

Pro Se

Vol. 31 No. 1 January 2021

Published by Prisoners' Legal Services of New York

Second Circuit Finds HO and EA Violated Accused's Due Process Rights

In *Jarvis Elder v. J. McCarthy, et al.*, 967 F.3d 113 (2d Cir. 2020), the plaintiff, after a successful Article 78 challenge to the determination of guilt made at a Tier III hearing, sued for damages for the six months that he spent in solitary confinement as a result of the hearing. The district court dismissed the plaintiff's 8th Amendment claim, finding that he had not alleged sufficient facts to support a claim of cruel and unusual punishment. The defendants then brought a Motion for Summary Judgment on the 14th Amendment claims which the court also granted. The plaintiff appealed and the Second Circuit, disagreeing with the district court, granted summary judgment to the plaintiff on some of his 14th Amendment due process claims and remanded others for trial and reversed the district court's dismissal of the 8th Amendment claim.

Factual Background

When the events at issue occurred, the plaintiff was incarcerated at Attica C.F. He came to the attention of prison staff when someone set fire to his cell. Confidential information that another prisoner (AP) was possibly involved in drug activity and the fire led Sergeant McCarthy to search AP's cell, where he discovered a list of addresses, a list of phone numbers and an inmate account disbursement

form completed in the plaintiff's name. When Sgt. McCarthy showed the materials to the plaintiff, the plaintiff said that they were his and the disbursement form was related to a withdrawal from his account.

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Covid-19 Update

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

As I write this message, the New Year is still a few weeks away but the 2020 Covid-19 pandemic is showing no signs of letting up anytime soon.

The United States is witnessing unprecedented numbers of infections and fatalities: over 200,000 new cases and approximately 3,000 deaths every day.

The situation in New York State is perilous as well, though we can proudly say that we offer more COVID tests per 100,000 than the vast majority of states and have the 5th lowest positivity rate (5.1%) in the country. By way of contrast, Idaho has the highest positivity rate (51.4%) and Hawaii the lowest (1.9%).

According to international health experts, Dr. Anthony Fauci among them, the reason for our comparative success is no mystery: it is due to the adherence of the vast majority of New Yorkers to the many safeguards, protocols and testing regimens put into place by the Governor and our other state and local leaders.

That said, our patience and vigilance will be called upon more than ever before as we head into the winter months. The need is great, as New York State's case count now matches its highs at the height of the pandemic in March and April: nearly 10,000 new cases of COVID every day. Noticeably, and thankfully, our mortality rate is much lower, but we are still numbering almost 100 deaths daily. According to the New York Times, as of December 10th, there have been at least 738,947 cases and 34,799 deaths in New York State since the beginning of the pandemic.

The COVID situation in New York State prisons is mirroring what is happening in our communities. Of New York's 52 prisons, 10 have reported no cases among incarcerated individuals, 17 prisons have had no more than 10 cases and five prisons have experienced a significant outbreak among the incarcerated population accounting for 58% of the total number of cases since the beginning of the pandemic. As of December 10, 2020, a total of 1,959 incarcerated individuals had tested positive for COVID-19. Of those, 1,755 have recovered from the virus but, tragically, 18 individuals have died, leaving 205 incarcerated individuals suffering from COVID-19.

The message I want to convey to the readership is one of hope tempered with a plea for continued patience, vigilance and comportment with all mandated health directives. Indeed, with respect to COVID-19 infections, things are likely to get worse before they get better, but by following mask, social distancing and hand-washing protocols we can certainly influence the pace at which we get to the "other side" of this national nightmare.

Along those lines, DOCCS has recently developed, in consultation with DOH, an asymptomatic surveillance testing plan that will allow for a number of incarcerated individuals from each facility to be tested every weekday, from multiple housing units, in order to avert potential outbreaks and target resources to facilities and housing units identified as a potential problem. This asymptomatic surveillance testing plan is in addition to testing individuals who display symptoms and those who are identified as part of a contact trace.

Cause for further optimism is the game-changing development of vaccines that will likely be available for distribution in the very near future. These vaccines, once approved by the Federal Drug Administration and, in New York, our state health professionals, promise to be safe and highly effective at keeping those inoculated from becoming extremely sick from the virus.

Counterintuitively, while the vaccines will undoubtedly reduce the number of positive cases and lessen the severity of the infection if a vaccinated person does become infected, keep in mind that the inoculated population can still become infected by Covid-19 and, unknown at the moment, is how contagious they will remain after inoculation.

Thus, the need to abide by the masking, social distancing and hand-washing protocols will remain even after people are vaccinated. This is an extremely important point if we are to get “ahead of the curve,” turn the tables on this awful virus and avoid the worst of what is being described as a very “dark winter.”

As for the vaccines themselves, I want you to know that we are working with the Department and the Administration to ensure that our incarcerated population, like other underserved populations (especially those in congregate settings), receive the attention they deserve and the medicines and treatment they need. We also continue to urge DOCCS to ensure the sufficient supply of masks and cleaning supplies for the prison population, engage in extensive testing at the prisons, monitor staff compliance with COVID-19 protocols, continuously update the COVID-19 DOCCS website and expand the criteria for early release consideration. Most recently we partnered with DOCCS to advise the population of the process of applying for Cares Act Stimulus checks.

The state seal of New York State features the motto, *Excelsior* meaning, “Ever Upward” which was officially adopted in 1778. This past January, Governor Cuomo proposed adopting a secondary motto, *E Pluribus Unum*, Latin for “Out of Many, One.” In his budget address, the Governor explained that the addition of this phrase was rooted in our founding fathers’ outlook. They believed the success of the country would come from everyone working together for the common good. In April 2020, the NYS Legislature added *E Pluribus Unum* as a secondary motto as part of the fiscal year 2021 enacted budget.

Soon thereafter, Governor Cuomo, in one of his many Covid-19 addresses, spoke of Western New York’s urgent need for medical supplies and medical staff to fight the increasing cases of COVID-19 in their hospitals. Pointing out that no one in New York would be left to fend for themselves he said: “We are one state, we are one family, we are one community, and we’re there to help one another.”

We are one and, as we have shown over and over again, we are New York tough.

In sum, while it remains frustratingly true that there is much we are still learning about the virus, we do have it within each of us to control how we choose to combat it. With that dedication and resolve, I am confident that, together, we can get through these rough times and emerge even stronger.

. . . *Continued from Page 1*

A few days later, Sergeant McCarthy completed his investigation. His report states that he had been investigating the source of possibly forged disbursement forms – not the fire in the plaintiff’s cell – which the prison had relied on when it paid out \$630.00 in disbursements from AP’s account.

