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Second Circuit Rules Administrative Remedies are Exhausted 30 Days After CORC Receives a Timely Appeal of a Grievance

The Prison Litigation Reform Act (PLRA) requires incarcerated persons to exhaust their administrative remedies before they file a federal civil rights lawsuit. This means that before filing a federal civil rights lawsuit alleging that their constitutional rights were violated, individuals in DOCCS custody must submit a grievance concerning a disputed matter and pursue that grievance through all levels of appeal, including receiving a decision from an appeal to the Central Office Review Committee (CORC).

DOCCS grievance regulations currently specify that the CORC has 30 days, beginning from the date an appeal is received, to render a decision (7 NYCRR §701.5[d][3][ii]). Despite this rule, the CORC frequently takes more than 30 days – sometimes far more – to issue a final decision. As a result, many individuals in DOCCS custody have found themselves in a situation where they have appealed a grievance to the CORC, but then the CORC's deadline expires and no decision has been issued. What then is the incarcerated person to do and when have they exhausted their administrative remedies?

This was the exact situation the Second Circuit considered in *Hayes v. Dahlke*, 2020 WL 5883945

(2d Cir. Oct. 5, 2020). In *Hayes*, the incarcerated plaintiff submitted several grievances concerning an assault and related acts of retaliatory harassment by DOCCS staff. DOCCS denied each grievance at the facility level and the plaintiff appealed the denials to the CORC. Five months after submitting his first

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REMEMBERING SUPREME COURT JUSTICE RUTH BADER GINSBURG

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

She was a fighter, an icon of women's rights, and so much more. And while not shy about tackling tough issues, my guess is that the widening political fissures that her passing will create are not what she'd want as any part of her esteemed legacy.

Sadly, the passing of Supreme Court Justice Ruth Bader Ginsburg promises to make a tumultuous time in our nation's history that much more contentious. This, for me, is particularly tragic as the Justice always seemed to use her energy, intellect and combative spirit in a productive way, with the goal of bringing people together. So, against that background, it seems an important time, for the collective good of our country, to revisit other lessons from her legacy.

You see, Justice Ginsburg was many things to many people, and her evolution on many key issues certainly wasn't monolithic. A review of some of those positions, on issues relevant to our audience, is a good primer and reminder of that fact.

According to a 9/23/20 analysis by The Marshall Project: "tributes have tended to focus on her work championing gender equity and reproductive rights. Her record on issues of criminal justice and race is less examined—and less consistent . . . Most criminal justice reform proponents we spoke to praised Ginsburg for her record, in which she was typically skeptical about the government wielding its power unfairly against defendants and prisoners. But there were times she sided with law enforcement and the Trump administration . . ."

A few quotes from prison law experts cited in The Marshall Project piece are illustrative.

David Fathi, director of the American Civil Liberties Union National Prison Project:

"On prisoners' rights, Justice Ginsburg was an inconstant ally. She authored *Cutter v. Wilkinson*, which enhanced protection for prisoners' religious rights. But she also wrote *Porter v. Nussle*, which erected new barriers for prisoners seeking to vindicate their rights in federal courts. She dissented in *Beard v. Banks*, when the court upheld 23-hour solitary confinement without newspapers, radio, television, or telephone calls. But she also joined the court's opinion in *Overton v. Bazzetta*, which upheld draconian visiting restrictions in Michigan prisons, including a potential lifetime ban on visits for prisoners found guilty of substance-abuse violations.

The reality, of course, is that no Supreme Court justice in recent memory has been a consistent champion of the rights of incarcerated people. Justice Ginsburg recognized prisoners as rights-bearing individuals and was willing, more frequently than most of her colleagues, to uphold those rights against government challenges."

Margo Schlanger, former law clerk for Justice Ginsburg and University of Michigan law professor:

"Justice Ginsburg developed a deep interest in prison conditions and prisoner rights long before she was a justice. In the 1990s, her husband, Marty Ginsburg, told me (rolling his eyes a bit at forgone

golf games) that before she was appointed to the Supreme Court, they frequently toured prisons when they were in Europe on vacation. Similarly, before she was on the Supreme Court, she ensured that each year's Court of Appeals law clerks visited a federal prison, so they understood the stakes of the criminal cases they helped her with.”

Andrea Armstrong, law professor at Loyola University New Orleans:

“When it came to prison conditions and the rights of incarcerated people, Justice Ginsburg simply wasn't as visible . . . She wasn't the primary author on any of our blockbuster human-rights-in-prison cases. . . she just wasn't a leader in this particular area of jurisprudence—but that doesn't negate her tremendous influence in other areas of law.”

Laura Rovner, professor of law and director of the civil rights clinic at the University of Denver College of Law:

“I don't think solitary confinement was really her issue. She did find it constitutionally problematic enough to vote that a certain amount of process needs to attend a decision to put people in solitary . . . But in *Davis v. Ayala*, a 2015 case . . . Justice Kennedy writes separately to condemn the practice of solitary confinement and she doesn't join that concurrence. So, this is not to say that I think she endorsed solitary confinement. But this is not one of the causes she was a real champion for.”

So, in the minds of many well-informed reform advocates, the Justice “wasn't perfect.” But, as most have also noted, she was pretty darn close.

That agreement reached consensus proportions when in 2019, the Berggruen Institute selected Justice Ginsburg from a list of more than 500 nominees for the Berggruen Prize for Philosophy & Culture. A lifetime achievement award for contributions to social justice, human rights, cultural and ethical advances, the award included the opportunity for Justice Ginsburg to select the nonprofit organization to which the Berggruen Institute would donate \$1 million.

All of this is to say that we, as a country, should take a lesson from the Justice's life, especially at this precarious moment in our relatively short experiment with democracy. Her life, and our history as a nation, has always reflected what this country is really about: a battleground in, what former Supreme Court Justice William O. Douglas first coined, “the marketplace of ideas.”

In no small part, Justice Ginsburg's life reminds us that there's room for many opinions, people can disagree without being disagreeable, change takes time and that, as Dr. King once famously said, “the arc of the moral universe is long, but it bends toward justice.”

Here's hoping that this view of her legacy leads to better days for the country – which, to my mind, would be a truly fitting tribute to this most special of American patriots.

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appeal, however, not having received a CORC decision relating to any of his appeals, the plaintiff filed a 1983 civil rights claim concerning both the assault and harassment. Only after filing suit – approximately nine months after the first appeal was received – did the CORC issue decisions on the grievances.

In response to the lawsuit, the defendants moved for partial summary judgment, arguing that since the plaintiff had filed his claims before receiving CORC decisions, he had not exhausted his administrative remedies as the PLRA requires. Plaintiff answered that he had done everything the DOCCS grievance regulations required of him and that the CORC’s failure to act within its 30-day deadline rendered the grievance/exhaustion process unavailable to him. After considering these arguments, the United States District Court for the Northern District of New York, while conceding that the issues of exhaustion and availability were “a close question,” nonetheless granted the defendants’ motion, because there was no evidence plaintiff had written to the CORC concerning its delay and then gave it an opportunity to respond. Plaintiff appealed this determination to the Second Circuit.

In its decision, the Second Circuit, citing 42 U.S.C. §1997e[a], first reiterated that the PLRA requires incarcerated persons to exhaust all “available” administrative remedies before they file a civil rights claim. Indeed, there are no exceptions to the exhaustion requirement, other than that the prison’s remedies must be “available.”

Whether a prison grievance procedure is ‘available’ is a complex question that usually turns on the specific facts of a given case. Generally though, federal courts have found that such procedures are “unavailable” in three situations:

1. Where the procedures operate as a simple dead end, for instance when prison officials are consistently unwilling/unable to provide any relief;
2. Where the procedures are so **opaque** (vague or overly complex) that they are practically incapable of use; and
3. Where prison administrators thwart individuals from using the procedures through **machination** (plotting), misrepresentation, or intimidation.

See, Ross v Blake, 136 S.Ct. 1850 (2016).

In *Hayes*, however, the Second Circuit determined it need not **delve into** (look at) the unavailability exceptions. Citing the Supreme Court’s holding in *Jones v Bock*, 549 U.S. 199 (2007), the Second Circuit observed that it is the prison’s regulations alone which define the boundaries of exhaustion and DOCCS rules concerning the CORC, the Court wrote, were clear: 7 NYCRR §701.5(d)(3)(ii) provides that the CORC “shall” render a decision on a grievance “within 30 calendar days from the time the appeal was received.” No other qualifications to this 30-day rule appear in the regulations the Court noted, and the word “shall” – as opposed to “may” – implies that DOCCS has no discretion with respect to the requirement. Finally, once a grievance appeal reaches the CORC, there are no “next step” provisions for an incarcerated person to follow should the CORC fail to respond within its 30-day deadline.

