*, 495 U.S. 575, 600-02 (1990). The categorical approach looks to the plain text of the statute of conviction, and not to the underlying facts of the crime itself, to determine whether the minimum conduct criminalized by the statute necessarily matches the federal generic offense – in this case, the "use, attempted use, or threatened use" of force.

Judge Pooler of the Second Circuit, joined by Judge Leval, concluded that first-degree manslaughter under NYPL §125.20(1) is not a crime of violence because a conviction under that statute does not *necessarily* require the use of force. 954 F.3d at 82. In reaching that conclusion,

the Second Circuit looked to two decisions from the New York State Court of Appeals, which affirmed that a defendant could be found guilty of first-degree manslaughter by failing to act when he or she had a duty to do so. 954 F.3d at 81-82. Both cases dealt with parents who failed to intervene to protect their children from harm; in each, the New York Court of Appeals affirmed that the failure to take concrete action, when undertaken with the "intent to cause serious physical injury" required by NYPL §125.20(1), can constitute first-degree manslaughter if death results from the failure to act. Accordingly, because the statute "could be applied to a defendant who intentionally causes death by an act of omission in the face of a duty to protect the victim from a perceived harm," *id.* at 84, Judge Pooler found that a conviction under NYPL §125.20(1) is not a crime of violence.

In a vigorous dissent, Judge Raggi took issue with the majority's conclusion, noting that the petitioner's convictions "were undoubtedly brutal: Scott shot one of his victims in the head at point-blank range; he stabbed the other to death." *Id.* at 95. Judge Raggi found the two New York Court of Appeals decisions unpersuasive; in her opinion, those cases stated only that a person could *theoretically* be prosecuted for failing to act, whereas "Scott has not pointed to a single case . . . in which a defendant has 'in fact' been prosecuted for New York first-degree manslaughter based solely on omission[.]" *Id.* at 96.

But Judge Raggi also concluded that, even if a defendant *were* convicted for failing to act, such a conviction would still require the "use" of force under the Supreme Court case *United States v. Castleman*, 572 U.S. 157 (2014). In *Castleman*, the Supreme Court concluded that a defendant who harms another by using poison has "used" force even though the defendant did not physically touch the victim. *Castleman*, 572 U.S. at 171. The *Castleman* Court explained that the "use of force" in that scenario is "not the act of sprinkling the poison; it is the act of employing poison knowingly as a device to cause physical harm." *Id.* While the *Scott* majority distinguished *Castleman* because it involved *some* action (sprinkling poison), Judge Raggi found that distinction unavailing, concluding that a person who injures another by failing to act "must be said, by his omission, to have adopted the physical force causing harm the 'instrument' of his own injurious intent[.]" *Scott*, 954 F.3d at 96-97.

The forceful dialogue between the majority and dissent in *Scott* is likely a reflection of the unsettled nature of the caselaw in this area. Before 2018, a crime of violence had a second definition: a conviction that, "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. §16(b). But in April 2018, in a case called *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), the Supreme Court struck down this second definition, finding that it produced "more unpredictability and arbitrariness than the Due Process Clause tolerates." Because courts before *Dimaya* sometimes looked to both definitions when ruling on whether a particular conviction constitutes a crime of violence, the caselaw in this area is now quite complex and difficult to decipher. In perhaps the best illustration of the confusing state of the law, the Second Circuit issued a precedential decision, *Thompson v. Barr*, 924 F.3d 70 (2019), which found assault in the second degree under NYPL §120.05(1) to be a crime of violence, but then withdrew that decision two weeks later, with no new decision yet issued. *See Thompson v. Barr*, No. 17-3494 (2d Cir. May 30, 2019).

*Scott* is certainly not the last word from the Second Circuit on the question of what constitutes a crime of violence. But for now, *Scott* stands as a fascinating decision by the Court, and one that potentially opens new avenues for future litigants to challenge whether their conviction is a crime of violence under the ACCA or the INA.

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

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**Pro Se Staff**

**EDITORS:** BETSY HUTCHINGS, ESQ., KAREN L. MURTAGH, ESQ.
**WRITER FOR IMMIGRATION MATTERS:** NICHOLAS PHILLIPS, ESQ.
**GUEST WRITER:** ALISSA HULL, ESQ.
**COPY EDITING AND PRODUCTION:** ALETA ALBERT