To withdraw money from an incarcerated individual’s account, the account owner fills in, signs and gives a disbursement form to a Block officer who is responsible for confirming, in writing, that the name and DIN on the disbursement form matches the individual who is presenting it.

Sgt. McCarthy concluded that the handwriting on the disbursement form found in AP’s cell – which the plaintiff acknowledged was his – and the handwriting on seven suspect disbursement forms completed in AP’s name were the same. Based on this comparison, Sgt. McCarthy concluded that the plaintiff had forged AP’s disbursement forms, using AP’s name, DIN and account number. The plaintiff was charged with forgery and theft and placed in keeplock.

Employee Assistance

According to the plaintiff, he asked his employee assistant (EA) to collect documents, interview witnesses and arrange for the witnesses to testify at the hearing. He also states that he asked for copies of the allegedly forged disbursement forms and that the EA interview Sgt. McCarthy, AP, a handwriting expert and the officers who signed the AP disbursement forms that the plaintiff was accused of forging. According to the plaintiff, the EA told him that he could not see the disbursement forms until the hearing.

The EA’s notes on the employee assistant form indicated that the plaintiff had requested only that AP be interviewed and that Sgt. McCarthy, “a handwriting specialist” and the officers who signed the disbursement forms testify at the hearing. The EA maintained that the plaintiff did not request copies of the disbursement forms and did not ask that he interview the officers who signed the disbursement forms. According to the EA, he relayed to the hearing

officer (HO) the witnesses – identifying them by name or position – whom the plaintiff wanted to testify at the hearing.

The Hearing

At the hearing, the HO reported that AP had refused to testify and that he needed more information about the officers who signed the disbursement forms (signing officers). The plaintiff explained that the identification of the signing officers was crucial to his defense, because those officers were required to check the ID of the person who is submitting the disbursement forms and could exonerate him.

The HO announced that he was showing the disbursement forms to the plaintiff. However, the plaintiff said that he was not allowed to meaningfully review the forms because the HO “flipped through them and displayed them to him from where [the HO] was seated” but did not allow the plaintiff to hold them and look at them. The plaintiff objected that he had never received copies of the disbursement forms and thus lacked specific information about the accusations against him, including relevant dates and times.

The plaintiff denied stealing from AP and denied forging the disbursement forms. He argued that forging a disbursement form is impossible because the policy requires that an officer check the inmate’s name and ID number before accepting the form. The plaintiff was concerned that AP was framing the plaintiff in order to pull a scam and get money.

Sgt. McCarthy testified that the handwriting on the disbursement forms “resembled” plaintiff’s handwriting. He also testified that he could not identify the signing officers from the disbursement forms. The HO stated that he had gone to the block and asked officers to identify the officers who signed the forms, but they were unable to do so.

The HO found the plaintiff guilty of the charges and imposed a penalty of 6 months SHU and \$630.00 in restitution. The disposition stated that the HO had relied on the testimony of Sgt. McCarthy and the contents of the misbehavior report. He found that the “visual evidence of the signature was compelling in

the similarities.” It appeared to him that “some officers may have been lax in verifying I.D.” He also felt that “no credible defense was given.”

The Article 78

The Appellate Division reversed the hearing, finding that the determination of guilt was not supported by substantial evidence. See *Matter of Elder v. Fischer*, 115 A.D.3d 1177 (4th Dep’t 2014). As support for its conclusion, the court wrote that the misbehavior report and evidence presented at the hearing did not include evidence “that [McCarthy] showed [AP] the disbursement forms or that AP claimed that it was not his signature on the forms.” The court also criticized the HO’s failure to make meaningful efforts to identify the signing officers whom the plaintiff had requested be called as witnesses. And thirdly, the court found that the plaintiff was denied meaningful employee assistance, and was thereby prejudiced, pointing out that there was no evidence that EA had made any efforts to identify the signing officers or to secure their presence at the hearing. Thus, the court concluded, it could not be said that reasonable efforts were made to locate the plaintiff’s witnesses.

The Complaint

Among the due process violations raised by Plaintiff Elder were the following:

- The EA violated the plaintiff’s right to assistance’s when he failed to i) interview the signing officers and ii) produce the allegedly forged disbursement forms;
- The HO violated the plaintiff’s right to know and review the evidence against him when he failed to produce allegedly forged disbursement forms;
- The HO violated the plaintiff’s right to call witnesses when he failed to identify and call as witnesses the signing officers; and

- The HO violated the plaintiff’s right to a decision which is supported by some reliable evidence.

The plaintiff also alleged that the unsanitary conditions in SHU violated his 8th Amendment right to be free from cruel and unusual punishment.

Discovery

The defendants produced the log book for plaintiffs’ Block which identified the officers who were on the block on the date and time that the disbursement forms were signed. In addition, they produced correspondence indicating that an Inmate Accounts employee believed AP’s complaints about wrongful disbursements were fraudulent and letters from AP to the plaintiff’s girlfriend stating his interest in her.

The defendants also produced **evidence that inculcated the plaintiff** [evidence from which an inference of the plaintiff’s guilt could be drawn]. For example, the plaintiff’s mother was a payee on one of the allegedly forged disbursement forms.

The Motions to Dismiss and for Summary Judgment*

Defendants’ Motion to Dismiss

The district court dismissed the plaintiff’s 8th Amendment claim because the plaintiff failed to allege that any of the defendants were aware of the allegedly unsanitary conditions in the SHU cell to which he was confined as a result of the Tier III. The court did not allow the plaintiff to amend the complaint to remedy the problems it identified.

Defendants’ Motion for Summary Judgment

The district court granted the defendants’ motion and dismissed all of the due process claims.

As part of the defendants’ motion for summary judgment, they included an affidavit from the HO. In the affidavit, the HO expanded on the disposition he wrote at the hearing, swearing that the hearing record on which he relied included the allegedly forged disbursement forms, the plaintiff’s disbursement

form found in AP's cell, the plaintiff's address and phone lists, mail receipts and a check endorsed by the plaintiff. The allegedly forged disbursement forms had handwritten designations of AP as payor. All were initialed or signed by unidentified correction officers.