Accordingly, the Second Circuit rejected the lower court’s finding that plaintiff had not exhausted because, before filing, he did not write to the CORC concerning its delay in deciding his appeal. The DOCCS grievance rules do not require that the grievant write to the CORC when

it fails to decide an appeal within 30 days and, the Court wrote, it is only those rules which control whether a grievance has been exhausted.

Applying this analysis to the facts presented in the *Hayes* case, the Second Circuit held that an incarcerated person who has followed the DOCCS grievance procedures in their entirety, but who has not received a timely CORC decision, has exhausted their administrative remedies.

This ruling resolves an issue of significant and prolonged disagreement between New York's federal district courts. Before the Second Circuit decided *Hayes*, it was unclear what an incarcerated person was to do when CORC failed to issue an appeal decision within 30 days of receiving the appeal. Many individuals filed lawsuits after fruitlessly waiting months for a CORC decision only to have the district courts dismiss the lawsuits for failure to exhaust. Often these decisions would turn on individual and subjective factors, such as the length of CORC's delay, whether the delay was reasonable, and/or whether the incarcerated person had made an effort to contact the CORC about the delay. With this decision, the Second Circuit has replaced weighing such subjective factors with a clear 'brightline' standard: if you have properly submitted and appealed a grievance up to the CORC and the CORC does not issue a decision within the 30-day deadline for doing so, you have exhausted your administrative remedies.

We would note that while this standard is significantly clearer, it nonetheless remains quite strict. For instance, all but one of the grievances in *Hayes* were beyond the CORC's 30-day deadline. The last one, however, had only been received by the CORC 26 days before the plaintiff filed his lawsuit. The Second circuit held that this grievance had not

been exhausted because the CORC still had four days to decide it at the time of filing. Critically, this was the case even though the CORC did not actually end up deciding that grievance within its deadline. Thus, going forward, while incarcerated persons in DOCCS custody need no longer wait indefinitely for a CORC decision, they must be sure the CORC's 30-day deadline (beginning on the date CORC receives the appeal) has passed to ensure they have exhausted.

Finally, it is possible DOCCS may seek to amend its grievance rules in the wake of the Second Circuit's determination here. Such changes would have to follow the State's regulatory procedure for rulemaking, which typically includes a period for public review and comment. Should DOCCS propose rule changes, we will report on this development in a future issue of *Pro Se*. In the meantime, the Second Circuit's decision here marks a significant victory for incarcerated litigants as it clarifies a long-standing issue of confusion related to CORC delay and exhaustion under the PLRA.

David Shapiro of the Northwestern Pritzker School of Law, Legal Clinic, Chicago, Illinois represented Plaintiff Hayes in the Section 1983 lawsuit.

Prisoners' Legal Services of New York and the Prisoners' Rights Project of the Legal Aid Society submitted a joint Amicus brief in support of the Plaintiff's appeal to the Second Circuit.

News and Notes

Changes in State Statutes of Limitations and Court Filing Deadlines

Statutes of Limitations (SOLs) set the firm and final deadlines for bringing a legal action in court. On March 20, 2020, Governor Cuomo issued Executive Order (EO) 202.8, “tolling” for 30 days all state SOLs. Tolling means that the clock stops running. Since that EO, each month the Governor has issued an EO stating that all prior modifications are to be continued. The Governor did not use the word “toll” in other than the first EO.

Recently some debate has arisen within the New York legal community as to the precise legal meaning and implications of these Executive Orders upon state SOLs. Specifically, some uncertainty has been noted as to whether the Governor has the legal and statutory authority to toll statutes of limitations. If the Governor is without such legal authority, then the statutes of limitations have only been suspended, not tolled.

There is an important difference between an SOL that is “tolled” and an SOL that is “suspended.” If the SOLs were tolled, then the period of time during which these Executive Orders have been in effect (presently March 20 through November 3, or 228 days), the clock counting down to an SOL deadline would have stopped running on March 20. Further, on November 4, an additional 228 days would be added to an SOL period, thus extending the deadline ahead that many days.

However, if the SOLs were only suspended (as opposed to tolled), then the only SOLs that were affected at all by the Executive Orders are those that would have expired during the suspended period. And for those affected claims, where an SOL would have expired during the suspended period, when the suspensions are finally ended (currently November 3), the statute of limitations deadline will expire on that date.

No court cases have yet ruled on this specific issue. However, given the unprecedented situation this has created, case law involving other past interruptions of statutes of limitation, and the genuine uncertainty surrounding the effect of these Executive Orders and the Governor’s authority to toll SOLs, we advise strong caution. Missing a statute of limitations means the affected claim is forever barred from ever being brought.

Accordingly, we strongly recommend the Executive Orders be treated as only suspending statutes of limitations for the duration of the Orders instead of a tolling of those deadlines.

This means that if you have a potential legal claim where the statute of limitations period would have expired under normal circumstances anytime during the COVID-19 emergency suspension period (since March 20), you should commence in court any such action or claim on or before the final day of the suspension. Currently, this is November 3. As there is no guarantee that the Governor will issue another extension, you should not delay.

Here are several examples of the effects of SOL suspensions:

Example 1: On March 20, 2020, you received a decision on a Tier III administrative appeal. The four-month statute of limitation on your Article 78 began running and counting down on March 20. Any Article 78 challenge to the hearing disposition must be commenced within four months, which was July 20. Due to the suspension of statutes of limitation, the deadline did not expire on July 20. Instead, you can commence an Article 78 in court until the last day of the suspension, which is currently November 3.

Example 2: On January 31, 2020, you fell and were injured along a prison walkway that had not been properly cleared of snow and ice. You might want to pursue a negligence claim against the State in the Court of Claims. To preserve your right to bring such a claim, you must either serve a Notice of Intention to File a Claim within 90 days of the incident or file an actual claim within that time. If you timely serve a Notice of Intention, then you will have 2 years from the date of the incident to commence an actual negligence claim, or January 31, 2022. Here, the 90 days from the January 31 incident was April 30, 2020. Due to the suspensions of the deadlines, you can still submit either a Notice of Intention or an actual claim until the last day of the suspensions, or November 3.

Example 3: Last year, on May 1, 2019, correction officers assaulted you. You timely served a Notice of Intention on May 15, 2019. This preserved your right to bring a state tort claim for assault against the State within the one-year statute of limitations that applies to intentional torts. This means you had until May 1, 2020 to file your Claim. If you did not file your claim on that date, you still have time and can commence that claim any time before the suspensions end. Unless the Governor extends the suspension period further, you would need to file your claim by November 3, 2020.

Exclusion of Individuals with Mental Illness from the Shock Incarceration Program

The DOCCS Shock Incarceration Program (“Shock Program”) is a six-month program of highly structured military-style discipline, exercise, work and educational programming, substance abuse treatment, and pre-release and life skills counseling. After completing the Shock Program, an individual is eligible for release from prison to community supervision. To be eligible for the Shock Program, prisoners must meet requirements listed in New York Correction Law Section 865. However, even if a prisoner meets those statutory requirements, DOCCS’ Directive Number 0086 excludes all prisoners with mental health levels of 1, 2, or 3 from the Shock Program. These mental health levels are determined by Office of Mental Health (OMH) staff for prisoners on the OMH caseload.

DOCCS treats prisoners who are denied shock due to mental illness differently depending on whether they are court-ordered to be enrolled in the program or chosen by DOCCS to participate in the program. New York Penal Law Section 60.04 requires that prisoners who are court-ordered to the Shock Program, but excluded because of mental illness or a medical condition, be provided with an alternative placement so that they derive the same benefit as those individuals who complete the Shock Program. However, prisoners who have a mental health level of 1, 2, or 3, and who are not court-ordered to participate in Shock are not offered the alternative program. As a result, under DOCCS’ current policy, these prisoners with mental illness cannot benefit from the early release benefits of the Shock program.

If you have been excluded from the Shock program based on your OMH level and have been denied an alternative program, you should file a grievance with DOCCS and be sure to exhaust the entire grievance and appeals process.

If you are interested in additional information about exclusions from the Shock program due to mental health issues, please write to the Buffalo Office of Prisoners' Legal Services of New York, at the following address: Prisoners' Legal Services of NY, 14 Lafayette Square, Suite 510, Buffalo, NY 14203.

False Positive Urinalysis Putative Class Action Update

In 2019, DOCCS began using a new urinalysis drug testing machine called the Indiko Plus to determine whether incarcerated individuals had used illegal substances. DOCCS later discovered that the test results from these new devices were unreliable and reversed and expunged all hearing dispositions that were based on urinalysis test results from the Indiko Plus drug testing devices.