Second Circuit Decision

The Court first noted that an appellate court reviews *de novo* an order granting summary. *Elder*, at 123. When an issue is reviewed *de novo*, the reviewing court substitutes its judgment for that of the trial court. In the context of a review of an order granting summary judgment, the court also construes all record evidence in the light most favorable to the non-moving party. *Id.* A reviewing court will only affirm an order granting summary judgment when there is no genuine dispute as to any material fact and the movant, in this case, the defendants, is entitled to judgment as a matter of law. *Id.*

The Court also noted that a sentence requiring a prisoner to serve time in SHU "represents a substantial loss of liberty even for a lawfully imprisoned person." *Id.*, at 124. Thus, the Court went on, "certain due process protections must be observed before an inmate may be subject to confinement in SHU." *Id.* Included among these protections are a reasonable opportunity to call witnesses and present documentary evidence and a written statement of disposition, including supporting facts and reasons for the action taken. *Id.*

Plaintiff's Right to a Determination Supported by Some Reliable Evidence

In *Sira v. Morton*, 380 F.3d 57, 81 (2d Cir. 2004), the Court held that at a prison disciplinary hearing, the accused individual has a due process right to a determination of guilt that is supported by some reliable evidence.

Reviewing the evidence before it, the *Elder* Court found that although the HO had concluded that the handwriting on the disbursement forms was similar to the plaintiff's, "the entire proceeding rested on the assumption – one unsupported by any direct evidence and supported by McCarthy's report only by inference – that forgery and theft had

occurred." However, the Court wrote, "the hearing record lacked any direct evidence that [AP] had complained of theft or forgery, or that money was withdrawn from [AP's] account against his will." Further, there were no handwriting samples from AP in the record to suggest that the disbursement forms at issue were forgeries. This aspect of the record persuaded the Second Circuit that the evidence in the record was insufficient to find the plaintiff guilty of theft and forgery.

Plaintiff's Right to Call Witnesses

As the U.S. Supreme Court wrote in *Ponte v. Real*, 471 U.S. 491, 495 (1985), chief among the due process protections at a prison disciplinary hearing is the right to call and present witnesses in the accused's defense. A witness request can be denied due to irrelevance or where granting the request would be unduly hazardous to institutional safety or correctional goals. However, as the Second Circuit wrote in *Kingsley v. Bureau of Prisons*, 937 F.2d 26, 30-31 (2d Cir. 1991), the burden is on the hearing officer who denies the request to prove the rationality of his position.

Here, the Court found, it was unreasonable for the HO to expect the plaintiff to be able to name the signing officers. *Elder*, at 125. If he did not commit the forgery and submit the disbursement forms, he would have had no way of knowing which officers approved them. *Id.* Moreover, as revealed during discovery, the information identifying the signing officers was readily available. *Id.*

Further, the Court noted, the HO's effort to identify the signing officers was "patently insufficient." *Id.* The HO spoke to 5 officers who worked on the plaintiff's Block, but did not identify them, reveal how he selected them, what he asked them or whether he showed them the disbursement forms at issue. *Id.*

Finally, the Court wrote, the names of the officers who would have signed the disbursement forms were readily available from the records produced during discovery. The officers who sign disbursements are known as "hall captains." The officers who are the daily hall captains are identified in the Block staffing logs. Thus, the HO could have

identified the signing officers by interviewing the hall captains for the day that the disbursements were signed.

The Second Circuit held that the HO's failure to examine the facility log books to determine the officers who could have signed the disbursement forms violated the plaintiff's right to due process of law. It therefore reversed the district court's finding with respect to whether the HO had violated the plaintiff's right to call witnesses and granted judgment to the plaintiff.

Plaintiff's Right to Assistance

Identify and Interview Witnesses

The plaintiff testified at his deposition that he asked the EA to interview the signing officers. The EA says that the plaintiff asked only that the officers be produced at the hearing. When deciding a motion for summary judgment, the court must accept as true the statements of the non-moving party.

Due process principles require prison authorities to assist an inmate in marshalling evidence and presenting a defense. *Elder*, at 126, citing *Eng v. Coughlin*, 858 F.2d 889, 897 (2d Cir. 1988). When an individual is in pre-hearing confinement, such assistance includes gathering evidence, obtaining documents and relevant tapes, and interviewing witnesses. *Id.*

With respect to the claim that the EA violated the plaintiff's right to assistance, the *Elder* Court wrote, "Considering how easily the EA could have identified the plaintiff's witnesses by consulting prison records (and taking as true [the plaintiff's] account of the relevant facts, as we must at this stage of the proceedings), we think [the EA] could be shown to have fallen short of meeting his constitutional obligation to assist [the plaintiff] . . ." *Id.* at 127.

Production of Records

The evidence concerning what assistance the plaintiff requested is disputed. In a motion for summary judgment, the district court was required to credit the non-moving party's evidence. In this case,

the plaintiff was the non-moving party. The plaintiff testified at his deposition that he asked the EA to obtain copies of the allegedly forged disbursement forms.

The district court concluded that even if the plaintiff had asked the EA for the documents, the EA's failure to produce them was harmless error because the HO allowed the plaintiff to review the documents at the hearing. The Second Circuit rejected this conclusion, pointing out that the plaintiff claimed the HO did not allow him sufficient access to the documents. Thus, the Court ruled, the district court erred in dismissing the claim.

Court's Conclusion

The Second Circuit concluded that the EA's alleged failure to carry out the plaintiff's requests, if proven, would have violated the plaintiff's right to due process of law. The Court held that the plaintiff is therefore entitled to a trial to determine what assistance he requested and whether the EA failed to provide him with the requested assistance.

8th Amendment Right to Be Free from Cruel and Unusual Punishment

The district court found that the plaintiff's allegation of unsanitary SHU conditions was the most compelling of his allegations regarding his conditions of confinement. It concluded, however, that the plaintiff had not plausibly alleged that any defendant knew or was deliberately indifferent to those conditions and therefore dismissed the claim. The plaintiff argued on appeal that he should have been allowed to amend the complaint to address this issue. The Second Circuit, citing *Shomo v. City of New York*, 579 F.3d 176, 183-84 (2d Cir. 2009), agreed: "Where a district court cannot rule out any possibility, however unlikely it might be, that an amended complaint would succeed in stating a claim, a *pro se* complaint should not be dismissed without granting leave to amend at least once." *Elder* at 132.

Based on this analysis, the *Elder* Court ordered the district court to allow the plaintiff to amend his complaint to replead his 8th Amendment claim.

*In its decision, the Court addressed several issues that are not discussed in this article, including qualified immunity and the plaintiff's due process right to notice of the charges.

Fabien M. Thayamball and Alexandra A.E. Shapiro, Shapiro Arato LLP, represented Jarvis Elder in this Section 1983 lawsuit.

NEWS & NOTES

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 and the Courts 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 four 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 back page of *Pro Se* for a list of PLS offices and the prisons each covers.

Federal Lawsuit for Damages Filed Against DOCCS Officials for Policy of Unlawfully Excluding From Shock Individuals Who Were Court-Ordered to the Program

In the April 2020 issue of *Pro Se* we reported on the decision in *Matter of Matzell v. Annucci*, 183 A.D.3d 1 (3d Dep't 2020), a case brought by PLS in which the Court held that DOCCS officials had unlawfully excluded Mr. Matzell from the Shock Incarceration Program ("Shock"). As part of his sentence, the court had ordered Mr. Matzell to participate in Shock. Individuals who are court ordered to Shock become time-eligible to be enrolled

in the program when they are within 36 months of their conditional release date. A person who successfully completes Shock becomes immediately eligible for conditional release, and in the case of those with determinate sentences like Mr. Matzell, such release is immediate and automatic. When Mr. Matzell became time-eligible, prison officials refused to admit him, citing several drug-related misbehavior reports.

First the Albany Supreme Court, and then the Third Department of the Appellate Division on the State's appeal, held that DOCCS officials were without any lawful authority or discretion to deny Mr. Matzell admission to Shock.

Since the 2009 Drug Law Reform Act (DLRA), courts have been empowered to order certain qualifying individuals to Shock as part of their sentence. As the Matzell court recognized, the Shock statutes (Correction Law §§865 and 867) make clear that individuals with a Shock order may only be excluded from the program for a disqualifying "medical or mental health condition." Moreover, as the Court noted, Penal Law §60.04(7) also makes clear that even where "an inmate designated by court order for enrollment in the shock incarceration program requires a degree of medical care or mental health care that cannot be provided at a shock incarceration facility, the department . . . shall . . . provide a proposal describing a proposed alternative-to-shock-incarceration program." As that alternative, DOCCS often offers participation in ASAT or phase one of CASAT.

During the course of the state court appeal, DOCCS placed Mr. Matzell in Shock. Mr. Matzell completed the program and was then released to community supervision. However, because DOCCS did not admit Mr. Matzell to the Shock when he became eligible to participate, Mr. Matzell spent 506 more days in DOCCS custody than he would have if he had been lawfully and timely admitted to the program.

On November 25, 2020, Mr. Matzell filed a federal civil rights claim in the United States District Court for the Southern District of New York against various DOCCS officials, seeking damages for the additional 506 days of imprisonment. He alleges that many more individuals have suffered similar

wrongful exclusion from Shock by DOCCS officials over the years, and thus seeks class action status in the case on behalf of all others who are similarly situated. That is, he seeks damages for and on behalf of all others like him who were court ordered to Shock but wrongfully excluded from timely admission into the program. There is a three year statute of limitations on such damage claims, and thus if eventually certified by the court as a class action, it could apply to anyone who was similarly wrongfully excluded from Shock and adversely affected by such exclusion since November 25, 2017.

If you would like additional information about the lawsuit, please contact the attorney and law firm representing Mr. Matzell: Katherine Rosenfeld, Emery Celli Brinckerhoff Abady Ward & Maazel, LLP, 600 Fifth Avenue, 10th Floor, New York, NY 10020.

PRO SE VICTORIES!

People v. Sara G. Kielly, F/K/A Alan Outman, Ind. No. 2012-093 (Co. Ct. Broome Co. Sept. 14, 2020). In the context of a Criminal Procedure Law 440.10 motion, the court ruled that where the current Broome County Chief Assistant District Attorney was Sara Kielly's criminal defense attorney while he was in private practice, all of the attorneys employed by the Broome County District Attorney's Office were disqualified from matters involving Ms. Kielly. In reaching this result, the court relied on New York Rules of Professional Conduct governing former client conflicts. The court ordered that should any further proceedings involving Ms. Kielly arise during her former defense attorney's employment as an Assistant District Attorney, the Broome County District Attorney must apply for the appointment of a special district attorney.

Julio Nova v. State of New York, Claim No. 134129, Motion No. M-95173 (Ct. Clms. July, 10, 2020). The court in part granted and in part denied the defendant's motion to dismiss the claim that the Albany County Clerk treated Mr.

Nova, an incarcerated individual, differently than he did other litigants and thereby hindered his ability to proceed with a civil rights claim. The defendant moved to dismiss the claim relating to the County Clerk, arguing that the court did not have jurisdiction because the clerk is a *county employee* and the court of claims is only authorized to hear claims relating to the conduct of *state employees*. The court, noting that county clerks have both county functions and state functions, ruled that the function that Mr. Nova alleged the clerk had violated related to the clerk's state functions and therefore the claim was properly before the state court of claims. The court also denied the State's motion to dismiss the claim that the clerk failed to process claimant's motions as required by court rules and regulations. With respect to denying this aspect of the motion, the court found that the State had not submitted sufficient documentary evidence to "utterly refute" the claimant's allegation that the clerk had failed to process the claimant's motions.

DOCCS Agrees to Reverse 24 Hearings Challenged in Article 78 Proceedings

DOCCS agreed to reverse the disciplinary hearings challenged in the following Article 78 proceedings. The cases were decided between January 1 and December 10, 2020:

Matter of Bernard Patterson v. Anthony Rodriguez, 179 A.D.3d 1378 (3d Dep't 2020)

Matter of Jamel Black v. Anthony Annucci, 179 A.D.3d 1371 (3d Dep't 2020)

Matter of Wallace Drake v. Anthony Annucci, 179 A.D.3d 1374 (3d Dep't 2020)

Matter of Darren Breeden v. NYS DOCCS, 179 A.D.3d 1374 (3d Dep't 2020)

Matter of Thomas King v. Donald Venettozzi, 179 A.D.3d 1365 (3d Dep't 2020)

Matter of Anthony Arriaga v. Mario Panzarella, 181 A.D.3d 1143 (3d Dep't 2020)

Matter of Jeffrey Dibble v. Donald Venettozzi, 181 A.D.3d 1139 (3d Dep't 2020)

Matter of Renato Albanese v. Anthony J. Annucci, 181 A.D.3d 1085 (3d Dep't 2020)

Matter of Phillip Battease v. NYS DOCCS, 181 A.D.3d 1076 (3d Dep't 2020)

Matter of Duane Brown v. Anthony J. Annucci, 181 A.D.3d 1087 (3d Dep't 2020)

Matter of Patrick Bannon v. NYS DOCCS, 182 A.D.3d 898 (3d Dep't 2020)

Matter of Donald M. Dove v. Jaifa Collado, 182 A.D.3d 893 (3d Dep't 2020)

Matter of Anthony Perez v. Donald Venettozzi, 182 A.D.3d 869 (3d Dep't 2020)