In November 2019, Prisoners' Legal Services of New York (PLS) and the law firm of Emery Celli Brinckerhoff Abady Ward & Maazel ("Emery Celli") filed a lawsuit on behalf of named Plaintiff Nadezhda Steele-Warrick in the U.S. District Court for the Eastern District of New York, alleging negligence claims against the Microgenics Corporation and Thermo-Fisher Scientific Incorporated, the companies that provided DOCCS with the Indiko Plus urinalysis testing devices.

PLS has received many inquiries about the status of *Steele-Warrick v. Microgenics and Thermo-Fisher*. Due to the volume of mail that we are receiving about the case, we are unable to provide individualized responses to the inquiries. In an effort to address the inquiries, below are the answers to the most frequently asked questions:

What is the status of the class action lawsuit?

Currently, the case is still in the relatively early stages of discovery (the process of gathering and exchanging information). Discovery has been significantly delayed due to COVID-19. We anticipate this process will continue for at least the next several months. Additionally, we are awaiting the court's ruling on the Defendants' motion to dismiss. A ruling on that motion will be the next significant development in the case, and when the court issues its decision, we will provide an update in *Pro Se*.

When will the class action be resolved?

We are still at the very beginning stages of a class action. Due to their complexity, class actions tend to move slowly and can take several years to be resolved.

How much money will I receive in damages?

It is far too early in the litigation to make any assessment regarding the potential damages or how they may be calculated.

Am I a class member?

Currently, the lawsuit is a "putative" class action. This means that the court has not agreed to certify the class. If certified, the proposed definition of the class may change. Our proposed class definition presently includes those who received disciplinary dispositions resulting from the Indiko Plus in 2019 and subsequently received a reversal from DOCCS. If you meet these criteria, you are part of the current proposed class.

Why haven't there been recent updates regarding the class action?

As noted, class actions tend to move more slowly than individual cases. Moreover, the COVID-19 pandemic has caused additional and unanticipated delays. Given the ongoing pandemic, further delays would not be unexpected. We will provide periodic updates on the status of the case only when there are significant developments to report. We anticipate our next update will be when the motion to dismiss is decided.

Why haven't I received a response to my letters or confirmation that you received my paperwork?

Due to the large number of people impacted by this matter and the voluminous correspondence we are receiving, we are unable to provide responses to individual inquiries or confirm receipt of paperwork. If and when there are developments to report upon, they will be reported in *Pro Se*.

Can you provide me with individual representation or guidance regarding my case?
Unfortunately, due to large number of individuals affected by this matter, we are unable to provide individual representation or guidance.

Can you refer me to a lawyer who would pursue my individual case?

We are unable to offer referrals.

PLS COVID-19 Update

Since the pandemic began, PLS has been publishing what we call an Insert (because we send it with all of our client correspondence) that informs readers about developments in how DOCCS, the Governor, the State Legislature, the Courts and PLS are responding to COVID-19. We have been sending the Insert with our correspondence and publishing it in *Pro Se*. Because the Insert is now 7 pages, we can no longer publish it in the paper version of *Pro Se*. Readers of the paper version of *Pro Se* can request a copy of the most recent version of the Insert by writing to the PLS Office which handles requests for assistance from the prison where they are currently living. See last page of *Pro Se* for a list of PLS offices and the prisons each covers.

Statute Allows Surcharge and Fee Waiver for Defendants Under Age 21

The NYS Criminal Procedure Law §420.35 was recently amended to allow a court to waive the mandatory surcharge, the crime victim assistance fee, the DNA fee, the sex offender registration fee and/or supplemental sex offender victim fee when the court finds that the defendant was under the age of 21 at the time the offense. Effective August 24, 2020, subsection 2-a of §420.35 permits the court to waive the surcharge and fee:

1. If imposition of the surcharge or fee would work an unreasonable hardship on the defendant, his or her immediate family, or any other person who is dependent on the defendant for financial support;
2. After considering the goal of promoting successful and productive reentry and reintegration as set forth in Penal Law §1.05, if the imposition of such surcharge or fee would adversely impact the defendant's reintegration into society; or
3. In the interests of justice.

STATE COURT DECISIONS

<p>Disciplinary and Administrative Segregation</p>

Court Upholds Finding that Petitioner Participated in a Demonstration

According to the misbehavior report charging Juan Abreu with participating in a demonstration, when program aides commenced a dorm-wide substance abuse treatment session, forty-two individuals refused to participate. One of the forty-two participants said in a loud voice that they would not participate in the session unless the aides permitted another individual to return to the dorm. The misbehavior report asserts that Mr. Abreu, in a loud voice, agreed with this statement and began arguing with one of the program aides. The hearing officer found Mr. Abreu guilty of the charge.

Mr. Abreu challenged the determination of guilt in an Article 78 proceeding. The Appellate Division, Third Department, found that substantial evidence supported the hearing officer's decision. In *Matter of Abreu v. Venettozzi*, 129 N.Y.S.3d 347 (3d Dep't 2020), the court found that regardless of whether Mr. Abreu had been verbally abusive as charged, the evidence established that he, like the other individuals in the session, remained silent and would not participate. Petitioner's exculpatory explanation for his silence and any inconsistencies in the evidence, the court wrote, gave rise to a credibility issue. Deciding what evidence is believable and what evidence is not believable, the court noted, is a matter within the hearing officer's discretion.

For newer readers, matters that are within a hearing officer's or judge's discretion are those matters over which the hearing officer or judge

has authority to make decisions based on their own opinions within general legal guidelines.

Based on this analysis, the court confirmed that hearing officer's determination of guilt.

Juan Abreu represented himself in this Article 78 proceeding.

Court Finds Gifts to Officer are Evidence of Stalking

After a female officer reported that flowers and a gift were sent to her former address by an individual identified only as "Daniel," and an incarcerated individual named Daniel asked her if she had enjoyed her Valentine's Day present, the officer reported to security staff that Daniel Washington had engaged in misconduct. The security staff investigation revealed that the telephone number on the package was that of Daniel Washington's sister and that at the end of January, Mr. Washington had sent his sister \$200.00. Following the investigation, Mr. Washington was charged with and found guilty of stalking, harassment and possessing an employee's personal information.

In *Matter of Washington v. Venettozzi*, 129 N.Y.S.3d 355 (3d Dep't 2020), the petitioner argued that the determination of guilt was not supported by substantial evidence. The Court disagreed. Rule 107.11 prohibits the harassment of an employee. Included in the expressly prohibited conduct is "communicating messages of a personal nature to an employee." The court found that unsolicited gifts of a personal nature violate this rule.

With respect to proving a violation of Rule 113.26 which prohibits the unauthorized possession of personal identifying information including home addresses, the court found that it was not necessary to prove that the petitioner physically possessed the officer's person

information. “The rule broadly prohibits,” the court wrote, “the solicitation or exchange of such information as well.”

Rule 101.22 (Stalking) prohibits conduct directed at a specific employee where the inmate knows, or reasonably should know, that such conduct is likely to cause reasonable fear of material harm to the physical health, safety or property of such person.” The court found that “the receipt of packages at an address associated with a correction officer would be likely to cause reasonable fear of material harm to his or her health, safety or property.”

Based on this analysis, the court confirmed the hearing officer’s determination.

Daniel Washington represented himself in this Article 78 proceeding.

Dissent Slams Court of Appeals Majority in Lost Razor Case

In *Matter of Zielinski v. Venettozzi*, 2020 WL 5520171 (Sept. 15, 2020), a substantial evidence challenge to a Tier III hearing, the Court of Appeals affirmed the Appellate Division decision finding that there was a rational basis for DOCCS’ determination that on February 4, 2017, Jeremy Zielinski had violated the Rule 116.10: an inmate shall not lose, destroy, steal, misuse damage or waste any type of State property. Without setting forth the facts underlying the charges, the majority of the court found that the misbehavior report, “razor check records,” and contraband receipt was adequate evidence on which to base a determination that the petitioner violated the rule. The majority also agreed with the Appellate Division’s conclusion that the hearing officer did not violate Mr. Zielinski’s right to call witnesses when she found the proposed testimony to be immaterial.

Judges Wilson and Rivera disagreed with both the majority’s reasoning and their conclusion. Judge Wilson, who wrote the dissent, began by observing that because razors are both a necessity and a danger in prison, DOCCS has to have policies to ensure that razors which are given to prisoners are accounted for – thus eliminating the possibility that prisoners will convert razors into weapons – and must strictly follow these policies. Thus, at Clinton C.F., staff log the distribution of razors to prisoners and conduct weekly inspections to check that each prisoner who was given a razor still has it. Notably, the judge wrote, if a prisoner loses a razor, staff give him a new one without documenting the loss and replacement. The policy at Clinton provides that prisoners are not required to accept razors.

Mr. Zielinski was disciplined twice in a 30-day period for not having a razor. At his first hearing relating to a charge that on January 3, 2017, Mr. Zielinski lost or destroyed his razor, Mr. Zielinski testified that his razor had been stolen. At the second hearing, relating to a charge that on February 4, 2017, Mr. Zielinski lost or destroyed his razor, Mr. Zielinski testified that he had never been issued a second razor. The hearing which related to the February 4 incident is the hearing that is the subject of the Article 78 challenge.

The judge noted that consistent with Mr. Zielinski’s defense that between January 3 and February 4, he had not possessed a razor, the record showed that at the hearing, Mr. Zielinski had more than five weeks of facial hair. Further, at the hearing no witness testified that they had provided Mr. Zielinski with a replacement razor or had seen him with a razor. There was no documentation that staff had provided a replacement razor. In the absence of such evidence, Judge Wilson noted, the hearing officer relied on three pieces of evidence.

The first piece of evidence was *the hearing officer's statement* that Clinton C.F. had a policy regarding the provision of replacement razors. Thus, the hearing officer opined, had the policy been followed, staff would have given Mr. Zielinski a replacement razor after the first razor was lost. The hearing officer, by using her own statement as evidence, Judge Wilson noted, served both as judge and fact witness.

Second, the hearing officer relied on cell inspection records for four weeks in January which the hearing officer said showed that Mr. Zielinski had possessed a razor. But, Judge Wilson wrote, these records did not show that individuals possessed razors; rather, without reference to any individual, they document that all cells for the company had been inspected and were in compliance with the razor policy with the exception of noted discrepancies. Under the noted discrepancies, the hearing officer stated, there were no references to Mr. Zielinski, thus he must have had a razor between January 3, when first razor was lost, and February 4, when staff again documented that he did not have a razor.

Third, the hearing officer noted that had Mr. Zielinski not had a razor between January 3 and February 4, he would have received a misbehavior report before February 4, which, as the hearing officer noted, did not occur.

To defend himself, Mr. Zielinski argued that the razor checks were not reliable and that in any event, he would not have been listed among "discrepancies" because he had refused a replacement razor, and thus, not having a razor would not have been a discrepancy. In support of his defense, Mr. Zielinski requested the following witnesses: the inmate records coordinator, the officer in charge of razors or, if no officer was in charge of razors, the Deputy Superintendent of Security who could testify about the prison's procedures for razor replacement. The hearing officer denied the witnesses because 1) no specific person was

responsible for razors and 2) the witnesses were not relevant because they did not witness the incident.

The hearing officer found Mr. Zielinski guilty and imposed a sanction of 75 days keeplock.

Judge Wilson framed the issues in the Article 78 as:

- Whether Mr. Zielinski should have been allowed to present evidence that the prison's razor check verification process is unreliable; and
- Whether the hearing officer properly relied upon the absence of a discrepancy on the cell inspection records to conclude that Mr. Zielinski had lost state property.

With respect to these issues, the Judge wrote, if the razor check verification records are reliable, and show that Mr. Zielinski received a second razor which he lost, the determination of guilt will stand. But, he continued, if the record keeping is shoddy, or if the records do not establish that Mr. Zielinski received a second razor which he lost, he should not be punished for losing a razor that he never had.

With respect to the hearing officer's decision not to call the witnesses requested by Mr. Zielinski because the witnesses "were not relevant," Judge Wilson wrote, quoting from *People v. Primo*, 96 N.Y.2d 351 (2001), "evidence is relevant if it 'tends to prove the existence or non-existence of a material fact.'" To determine whether evidence "tends to prove the existence or non-existence of a material fact," the reviewing court is guided by the question posed in *McCormick on Evidence* §185 (8th Edition, Jan. 2020 update): "Does learning of this evidence make it either more or less likely that the disputed fact is true?"

Judge Wilson then turned to what he characterized as the one factual issue at the hearing: Did the prison issue Mr. Zielinski a razor between January 3 and February 4, 2017? With respect to this issue, Mr. Zielinski tried to call the DSS to explain the policies and typical practices for tracking and issuing replacement razors and to call the IRC to testify whether misbehavior reports are invariably issued each time a prisoner does not have a razor at cell inspection (as the hearing officer claimed).

Judge Wilson concluded that the witnesses were “undeniably relevant.” First, the hearing officer referred to a “standard protocol” to support her inference that a razor would have been issued following the first hearing relating to a missing razor. With respect to this “fact,” the Judge noted, “the hearing officer cannot both be the sole source of evidence about the existence and reliability of the prison’s policy and simultaneously deny the accused, as irrelevant, all witnesses with the knowledge of the same subjects.

Turning to the issue of the hearing officer’s reasons for denying the witnesses requested by Mr. Zielinski, the judge noted that the Department’s own regulations require the hearing officer to provide a reason for the denial of the witnesses requested by the accused prisoner. With respect to this requirement, the judge noted that the hearing officer’s reason for not calling the DSS – that he was not present on February 4 when the officer determined the razor was missing – was a **non-sequitur** [literally meaning: “it does not follow”]. The misbehavior report only shows that on that date, the razor was missing. It does not show whether a razor had been issued between January 3 and February 4.

In any event, the judge noted, it was clear that Mr. Zielinski did not want to question his witnesses about the events of February 4; he wanted to question them about the policies with respect to replacing lost razors and the reliability

of the records. Thus, the hearing officer’s reason for denying the witnesses was unrelated to the reason that Mr. Zielinski wanted them to testify. Thus, the judge concluded, the factual basis for the hearing officer’s denial was wholly unsupported by the record.

Judge Wilson also rejected the Third Department’s reason for agreeing that the witness denial had not violated Mr. Zielinski’s right to call witnesses. The Third Department held, see 177 A.D.3d 1047 at 1048, that the accused had failed to demonstrate how his requested witnesses would have provided relevant or non-redundant testimony regarding the determination of guilt. The record shows that this conclusion, Judge Wilson wrote, is untrue.

Finally, Judge Wilson wrote, the determination of guilt was not supported by substantial evidence. First, the judge noted, the hearing officer’s “testimony” as to the razor check policy was internally inconsistent. In spite of Mr. Zielinski’s testimony that he was not issued a second razor, the hearing officer said it was standard procedure that he would have been given one. And she then noted that he must have been given a new razor, otherwise the inspection record from January 7, would have shown that he did not have one. These two statements, Judge Wilson noted, are contradictory. If the claimed standard procedure had been followed, Mr. Zielinski would not have been issued a razor until January 9, in which case the January 7 inspection report would have shown that he did not have a razor. Thus, the determination of guilt, in Judge Wilson’s view, was not supported by substantial evidence.

Finally, Judge Wilson wrote, the hearing officer wrongfully shifted the burden of proof to Mr. Zielinski. Prisoners are permitted not to have razors if they decide not to have them. To prove a violation of losing state property, the burden is on the prison officials to show that Mr. Zielinski was given the property that he was alleged to

have lost. Thus, Judge Wilson wrote, citing *Matter of Betances v. Leclaire*, 47 A.D.3d 1044 (3d Dep't 2008), prison officials must produce evidence that they gave Mr. Zielinski a razor. There is no evidence in the record showing that Mr. Zielinski was issued a razor when he was released from the keeplock sanction that was imposed following the hearing relating to the January 3 misbehavior report. Thus, Judge Wilson concluded, “[e]ven if we ignore the regulatory and due process violations and the internal inconsistency of the hearing officer’s description of the razor check policy, we are left with speculation, not proof.”

Jeremy Zielinski represented himself in this Article 78 proceeding.

Miscellaneous

Dangerous Contraband Under the Penal Law

In *People v. Robinson*, 183 A.D.3d 1118 (3d Dep't 2020), the defendant was charged with promoting prison contraband in the first degree in violation of Penal Law 205.25(2). The offense of promoting prison contraband in the first degree requires the People to prove that an incarcerated individual knowingly and unlawfully made, obtained or possessed dangerous contraband. Contraband is dangerous when, the Court of Appeals wrote in *People v. Finley*, 10 N.Y.3d 647, 657 (2008), “there is a substantial probability that the item will be used in a manner that is likely to cause death or other serious injury, to facilitate an escape or to bring about other major threats to a detention facility.”

In *Robinson*, the contraband in question was a scalpel type instrument, 1½ inches long that the People claimed the defendant had passed while he was on contraband watch. A correction officer

testified that the item could “cut someone pretty deeply.”

One of the arguments raised by the defendant was that the People had failed to prove that the scalpel was dangerous. With respect to this claim, the court held that the jury, “upon viewing the item in evidence could reasonably have found that the testimony about its dangerousness was accurate[.]” The court then noted that “even an item unable to render harm has been found to be dangerous contraband,” citing *People v. Silcox-Mix*, 159 A.D.3d 1060 (3d Dep't 2018), in which the court found that a fake gun made from bars of soap and notebook and carbon paper met the dangerousness criterion as it would likely have led to the use of deadly force to protect against its apparent threat.