Matter of Brandon Vilella v. Anthony J. Annucci, 185 A.D.3d 1362 (3d Dep't 2020)

Matter of Stoker Olukotun-Williams v. Anthony J. Annucci, 185 A.D.3d 1368 (3d Dep't 2020)

Matter of Christina Urena v. William F. Keyser, 185 A.D.3d 1368 (3d Dep't 2020)

Matter of Gerardo Barrera v. Lt. Mario Panzarella, 185 A.D.3d 1362 (3d Dep't 2020)

Matter of Marvin Greene v. Anthony J. Annucci, 186 A.D.3d 1868 (3d Dep't 2020)

Matter of David Louime v. Donald Venettozzi, 186 A.D.3d 1870 (3d Dep't 2020)

Matter of Robert J. Colvin v. Donald Venettozzi, 186 A.D.3d 1866 (3d Dep't 2020)

Matter of Elisha Torres v. Donald Venettozzi, 186 A.D.3d 1855 (3d Dep't 2020)

Matter of Tremaine Green v. Anthony Annucci, 187 A.D.3d 1597 (4th Dep't 2020)

Matter of Jason Pagan v. Anthony J. Annucci, 131 N.Y.S.3d 918 (3d Dep't 2020)

Matter of Gill Terrence v. Anthony J. Annucci, 2020 WL 6689037 (4th Dep't Nov 13, 2020)

Matter of Ronald Snyder v. Anthony J. Annucci, 2020 WL 6929028 (3d Dep't Nov. 25, 2020)

Matter of Vinod Patel v. Donald Venettozzi, 2020 WL 7249519 (3d Dep't Dec. 10, 2020)

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 submission

STATE COURT DECISIONS

COVID-19 Issues

Prisoner Released Pending Appeal Due to COVID-19 Concerns

A jury convicted George Garcia of two counts of criminal possession of weapon in the second degree. Both counts involved possession of a loaded firearm.

At trial, Mr. Garcia testified that while he and his girlfriend were at a club, his girlfriend was assaulted. The assault led to an argument between Mr. Garcia and the assailant, following which club employees asked the two men to leave. Believing that he was being followed, Mr. Garcia went to his car and took his gun out of the trunk to scare the people whom he believed were threatening him. As he was walking back toward the club to get his

girlfriend, police arrested him. The jury found Mr. Garcia guilty. The court imposed a sentence to 3½ years of incarceration followed by 3½ years of post-release supervision.

The events at issue occurred in July 2017. Mr. Garcia was released on bail between his arrest and conviction. In or around January 2019, Mr. Garcia began serving his sentence.

In the summer of 2020, Mr. Garcia brought a motion pursuant to Criminal Procedure Law (CPL) §440.20, seeking to be released from serving the remainder of his sentence. He argued that due to his underlying medical conditions and the danger he is in from COVID-19, continued incarceration would constitute cruel and unusual punishment and violate due process of law. The trial court denied the motion without prejudice in August 2020.

Mr. Garcia next sought release by means of a CPL §460.50 motion. This section of the law provides: “Upon application of a defendant who has taken an appeal to an intermediate appellate court from a judgment or from a sentence of a criminal court, a judge . . . may issue an order both (a) staying or suspending the execution of the judgment pending the determination of the appeal, and (b) either releasing the defendant on his own recognizance or fixing bail pursuant to the provisions of article five hundred thirty.”

Criminal Procedure Law §510.30 (Application for securing order; rules of law and criteria controlling determination), provides that in ruling on a bail application, the court must, on the basis of available information, consider information about the person seeking bail that is relevant to his/her/their return to court, including:

- The defendant’s activities and history;
- The charges;
- The defendant's record of criminal conviction;
- The defendant's history with respect to flight to avoid criminal prosecution;

- If monetary bail is authorized, the defendant's financial circumstances, and, in cases where bail is authorized, the defendant’s ability to post bail without posing undue hardship, as well as his or her ability to obtain a secured, unsecured, or partially secured bond;
- The defendant’s history of use or possession of firearms; and
- In the case of an application for a securing order pending appeal, the merit or lack of merit of the appeal.

Section 510.30(2) provides that where the person moving for bail is a defendant-appellant in a pending appeal from a judgment of conviction, the court must also consider the likelihood of ultimate reversal of the judgment. A determination that the appeal is palpably without merit alone justifies, but does not require, a denial of the application, regardless of any determination made with respect to the factors specified in §510.30(1).

In *People v. George Garcia*, 2020 WL 6066990 (Sup. Ct. N.Y. Co. Oct. 8, 2020), the court noted the following facts as relevant to the defendant’s application for bail pending appeal.

Mr. Garcia was 67 years old at the time of the events that resulted in his arrest. He had never before been arrested. He was out on bail through the end of the criminal trial, never missed an appearance and complied with all conditions.

At trial, Mr. Garcia testified that he had no intention of harming anyone; he just wanted to scare the people who were following him. While he did tell his son that he wanted to shoot the person who had assaulted his girlfriend, at trial he explained that when he said this, he was in jail for the first time and under a lot of stress from lack of sleep and not having been given his diabetes medication.

Mr. Garcia suffers from hypertension, diabetes and dilated cardiomyopathy. He was hospitalized five times between 2013 and 2017 for symptoms including shortness of breath, chest pain and persistent coughing. While incarcerated, he suffered cardiac arrest requiring the use of a defibrillator.

The Center for Appellate Advocacy, which represented Mr. Garcia in the motion for bail pending appeal, has committed to assisting Mr. Garcia through its reentry program. According to defendant's counsel, if released, Mr. Garcia would self-isolate as he is at serious risk of illness and death should he contract the virus.

The court also considered living conditions at Gowanda C.F., where Mr. Garcia resided. Noting that the difficulties of maintaining social distancing and other hygienic measures to prevent the spread of COVID-19 in prisons and jails is well established, the court considered the conditions at Gowanda. There, the court found, there had only been one positive case and the individual had recovered. There had been 879 negative tests and there were 49 pending tests.

The court noted that it had partially been the absence of infections at Gowanda, and generally the absence of evidence that DOCCS had been deliberately indifferent to the health needs of the incarcerated population that had caused the court to deny the defendant's 440.20 motion to vacate his sentence based on his vulnerability to COVID-19. However, the court noted, social distancing may be impossible in prison since prisoners live in close quarters and share showers, telephones, toilets and meals with numerous other prisoners. Mr. Garcia was living in a four-person cell where he sleeps three feet from other individuals, two of whom were recent transferees.