G. Scott Walling, Esq. represented the appellant in this criminal appeal.

Name Change Petition Denied

In *Matter of D.C.S. for Leave to Assume the Name of E.A.F.*, 68 Misc.3d 663 (Sup. Ct. St. Lawrence Co. 2020), the petitioner, who resides at the St. Lawrence Psychiatric Center as a result of a civil confinement order finding her to be a dangerous sex offender, asked the court to allow her to change her name to E.A.F. The Attorney General opposed the petition with respect only to the petitioner’s desire to change her **surname** (last name) because allowing this change “would have the compounding effect of causing potential confusion and misrepresentation as to Petitioner’s criminal past, and specifically her sexual conviction all in contravention of the purpose of [the Sex Offender Registration Act] and Article 10 of the Mental Hygiene Law [the civil confinement statute].”

In determining whether to grant the petition, the court noted that the petitioner had pled guilty to attempted assault in the second degree and attempted sexual abuse in the first degree. It then noted that the petitioner's reason for the name change petition: a female name would better reflect her transgender female identity and "to accurately reflect herself with this new name." In response to a request from the court, the petitioner stated that she wanted to change her surname from "S" to "F" because she wanted to share her long-term partner's surname. The petitioner did not submit an affidavit from her partner.

In its analysis of the legal issues presented by the petition, the court first noted that, "[u]nder the common law, a person may change his or her name at will so long as there is no fraud, misrepresentation or interference with the rights of others." Individuals can also seek a name change under Article 6 of the NY Civil Rights Law. Citing to Civil Rights Law §63, the court noted that a court's review of a name change application is limited; if the court is satisfied that there is no reasonable objection to the proposed name change, the court must authorize the name proposed. The court went on to state, however, that it is not a mere rubber stamp and need only grant the application if the court is satisfied of the truth of the petition.

In D.C.S.'s case, the court found that the formal notice and other requirements of the Civil Rights Law had been met. It then turned to the issue of whether there was a reasonable objection or demonstrable reason to deny the petition. Citing *Matter of Boquin*, 24 Misc.3d 473 (Sup. Ct. Westchester Co. 2009), the court wrote, ". . . it is the Court's obligation to ensure that the name change will not be a source of fraud, evasion or interference with the rights of others." A reasonable objection, the court wrote, may include factors from which the court may infer fraud, misrepresentation or intent to interfere with the rights of others.

Here, the court found that the following factors, standing alone, are not reasonable objections:

- That the petitioner is transgender and wishes to change her traditionally male name to a traditionally female name;
- That the petitioner is incarcerated;
- That the petitioner was a prisoner born one gender but self-identifying as another; and
- That there is potential for confusion in the name change.

In this case, the court concluded that indications of fraud, misrepresentation or intent to interfere with the rights of others may be inferred from the following facts:

- The petitioner's past incarceration for first degree rape of a child;
- The judicial determination that petitioner was a dangerous sex offender requiring treatment in a secure facility;
- The petitioner's designation as a level 3 sex offender under SORA;
- The petitioner's desire to change her entire name – as opposed to just her first and middle names;
- The petitioner's application to change from a male name to a female name; and
- The petitioner's desire to assume the name of her romantic partner in the absence of a supportive affidavit from the partner.

Based on this analysis, the court denied the name change application.

Hannah Walker of the Sylvia Rivera Law Project, represented D.C.S. in this name change petition.

There is No Right to Be at Any Particular Prison

In *Matter of Rincon v. Annucci*, 2020 WL 5665106 (3d Dep’t Sept. 4, 2020), the petitioner alleged that his right to due process of law was violated by the Department’s absence of a mechanism for challenging the truth of the information that led to the Department’s decision to allow him to reside at only 14 of the state’s 52 prisons. The lower court dismissed the petition and the petitioner appealed.

In analyzing the petitioner’s claim, the Third Department noted that “[i]nmates have no constitutional rights to remain at a particular facility or any expectation that transfer will not occur without misconduct, [citations omitted] . . . nor are they entitled to challenge the respondent’s almost unbridled authority to transfer [them] from one facility to another.” Thus, the court found, petitioner does not have a due process right to “know or dispute the reasons for his place of confinement.”

Based on this analysis, the court declined to reverse the lower court’s decision.

Danny Rincon represented himself in this Article 78 proceeding.

FEDERAL COURT DECISIONS

Court Issues Preliminary Injunction in E-Stop Challenge

The e-Stop Law, set forth at Executive Law §259-c(15), requires, among other thing, that the Parole Board impose on certain categories of sex offenders a mandatory release condition prohibiting access to all social media websites. The language of the statute requires that the condition be imposed on sex offenders where the victim was under the age of 18; those who are Level 3 offenders; and those who used the

internet to facilitate crimes. In March 2020, PLS, the New York Civil Liberties Union (NYCLU) and the Rutgers Constitutional Rights Clinic filed *Jones v. Stanford and Annucci* in the federal district court for the Eastern District of New York. The lawsuit is a direct challenge to a state statute and two DOCCS Directives that ban most sex offenders released to community supervision from accessing social media sites, or from possessing or accessing the internet or any internet-connected device without permission of the parole officer.

Plaintiffs’ counsel in *Jones v. Stanford and Annucci* made a motion for a preliminary injunction, asking the court to order DOCCS and the Parole Board to stop imposing the e-Stop condition, in the absence of any individual assessment or any evidence that an individual has abused the internet or social media. On September 9, 2020 Judge Raymond Dearie of the U.S District Court for the Eastern District of New York agreed with the plaintiffs and granted a preliminary injunction.

In its decision, the Court relied heavily on *Packingham v. North Carolina*, 137 S.Ct. 1730 (2017). In *Packingham*, the Supreme Court recognized that the internet and social media are at the core of First Amendment free speech in the twenty-first century. The *Jones* Court found that e-Stop violates the First Amendment because it is not narrowly tailored to further the state’s compelling interest in protecting children, in that it prohibits lawful internet activity that is unrelated to the state’s interest in protecting children.

The Court rejected the state’s attempt to distinguish the *Packingham* case. The North Carolina law at issue in *Packingham* was similar to New York’s e-Stop law in that it imposed a social media ban on sex offenders. The ban in *Packingham* applied to all people on North Carolina’s sex offender registry. New York’s e-Stop condition is a parole release condition that

applies to sex offenders who are on community supervision, parole or post-release supervision (PRS). Thus, the North Carolina condition could remain in place over a longer period of time, because sex offenders may be required to continue to register long after a criminal sentence and supervised release has expired. The *Jones* Court, however, noted that sex offenders released from New York State prisons could be subject to PRS, and therefore subject to the e-Stop ban, for as long as 25 years. The Court also pointed out that the Supreme Court's *Packingham* decision was not based on the distinction between a condition imposed on people required to register on the sex offender registry, versus a release condition imposed on people serving the parole or PRS portion of a sentence, and noted that nothing in the *Packingham* decision suggests the e-Stop condition could be proper or permissible because it only applies to people on community supervision.

The plaintiffs' lawyers argued that the e-Stop ban is not narrowly tailored to further the state's interest in protecting children because the condition is required to be imposed on sex offenders who have no history of abusing the internet, and does not require an individualized assessment of the likelihood that an individual may abuse the internet. In response, the state argued that New York's Board of Examiners of Sex Offenders conducts a detailed and individualized assessment of each sex offender before a person is designated as a level 3 offender. The Court found, however, that the assessment that results in a sex offender level under the Sex Offender Registration Act (SORA) does not address the internet, social media, or the risk that an individual may commit additional crimes through use of the internet. Although there is an assessment of the risk presented by released sex offenders, the e-Stop condition is required to be imposed without any assessment of the risk that a particular offender may use the internet to commit new crimes.

The state also argued that the social media ban should be imposed despite the fact that the plaintiffs have no history of criminal activity on the internet. The state argued that the fact that the plaintiffs had not used the internet to commit crimes was irrelevant, and simply indicated that plaintiffs had no opportunity to abuse the internet because their crimes were committed before the internet was in common use. The *Jones* Court rejected this claim, and found instead that the plaintiffs were convicted in 2006, 2011, and 2017, when the internet was already in wide use.

The most important consideration in a request for a preliminary injunction is showing irreparable harm. The state argued that there was no irreparable harm, and that the plaintiffs' delay in seeking the preliminary injunction was evidence that any harm was insignificant. The Court rejected their argument and held that the loss of First Amendment rights for even a short time is irreparable harm as a matter of law.

Throughout the decision the Court balanced the value of the internet and social media for First Amendment expression against the risk of criminal activity targeting children on the internet. The Court found that the state can take appropriate steps to prevent internet-related crimes, but cannot do so by banning whole categories of people from social media, without any particular evidence that individuals are likely to engage in internet-related criminal activity. The underlying premise of the e-Stop Law is that a conviction for a sex offense is itself sufficient evidence that the person is likely to engage in internet-related crimes. The Court specifically rejected this idea, and issued a preliminary injunction ordering the defendants, DOCCS and the Parole Board, to stop imposing the e-Stop social media condition on sex offenders who have not used the internet to facilitate their underlying sex offenses. The effect of the Court's order is that DOCCS and the Parole Board are prohibited from imposing the e-Stop social media ban while the *Jones v.*

Stanford case moves forward. As the case moves forward plaintiffs will seek permanent as opposed to merely preliminary relief, with respect to the both e-Stop social media ban, and the related internet and computer restrictions imposed pursuant to DOCCS Directive 9202.

The plaintiffs in *Jones v. Stanford* are represented by a team of attorneys from the New York Civil Liberties Union (NYCLU), the Rutgers Law School Constitutional Rights Clinic, and Prisoners' Legal Services of New York.

District Court Erred When It Resolved Credibility Dispute

In *Randolph v. Griffin*, 816 Fed. Appx. 520 (2d Cir. 2020), the Second Circuit reviewed a district court decision granting summary judgment to the defendants. The Second Circuit reversed the decision, finding that the district court had erroneously resolved a credibility dispute in the defendants' favor.

In his complaint, the plaintiff alleged that in 2012, at Southport C.F., some of the defendants had used excessive force and others had failed to intervene to stop the assault. The plaintiff claimed this conduct violated his 8th Amendment right to be free from cruel and unusual punishment. The defendants agreed that a use of force had taken place, but asserted that the force was necessary and not excessive. Medical records showed that following the incident, the plaintiff's cheek, ankle and lower back were slightly swollen.

The district court found that no reasonable jury could reasonably grant the plaintiff relief on his 8th Amendment claims and dismissed them.

The Second Circuit first noted that in deciding a motion for summary judgment, the district court must “**constru[e]** [read] the

evidence in the light most favorable to the non-movant.” Only when there is no genuine dispute as to any material fact, the Court wrote, is the moving party entitled to judgment as a matter of law.

The Court went on to discuss the elements of an 8th Amendment claim of cruel and unusual punishment. First, the Court wrote, citing *Crawford v. Cuomo*, 796 F.3d 252 (2d Cir. 2015), the plaintiff must show that “the conduct was objectively harmful enough or sufficiently serious to reach constitutional dimensions.” This is known as the objective requirement.

Second, the plaintiff must show that the defendants had the necessary level of **culpability** (being worthy of blame). This can be shown by evidence that the defendants' actions were **wanton** (unjustifiable and cruel) in light of the circumstances of the conduct. This is known as the subjective requirement.

In Plaintiff Randolph's case, the Court wrote, there was “a genuine dispute of material fact” as to whether the defendants' force was objectively serious enough to violate the constitution. Thus, the Court concluded, the district erred when it found there was no genuine dispute of material fact based on the insufficiency of corroborating evidence of excessive force. That is, the lower court granted judgment to the defendants based on the court's conclusion that no evidence beyond the plaintiff's testimony supported his claim.

The Court disagreed with the district court's finding that because the plaintiff had not produced enough corroborating evidence and that the defendants' version of the events was more consistent with the record, the defendants were entitled to summary judgment. The district court erred, the Court wrote, when in assessing objective harm, it discredited the plaintiff's testimony because it was not supported by corroborating evidence. “Under this Court's

precedent,” the Court wrote, “even when a plaintiff relies exclusively on his own testimony, courts have denied summary judgment to defendants as long as the plaintiff’s ‘testimony was not contradictory or rife with inconsistencies such that it was facially implausible.’ ”

Plaintiff Randolph, the Court noted, consistently maintained that several of the defendants had repeatedly assaulted him without provocation and while he was handcuffed. The Court found this testimony to be “more than mere conclusory allegations[;]” rather, it was “specific and detailed and made under penalty of perjury.” Further, the Court said, the plaintiff’s testimony was not “so ‘contradictory or rife with inconsistencies’ even though it contains some, ‘that it [is] facially implausible.’ ” Thus, the Court held, the plaintiff’s sworn statements, even standing alone, were adequate to counter summary judgment.

The Court went on to note that the district court had erred when it resolved, in the moving parties’ favor, conflicting versions of the incident in a summary judgment motion. Citing *Jeffreys v. City of New York*, 426 F.3d 549, 551 (2d Cir. 2005), the Court wrote that “as a general rule, ‘district courts may not weigh evidence or assess the credibility of witnesses at the summary judgment stage.’ ” In *Randolph*, the Court wrote, the district court found “that the record evidence of Randolph’s injuries is more consistent with the defendants’ version.” While the district court wrote that it was not reconciling the parties’ conflicting versions of what happened, the appellate court found that in fact, the district court did just that when it credited the defendants’ version. Citing *Fincher v. Depository Tr. & Clearing Corp.*, 604 F.3d 712, 726 (2d Cir. 2010), the *Randolph* Court wrote, “Where the evidence presents ‘a question of he said, she said, the court cannot take a side at the summary judgement stage.’ ” The Court concluded, “By weighing the conflicting evidence, the district court improperly engaged

in fact finding in violation of well-settled summary judgment standards.”

The Court used the same analysis and reached the same result with respect to the district court’s determination that the plaintiff had produced insufficient corroborating evidence of the subjective element of his claim – that the defendants had acted with **malice** (cruelty). At his deposition, the plaintiff stated under oath that he was complying with the defendants’ orders before he was assaulted without provocation and while he was in handcuffs. Viewed “in context and in the light most favorable to [the plaintiff],” the Court wrote, “a reasonable jury could find that the defendants’ use of force – specifically, the use of a baton and physical blows on a handcuffed inmate – was unjustified and rose to the level of malicious or sadistic conduct.”

Based on the analysis set forth above, the Court vacated the district court’s judgment and remanded the case for further proceedings.

Lauren M. Capaccio of Shapiro, Arato Bach LLP, represented Leonard Randolph in this §1983 action.

Letter to Sister Concerning Officer Was Protected Speech

In a letter to his sister, Dwayne Bacon, a federal prisoner, wrote “there is only one Black Woman here. I believe she is an Indian. She is very beautiful and healthy. I do want her but I want a few other Women as well.” Confronted by a lieutenant, Mr. Bacon said he was referring to Officer Ferland. Mr. Bacon was then placed in a SHU and accused of “making sexual proposals to another.” The report noted that the threat was indirect, that is, he did not make the statement to Officer Ferland.

At the hearing into the charge, Mr. Bacon admitted writing the letter. He denied it was a sexual proposal. He said he wrote the letter to make his sister laugh. The hearing officer found Mr. Bacon guilty and imposed a sanction of 30 days SHU and 27 days loss of good time. Mr. Bacon spent 89 days in SHU. After he had served the SHU time and been transferred to another prison, the hearing was reversed.

Mr. Bacon filed a complaint in federal court alleging that he was placed in SHU and transferred to another prison in retaliation for exercising his First Amendment rights to free speech. Two defendants moved to dismiss for failure to state a claim, arguing that the plaintiff does not have a First Amendment right to state his sexual desire for a female correction officer who is charged with maintaining security and that in any event, the defendants were entitled to qualified immunity. The district court dismissed the complaint, ruling that “the conduct for which Bacon was disciplined was not the fact that he wrote a letter, but that the letter contained what was perceived as a sexual threat against a prison employee” and that such threats do not constitute protected speech under the First Amendment.

The district court also stated that even if the letter contained speech protected by the First Amendment, the prison had a legitimate penological interest in prohibiting such conduct as permitting the use of sexual language or the discussion of sexual desire relating to a prison employee could pose a risk to that employee or others. Finally, the district court held that the defendants were entitled to qualified immunity because Mr. Bacon had failed to show that the defendant had violated a constitutional right. Mr. Bacon appealed to the Second Circuit.

In *Bacon v. Phelps*, 961 F.3d 533 (2d Cir. 2020), the Second Circuit began by examining whether the statements that the plaintiff made in his letter to his sister were protected by the First Amendment. To sustain a First Amendment

retaliation claim, the Court wrote, a prisoner must demonstrate that 1) the speech was protected, 2) the defendant took adverse action against the plaintiff; and 3) there was a causal connection between the protected speech and the adverse action.