With respect to whether he has raised a meritorious issue on appeal, Mr. Garcia argued that the trial court had wrongfully limited his right to question prospective jurors about their personal opinions on firearms and gun ownership.

Turning to the law, the court acknowledged that it was "highly unusual" for a court to grant bail to a defendant who has begun to serve a state prison sentence. The court identified two factors justifying the defendant's release. First, Mr. Garcia is not a flight risk. Second, his continued incarceration puts his health at significant risk, which, even if his appeal is denied, might not be true by the time his appeal is decided. By then, the spread of COVID-19 may be contained and there may be a vaccine. Finally, the

court concluded, granting this motion is "simply the right thing to do."

Applying the law to the facts, the court found that Mr. Garcia poses a minimal flight risk. Only a year and 2 months remains on his sentence. When he was out on bail before he was convicted and was facing at least 3½ years, Mr. Garcia had regularly returned to court. Further, Mr. Garcia has close family ties, a lengthy period living in the community and an absence of any criminal history other than the current offense.

As to the merits of the appeal, the court found that the appeal issue raised by the defendant is not "palpably without merit," nor is it a frivolous argument. However, the court believed the appeal was unlikely to succeed because the defendant would not be able to show that he was prejudiced by the trial court's limits on questioning the prospective jurors. The trial court had allowed extensive questioning on the prospective jurors' feelings about guns and gun ownership, the motion court found.

The court found that the likely delay in deciding Mr. Garcia's appeal mitigated in favor of granting the motion for bail.

The court found that granting the motion would likely **mitigate** [lessen] the risk of harm caused by incarceration should the virus spread through Gowanda C.F. Given Mr. Garcia's "unusually serious health conditions and their compelling relationship to the COVID-risk, Mr. Garcia has no room for error. Contracting COVID could easily become a death sentence for him." A year from now, the court wrote, after the appeal is decided, the risk may be significantly reduced.

The only downside to granting the motion is that if Mr. Garcia loses his appeal, he will have to return to prison. While prisoners do not normally get to choose when they will serve their sentences, the court wrote, Mr. Garcia poses only a slight risk of flight and is particularly vulnerable to COVID-19. Delaying the remaining service of his sentence will lessen the risk that he will die of COVID-19 in prison, at little cost.

For these reasons, the court granted the defendant's motion.

Hunter Hayney, Center for Appellate Litigation, represented George Garcia in this CPL §460.50 motion.

Court Denies Motion to Resentence Based On COVID-19 Related Prison Conditions

In 2003, Glenn White was convicted of attempted murder and sentenced to 25 years to life. In 2020, he filed a CPL §440.20 motion asserting that conditions at Fishkill C.F. showed that DOCCS, through its response to COVID-19, was deliberately indifferent to his health needs and that as a result, he is suffering the **de facto** [in fact, in reality] punishment of exposure to a potentially fatal virus which was unforeseeable when he was sentenced.

The People opposed the motion, arguing that the defendant's challenge to the conditions of his confinement **was not cognizable in** [was not contemplated by] Criminal Procedure Law §440.20 because the defendant does not claim that his sentence was unauthorized by law or disproportionate in light of his crimes. Conditions claims, the People argued, can only be brought in a civil or administrative proceeding against DOCCS.

Further, the People pointed out, while the New York County District Attorney must respond to a 440 motion, it "does not oversee the state prison system nor does it have access to the defendant's medical records" or those of other incarcerated individuals and is not in a position to respond to claims that the defendant is suffering from a serious medical condition or that conditions at Fishkill C.F. pose a particular danger to his health.

Finally, the People pointed out, while the District Attorney of Albany County had consented to the relief requested in a similar motion filed by another incarcerated individual "in the interests of justice," in *People v. Cancer*, Albany County Ind. No. 33-6322 (Sup. Ct. Albany Co. July 27, 2020), a judge of coordinate jurisdiction subsequently held

that even though the People were again consenting to the granting of the 440.20 motion, the court had no authority to reduce a valid sentence in the interest of justice. Moreover, the People argued, courts in New York County, Bronx County, Richmond County and Suffolk County have also denied such motions.

In *People v. White*, 69 Misc.3d 425 (Sup. Ct. N.Y. Co. 2020), the court first reviewed CPL §440.20, noting that the statute provides: "At any time after entry of judgment, the court in which the judgment was entered may, upon motion of the defendant, set aside the sentence upon the ground that it was unauthorized, illegally imposed or otherwise invalid as a matter of law." In addition, this section of the statute states ". . . when the court has imposed a sentence of imprisonment and such sentence is in accordance with law, such sentence may not be changed, suspended or interrupted once the term . . . of the sentence has commenced."

Reviewing the statutory language, the *White* court noted that CPL §440.20 does not permit a court to change the sentence once the defendant has been committed to DOCCS' custody and has begun serving the sentence. The court pointed out that the Fourth Department reached the same conclusion in *People v. Bedell*, 210 A.D.2d 922 (4th Dep't 1994), *lv. denied*, 23 N.Y.3d 1063 (1995).

In *Bedell*, the defendant brought a 440.20 motion grounded on a claim of cruel and unusual punishment. Fourteen years after the sentence was imposed, the defendant argued that that it was unconstitutionally harsh in light of her rehabilitation and her extraordinary achievements in prison. The motion court denied the motion on the ground that the court did not have the authority to grant the requested relief pursuant to CPL §440.20. The Appellate Division agreed. A concurring judge wrote, "The Court's power to examine the constitutional dimensions of a State-imposed sentencing scheme, however, is limited to weighing the gravity of the offense against the danger the offender poses to society at the time that the sentence is imposed. I know of no authority that permits a mid-sentence constitutional assessment as proposed by defendant and the dissent, nor does the dissent provide us with one."

Based on this analysis, the *White* court concluded, “Although defendant here frames his claim as one going to the continued legality of his sentence, his real challenge, as the People correctly argue, is to the conditions of confinement. Although defendant may feel an understandable sense of urgency in seeking release from [Fishkill C.F.], he cannot use a CPL 440.20 motion to circumvent the procedures that are in place to address claims of deliberate indifference to his medical needs.”

“Moreover,” the court continued, “by bringing a motion under the Criminal Procedure Law, rather than an administrative proceeding, an Article 78 proceeding, or a petition for a writ of habeas corpus under CPLR Article 70 in the county where he is incarcerated, defendant has left DOCCS out of this proceeding.” DOCCS, the court noted, is a necessary party to address claims about the current conditions at Fishkill C.F. and to provide evidence about the measures DOCCS is using to mitigate the spread of the virus.