The Court then noted, citing *Pell v. Pecunier*, 417 US 817, 822 (1974), that “prisoners only retain ‘those First Amendment rights that are not inconsistent with their status as prisoners or with the legitimate penological objectives of the corrections systems,’ such as the goal of maintaining institutional safety and security.” Thus, while prisoners have a First Amendment right to the free flow of mail in and out of the prisons, letters with threats are not protected by the First Amendment. *See, Davis v. Goord*, 320 F.3d 346, 351 (2d Cir. 2003).

Here, the Court found that the statements in the letter that the plaintiff sent to his sister, even if they were shown to be about Officer Ferland, were not profane, abusive or threatening. Rather, the Court concluded, they were merely an expression of attraction communicated by a person confined in a prison to a person outside of that prison. “Even using considerable imagination and affording substantial deference to the professional judgment of prison officials, [citation omitted],” the Court wrote, “we cannot say that, in the medium used (correspondence to a third party outside of prison), there was anything remotely threatening about the letter, nor that the prison had a legitimate penological interest in prohibiting the language that Bacon used.” Based on this analysis, the Court concluded that in context in which the speech occurred, it was protected speech.

The Court then turned to the question of qualified immunity. “Qualified immunity,” the Court wrote, “shields government officials from civil damages liability unless the official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct.

In deciding a motion to dismiss on qualified immunity grounds, the court must determine 1) whether the plaintiff established that his constitutional rights were violated and 2) whether the right at issue was clearly established at the time of the violation.

To determine whether a right was clearly established, the courts within the Second Circuit look to the decisions of the Second Circuit and the U.S. Supreme Court, because, to be clearly established, a right must be sufficiently clear that “every reasonable official would have understood that what he [or she] was doing violates the right.”

In this case, the *Bacon* Court wrote, citing *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987), the right at issue was not the general proposition that a prisoner has a First Amendment right to send mail and cannot be punished for its contents. Rather, the issue was whether when Mr. Bacon sent the letter, precedent for the Supreme Court or the Second Circuit had put prison officials on notice that they could not punish him for statements expressing desire for a woman later identified as a female correction officer. The Court found that there was no precedent establishing the right and therefore concluded that the defendants were qualifiedly immune.

Based on this analysis, the Second Circuit affirmed the district court’s dismissal of the complaint.

Dwayne Bacon represented himself in this §1983 action.

IMMIGRATION MATTERS

The past few months have seen several interesting immigration developments at the Second Circuit Court of Appeals, which continues to hear and decide cases during the COVID-19 pandemic. First, in a move that may well have major consequences for immigrants convicted of criminal offenses in New York State, the Second Circuit granted the federal government’s petition for rehearing *en banc* in *United States v. Scott*, 954 F.3d 74 (2d Cir. 2020), a decision which was initially featured in the June 2020 issue of *Pro Se*. In the original *Scott* decision, a two-judge majority concluded that a conviction for manslaughter in the first degree under New York Penal Law §125.20(1) is not a “crime of violence” under the Immigration and Nationality Act (“INA”) because manslaughter can be committed without taking any action, for example, by refraining from helping someone in danger of harm, with harm resulting. Thus, the *Scott* panel concluded that a manslaughter conviction did not necessarily have “as an element the use, attempted use, or threatened use of physical force against the person of another” as required by 18 U.S.C. §16(a).

Soon after the Second Circuit decided *Scott*, the federal government filed a petition asking the Court to reconsider its decision *en banc*, which means that the case would be reheard and redecided by all of the Second Circuit judges. Federal Rule of Appellate Procedure 35(a) provides for *en banc* rehearing on the vote of a majority of active circuit judges, although the Rule emphasizes that *en banc* review “is not favored and ordinarily will not be ordered unless” either “necessary to secure or maintain uniformity of the court’s decisions,” or the case presents “a question of exceptional importance.” On July 10, 2020, the Court granted the

government's petition for rehearing and the case has now been scheduled for oral argument before the *en banc* Court on November 6, 2020. A new decision will be issued at some point after oral argument is concluded.

While the *Scott* Court did not disclose why it granted *en banc* review – not providing a reason for granting *en banc* review is in accordance with the Court's usual practice – it seems highly likely that the Court will resolve the thorny issue of what exactly constitutes the “use of force” as required to constitute a crime of violence. In a 2003 decision on this question, *Chrzanoski v. Ashcroft*, 327 F.3d 188 (2d Cir. 2003), the Court concluded that a Connecticut assault conviction was not a crime of violence because the statute only required that the defendant “cause” physical injury, and so “it seems an individual could be convicted . . . for injury caused not by physical force, but by guile, deception, or even deliberate omission.” *Id.* at 195. The Court also noted that “human experience suggests numerous examples of intentionally causing physical injury without the use of force, such as a doctor who deliberately withholds vital medicine from a sick patient.” *Id.* at 196. However, this understanding of the use of force was seriously undermined by the Supreme Court's decision in *United States v. Castleman*, 572 U.S. 157 (2014), which found that bodily injury which is caused without physical contact, such as poisoning, still requires physical force even though the harm occurs only indirectly. While the first *Scott* decision found that *Castleman* was inapplicable to a situation in which a person fails to act entirely, the *en banc* Court may well come to a different conclusion.

Several other recent Second Circuit criminal-immigration decisions may be of interest to *Pro Se* readers. In *Rampersaud v. Barr*, 972 F.3d 55 (2d Cir. 2020), decided on August 19, 2020, the Court considered whether a lawful permanent resident's convictions for insurance fraud and grand larceny constituted aggravated felony fraud offenses. The petitioner, a lawful permanent resident born in Guyana, was

sentenced to one to three years' imprisonment and ordered to pay \$77,199 in restitution for his crimes.

To prove that a conviction is an aggravated felony fraud offense, the Department of Homeland Security (“DHS”) must prove by clear and convincing evidence that the loss to the victim or victims exceeded \$10,000. *See* 8 U.S.C. §1101(a)(43)(M)(i). In *Rampersaud*, DHS submitted a copy of the restitution order and argued that the order proved that the victim or victims' loss exceeded \$10,000. While the Immigration Judge and Board of Immigration Appeals (“BIA”) agreed with DHS, the Second Circuit reversed, finding that the restitution order was unclear as to whether the \$77,199 was tied to the insurance fraud conviction, the grand larceny conviction, or to other conduct uncharged in the indictment, which would be permissible under New York State law. 972 F.3d at 61. The Court thus remanded the case back to the BIA to reconsider its conclusion in light of the Second Circuit's conclusion that the restitution order lacked specificity.

In *Mota v. Barr*, 971 F.3d 96 (2d Cir. 2020), decided on August 17, 2020, the Court affirmed that a Connecticut conviction for felony possession of narcotics were “crimes involving moral turpitude” (“CIMTs”) under the INA. To involve moral turpitude, a conviction must involve both “reprehensible conduct” and “a culpable mental state.” *Id.* at 99 (quoting *Matter of Silva-Trevino*, 26 I. & N. Dec. 826, 834 (BIA 2016)). The Second Circuit found both elements present in the Connecticut statute, which provided that “[n]o person may manufacture, distribute, sell, prescribe, dispense, compound, transport with the intent to sell or dispense, possess with the intent to sell or dispense, offer, give or administer to another person[.]” *Id.* (quoting CONN. GEN. STAT. §21a-277(a)(1)). In particular, the Second Circuit affirmed the BIA's conclusion that “evil intent is inherent in the illegal distribution of drugs[.]” *Id.* (quoting

Matter of Gonzalez-Romo, 26 I. & N. Dec. 743, 746 (B.I.A. 2016)).

Finally, in *Rodriguez v. Barr*, --- F.3d ---, No. 18-1070, 2020 WL 5580446 (2d Cir. Sept. 18, 2020), the Second Circuit considered whether a conviction for sexual abuse in the first degree under NYPL §130.65(3)—which makes it a felony to “subject[] another person to sexual contact” when “the other person is less than eleven years old”—is an aggravated felony relating to the sexual abuse of a minor as defined by the INA. *See* 8 U.S.C. 1101(a)(43)(A). New York has adopted a broad definition of “sexual contact,” which includes “any touching of the sexual or other intimate parts of a person for the purpose of gratifying sexual desire of either party,” New York Penal Law §130.00(3). The petitioner in *Rodriguez* argued that this broad definition meant that his conviction was not an aggravated felony under the categorical approach. (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.)

The Second Circuit rejected this argument, finding that the conviction fit squarely within the BIA’s “flexible” definition of “sexual abuse of a minor,” and that the BIA’s decision sensible effectuated “the congressional intent to expand the definition of an aggravated felony and to provide a comprehensive statutory scheme to cover crimes against children.” *Id.* at (quoting *Oouch v. U.S. Dep’t of Homeland Sec.*, 633 F.3d 119, 121 (2d Cir. 2011)).

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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, Eastern, Edgecombe, Great Meadow, Greene, 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.

NEWBURGH, 10 Little Britain Road, Suite 204, Newburgh, NY 12550

Prisons served: Downstate, Fishkill, Green Haven.

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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MESSAGE FROM THE STAFF OF PRISONERS' LEGAL SERVICES OF NY REGARDING THE COVID-19 PUBLIC HEALTH EMERGENCY (11/5/2020)¹

The staff of Prisoners' Legal Services is concerned about the health and safety of everyone in DOCCS custody during this pandemic. To ensure that your health and safety are protected, PLS, other prisoners' rights advocacy organizations and Legislators have been in regular contact with DOCCS, the Board of Parole and Governor Cuomo's office about our concerns, particularly with respect to reducing the prison population by selectively releasing people.

Eligibility for Early Release: DOCCS is currently considering for early release non-violent felony offenders who have not been convicted of sex offenses and who are within 90 days of a release date. ***People who meet the eligibility criteria will be evaluated for release; they are not entitled to release.*** In addition to the requirement that individuals have a parole approved address, there are other factors that may result in denial of early release even if an individual otherwise meets the threshold eligibility requirements.

Consideration for early release is on a rolling basis. That means that as eligible individuals approach the 90-day mark, DOCCS will review the other factors to determine whether they will be released. If you believe you qualify for release consideration, we urge you to contact your ORC to make sure that your proposed release address will be approved.

DOCCS is also considering for early release pregnant and postpartum women who are non-violent felony offenders who have not been convicted of sex offenses and who would otherwise be released within 6 months. To be released, women who meet the criteria must have stable housing and health care.

In late October, PLS contacted the Governor's and the DOCCS Commissioner's offices about expanding the criteria with respect to who will be considered for early release.

Visitation: Visiting resumed at all NYS prisons in early August. When visits were resumed, DOCCS permitted an embrace between individuals and their visitors at the beginning and end of the visit.

Effective October 30, 2020 at 3:00 p.m., due to the emergence of micro-clusters in different areas of the state and upticks in several facilities, DOCCS modified its procedures: DOCCS no longer allows an embrace at the beginning or end of a visit.

On October 21, due to the high rate of infection at Greene and Elmira Correctional Facilities, visitation at these two prisons was suspended until further notice.

On October 25, due to the high rate of COVID 19 infection in the community, visitation at Southport C.F. was temporarily suspended.

¹ The coronavirus public health emergency and the actions undertaken in response to it are continually changing. The information in this message is current and accurate through November 4, 2020, and supersedes prior versions of this message.

Transfers: On October 21, due to the high rate of infection at Greene and Elmira Correctional Facilities, DOCCS suspended transfers into and out of these two facilities until further notice.

Testing For COVID-19: In August, DOCCS began offering testing to all incarcerated individuals at many prisons. **While tests are voluntary, as a precaution, DOCCS will place individuals who refuse the test in isolation for 14-days.** To date, testing of the population of each prison has been completed except for the following prisons: Auburn, Coxsackie, Otisville, Queensboro, Sing Sing, Sullivan, Ulster, Washington and Woodbourne.

On November 4, 345 incarcerated individuals were infected with COVID-19. (This number includes only people who tested positive and who had not recovered). Two hundred fifty-nine (259) of the infected individuals were at Elmira, 41 were at Greene and 14 were at Cayuga.

Deaths from COVID-19: Tragically, eighteen incarcerated New Yorkers have died from COVID-19. Sixteen of the deaths occurred before May 12. The most recent death of an individual in DOCCS custody from COVID-19 was reported in mid-October. Seventeen of the incarcerated New Yorkers who died were being treated in hospitals at the time of their deaths.

Reducing the Spread of the Virus: Wearing masks is one of the most effective measures for reducing the spread of Covid-19. DOCCS reports that it has provided all incarcerated individuals with surgical-type masks as well as 4 washable cloth masks. Individuals can request replacement masks if the masks that they were given are damaged. DOCCS requires correction officers, parole officers and civilian staff to wear masks while on duty. Incarcerated individuals are encouraged to wear masks and are required to wear them during movement, visits, and programming.

We strongly encourage you to wear a mask. Medical science has demonstrated that masks are an important and effective measure for controlling the spread of the virus. Masks protect the person who wears the mask as well as those who come into contact with him or her.

Scientists have not determined that people who recover from COVID-19 are immune from getting the virus a second time. Several people have been infected twice and many people do not have antibodies to the virus after they recover. **For this reason, even people who have recovered from COVID-19 should continue to wear masks and maintain 6 feet between themselves and others.**

Lawsuits for Release Relating to COVID-19

Due to the danger of widespread COVID-19 infection in prisons, there have been numerous lawsuits in state and federal courts seeking the release of prisoners serving sentences imposed by state court judges. To date, the lawsuits have not led to the release of any state-sentenced prisoner. The reasoning used by the courts to deny relief varies, but is rooted generally in various procedural and substantive legal hurdles. Lawsuits seeking relief for people who are not in state prison, for example pre-trial detainees and people charged with technical parole violations, have been more successful.

PLS has not ruled out bringing a lawsuit should there be significant legal and/or factual developments that change the current legal landscape. We continually monitor the situation in the NYS prisons and closely watching what is happening in courts across the country. Our goal is to take whatever action we believe is the most likely to result in the protection of – to the greatest extent possible – the health and safety of the incarcerated population.

The Impact of the Pandemic-Related Suspension of Programs

Due to efforts to control the spread of COVID-19, between mid-March and mid-June, DOCCS suspended all programming. To limit the impact that the suspension would have on the incarcerated population's chances of merit, parole and conditional release, PLS urged DOCCS to credit the individuals who were enrolled in these programs during the suspension with the entire period that the programs were suspended. DOCCS agreed to credit individuals who were enrolled in ASAT, CASAT, and IDDT with the period 3/16/20 through 4/10/20. PLS continues to urge DOCCS to reconsider this issue.

Changes in the State Statutes of Limitation

Due to the COVID-19 pandemic, on March 7, 2020, Governor Andrew Cuomo issued Executive Order (EO) 202 declaring a state-wide disaster emergency. On March 20, Governor Cuomo issued EO 202.8 modifying the New York the state court filing deadlines, including statutes of limitations deadlines for commencing actions, during the COVID-19 state of emergency. EO 202.8 applies to any state statutes of limitation for commencing actions that are set by Criminal Procedure Law, the Family Court Act, the Civil Practice Law and Rules, the Court of Claims Act, the Surrogate's Court Procedure Act, and the Uniform Court Acts and by any other statute, local law, ordinance, order, rule, or regulation.

The Governor extended the terms of this EO 202.8 on a monthly basis. **The last extension was on October 4, extending the modifications to deadlines through November 3.** As of November 4, the suspension of the SOLs was lifted.

The Effect of Changes to the State Statutes of Limitations and Court Filing Deadlines

EO 202.8 stated that it "tolled" – stopped the clock running – for all state court filing deadlines, including state statutes of limitations. None of the subsequent executive orders extensions used the word "toll." The executive orders extending EO 202.8 provided that all prior "modifications" are to be continued.

Recently some debate has arisen within the New York legal community as to the precise meaning of these executive orders upon state statutes of limitations (SOLs). A statute of limitation establishes a firm and final deadline for commencing a legal action in court. The legal community has noted that there is uncertainty as to whether the Governor has the authority to toll statutes of limitations. If the Governor does not have this authority, the statutes of limitations have only been suspended. They have not actually been tolled.

There is an important distinction between SOLs that are "tolled" and SOLs that are "suspended." If the SOLs were tolled, then for the period of time during which these executive orders have been in effect – March 20 through November 3 (228 days) – the clock

counting down to a SOL deadline stopped running. Further, on November 4, an additional 228 days would be added to a SOL period, thus extending the deadline by 228 days running from November 4.

However, if the SOLs were only suspended, the only SOLs that would have been affected by the executive orders are those that would have expired during the period of suspension. And for those claims, where the SOL would have expired during the suspension period, when the suspension was finally ended on November 3, the statute of limitations deadline will also expire on that date.

No court has yet ruled on this issue. However, given the unprecedented situation that these executive orders have created, case law involving other past interruptions of statutes of limitation, and the genuine uncertainty surrounding the effect of these executive orders and the Governor's authority to toll SOLs, PLS strongly advises caution. Missing a statute of limitations means the affected claim is forever barred from ever being brought.

Accordingly, we strongly recommend the executive orders be treated as only suspending statutes of limitations for the duration of the orders instead of tolling those deadlines. This means that if you have a potential legal claim where the statute of limitations period would have expired under normal circumstances anytime during the COVID-19 emergency suspension period – March 20 through November 3 – you should commence in court any such action or claim on or before November 3.