For these reasons, and because the relief that the defendant is seeking – a sentence of time served – is not a legal sentence, the court held that it had no authority to grant defendant’s 440.20 motion.

David Gray, Esq., represented Glenn White in this Criminal Procedure Law 440.20 motion.

Disciplinary & Administrative Segregation

Court Rules Charges Were Not Supported by Sufficient Evidence

In *Matter of David Soto v. Mary E. Robles*, 188 A.D.3d 1350 (3d Dep’t 2020), the petitioner claimed that the respondents’ determination that he had violated the rules against forgery, making a false statement and violating facility movement regulations was not supported by substantial evidence. The basis for the charges was that a number of signed callout sheets for a 2-month period showed that the petitioner had

gone to two programs that were conducted on the same night. Petitioner was found guilty at a Tier II hearing and that determination of guilt was upheld on administrative appeal. He then filed an Article 78 challenge that resulted in this decision.

Before the Appellate Division, the respondents conceded that the charge of forgery was not supported by substantial evidence. Although the respondents argued that the other charges were supported by substantial evidence, the court did not agree. First, the court noted, the writer of the misbehavior report did not testify at the hearing. Thus, the only evidence against the petitioner was provided by witnesses who established that the programs started at different times and that petitioner attended both, leaving one early to attend the other. His signature was on the attendance sheets for both programs. Significantly, the court wrote, no witness testified that the petitioner was not permitted to attend both programs. Thus, the court found, there was no evidence that petitioner provided false information or that he violated the facility movement regulations.

Based on this analysis, the court ruled that the determination of guilt must be annulled in its entirety and ordered the Superintendent of Eastern C.F. to expunge all references to this matter from petitioner’s prison records.

David Soto represented himself in this Article 78 proceeding.

Parole

BOP Must Reconsider Denial Of Merit Termination

Independent of a criminal prosecution for grand larceny in the first degree, Brad Reiter signed an agreement with Bellmore-Merrick Emergency Medical Services (BM-EMS) to re-pay BM-EMS \$850,000.00 in specified installments. Because of

this agreement, when the court sentenced Mr. Reiter, it did not impose a restitution order.

While he was in prison serving a sentence for grand larceny, Mr. Reiter paid the first installment of \$100,000.00. After he was released to parole supervision at his merit release date, he failed to make any further payments.

When Mr. Reiter became eligible for merit termination, his parole officer and the officer's supervisor twice imposed a 12-month deferral due to his failure to comply with the restitution agreement. During the second deferral process, BM-EMS advised that it had filed a confession of judgment against Mr. Reiter and was taking measures to enforce it.

After the second denial of Mr. Reiter's request for merit termination, he filed an Article 78 challenge, alleging that:

1. The respondents had failed to perform a duty that the law placed on them;
2. The determination was affected by error of law; and
3. The determination was arbitrary and capricious.

In *Matter of Brad Reiter v. NYDOCCS and NYS BOP*, Index No. 904551-20 (Sup. Ct. Albany Co. Oct. 14, 2020), the court noted the respondents' arguments in support of their opposition to the petition:

1. The denial of merit termination was based on failure to make restitution payments and this was proper and in accord with Correction Law §205(2);
2. The determination to deny merit termination was not arbitrary and capricious; and
3. The petition and other submissions were facially deficient because they lack factual allegations of an evidentiary nature.

In reviewing the parties' claims and arguments, the court first noted that its review was limited to determining whether there is a rational basis for the agency's decision or whether the decision was arbitrary and capricious. Turning to Correction Law §205(2), the court noted that the law states: "[a] merit termination granted by the department . . . shall constitute a termination of the sentence with respect to which it was granted. No such merit termination shall be granted unless the department is satisfied that termination of sentence from [various forms of parole supervision] is in the best interest of society and that the releasee, otherwise financially able to comply with an order of restitution . . . imposed by a court of competent jurisdiction . . . has made a good faith effort to comply therewith."

With respect to Correction Law §205(2), the court noted that merit termination cannot be granted unless the respondents are satisfied that a parolee has paid restitution "**imposed by a court of competent jurisdiction.**" (Emphasis added). Here, the court wrote, the record is clear that the sentencing court did not order restitution. Therefore, the court concluded, "[R]espondents' reliance on the private agreement between the petitioner and the victim as a court-imposed order of restitution is an error of law."

Because it was unclear to the court whether the respondents would have twice denied merit termination had they not relied on the lack of restitution payments, the court required the respondents to reconsider the petitioner's application for merit termination.

The court granted the petition and remanded the matter to consider the petitioner's application for merit termination without consideration of petitioner's restitution agreement.

Stephen N. Dratch of Franzblau Dratch, P.C., represented Brad Reiter in this Article 78 proceeding.

Court of Claims

Failure to Protect from Assault by Another Prisoner

After a basketball game at Sullivan C.F., Phillip Campbell was punched by one of the other players. He filed a claim seeking damages from the State of New York, alleging that the injury was a result of DOCCS' failure to protect him. After a bench trial on the **issue of liability** [whether the defendant was responsible for the claimant's injuries] the Court of Claims dismissed the claim and Mr. Campbell appealed.

On review, the Third Department, in *Campbell v. State of New York*, 186 A.D.3d 1849 (3d Dep't 2020), affirmed the lower court decision. The court began its analysis by noting that the State has a duty to safeguard incarcerated individuals in its care, including from attacks by other inmates. However, the court went on, citing *Vasquez v. State of New York*, 68 A.D.3d 1275, 1276 (3d Dep't 2009), that duty is limited to providing reasonable care to protect them from risks of harm that are reasonably foreseeable, i.e., those about which the defendant knew or should have known. "The mere occurrence of an inmate assault, without credible evidence that the assault was reasonably foreseeable," the court wrote, "cannot establish the negligence of the defendant."

Because the case was appealed after trial, the appellate court was required to defer to the credibility determinations made by the trial judge. The court summarized the findings of the trial court as follows. The evidence showed that the claimant and his assailant had no issues prior to the basketball game, following which the assailant attacked the claimant. Each was displeased with the other's performance on the

court. During the game, the assailant stated that he was going to beat the claimant. The claimant interpreted this as a threat to beat him up; the court found the statement could have been a promise to beat the claimant at basketball on the court. The claimant and the assailant agreed that no explicit threats of violence were made during the dispute. A staff witness testified that the players were trash talking during the game and that such talk was common and had never before led to violence. A correction officer witness testified that he had no indication that violence was brewing. The violence consisted of the assailant losing his temper and throwing a single punch following which the correction officer intervened.

The court's review of the proof led to the conclusion that the defendant neither knew nor should have known of the risk of assault. Thus, the court found, dismissal of the claim was warranted.

Brian Dratch of Franzblau Dratch, PC, represented Philip Campbell in this Court of Claims action.

Miscellaneous

NY Court of Appeals Addresses SARA Compliant Housing Issues

Under the Sexual Assault Reform Act (SARA) the parole board is required to impose a mandatory condition on certain sex offenders that prohibits them from being within 1,000 feet of any school. DOCCS treats SARA as a residence restriction, and therefore DOCCS will not approve a residence for a SARA-restricted person, unless it is more than 1,000 feet from a school. This has made it very difficult for many sex offenders to find residences in the

community where they can live after release from prison. Since 2014 DOCCS has been holding sex offenders in prison beyond their CR and parole open dates if they do not have approved SARA-compliant housing. In addition, for sex offenders serving determinate sentences, if the individual does not have an approved SARA-compliant residence when they reach the determinate maximum expiration (ME) date, DOCCS will continue to confine the person in a residential treatment facility (RTF) until a SARA compliant residence is found, or until the period of PRS expires. DOCCS' refusal to release sex offenders without an approved SARA compliant residence has led to litigation over several issues related to SARA and DOCCS' use of RTF's for sex offenders.

On October 13, 2020 the New York State Court of Appeals heard oral arguments in four cases that concern the SARA law and DOCCS' use of RTF's for sex offenders. Those four cases were all decided on November 23, 2020. In this article we summarize the four cases and the way the Court of Appeals addressed the issues raised in those cases.

People ex.rel. Negron v. Superintendent, Woodbourne Correctional Facility

The issue in the *Negron* case was which Level 3 sex offenders are subject to the mandatory SARA condition. The text of the statute, Executive Law §259-c(14), states that: “where a person [is] serving a sentence for [certain designated sex offenses], and the victim of such offense was under the age of eighteen at the time of such offense or *such person* has been designated a level 3 offender[,]” the parole board must impose the mandatory SARA condition. A level 3 offender refers to a person who has been designated a level 3 offender under the Sex Offender Registration Act (SORA).

On its face §259-c(14) appears to apply to people who are currently serving a sentence for a designated sex offense *and* either the victim

was under eighteen or the individual is a level 3 offender. *DOCCS, however, argues that the SARA condition must be imposed on all level 3 sex offenders, even if they are not currently serving a sentence for a sex offense.*

Level 3 is a lifetime status. In some cases, people were convicted of sex offenses in the 1980's or 1990's and have completed the service of entire sentence but they will be level 3 offenders for life. Such individuals may now be subject to parole supervision for a different conviction which is not a sex offense. The dispute in *Negron* was whether SARA applies to all level 3 offenders who are subject to parole supervision for any offense or to only those level 3 offenders who are currently serving a sentence for a designated sex offense.

The Court split 5-2 with a five-judge majority decision written by Judge Garcia holding that the SARA condition is only mandatory for level 3 offenders who are currently serving a sentence for one of the sex offenses designated in the statute. The Court found that the crux of the dispute is how to interpret “such person.” In the statutory context in which the phrase occurs, the Court held that “such person” refers back to the earlier reference to a person, that is, “a person serving a sentence for” a designated sex offense. Four other judges joined Judge Garcia. Thus, the majority opinion holds that the SARA condition is mandatory for a person serving a sentence for a designated sex offense, if the victim was under 18, or if the person serving the sentence is also a level 3 offender.

A dissenting opinion by Judge Fahey found that the statutory language was not clear, and that other evidence of legislative intent suggests the legislature intended the mandatory SARA condition to apply to all level 3 offenders regardless of whether they are currently serving a sentence for a sex offense.

The parole board has for years imposed the mandatory SARA condition on all level 3 offenders, so the recent majority decision will require a change in recent practice.

**People ex. Rel. McCurdy v. Warden,
Westchester County Correctional Facility**

The *McCurdy* case concerns the question of how long DOCCS can confine a sex offender in an RTF after the person has completed their determinate sentence and is, in theory, released to post-release supervision (PRS). Under Penal Law §70.45(3) the parole board can impose a release condition that requires a person to be transferred to, and required to participate in the programs of, an RTF for up to the first six months of PRS. Since 2014, if after 6 months in an RTF, a SARA restricted sex offender still did not have an approved SARA-compliant residence, DOCCS has relied on Correction Law §73(10) to continue to confine the individual in an RTF. According to Correction Law §73(10), “The commissioner is authorized to use any residential treatment facility as a residence for persons who are on community supervision. Persons who reside in such a facility shall be subject to conditions of community supervision imposed by the board.”

The issue raised in *McCurdy* was whether DOCCS’ authority to confine sex offenders in an RTF is limited to the 6 months authorized by Penal Law §70.45(3) or, whether Correction Law §73(10) authorizes DOCCS to continue to confine a person in RTF status beyond the six-month limit of Penal Law §70.45(3). Through his counsel McCurdy argued that the two statutes, Penal Law §70.45(3) and Correction Law §73(10), are very similar in that both authorize RTF confinement, and so the statutes must be “harmonized” by applying the six-month time limit to both statutes. McCurdy argued that if the six-month time limit was not applied to Correction Law §73(10), the six-month time limit in Penal Law §70.45(3) would be

meaningless. PLS, which filed an *amicus curiae* (friend of the court) brief in support of McCurdy, argued that Correction Law §73(10) does not permit “confinement” at all; it simply permits DOCCS to use an RTF as a residence for a person who is on community supervision. A residence, which is all that Correction Law §73(10) authorizes, is not generally understood to be a place where a person is incarcerated.

In *McCurdy* the Court split 4-3, with a four-judge majority holding that DOCCS can lawfully rely on Correction Law §73(10) to confine sex offenders in an RTF for as long as it takes for the person to find a SARA-compliant residence, or potentially until the expiration of the person’s period of PRS. While the majority opinion refers to DOCCS authority under Correction Law §73(10) as providing a “temporary residence” until the person has a SARA compliant residence in the community, the dissent describes RTF confinement under Correction Law §73(10), after the six months authorized by Penal Law §70.45(3), as “potentially indefinite confinement.”

The Court majority rejected the argument that the two statutes are so similar that the six-month time limit must be applied to both statutes. Rather, the Court held, the statutes are significantly different because under Penal Law §70.45(3), the parole board can require not only that a person be held in an RTF, but also that a person participate in RTF programs. By contrast, nothing in Correction Law §73(10) authorizes DOCCS to mandate RTF program participation. Based on that distinction the majority found that the two statutes have different purposes, and provide different authority. Therefore, the Court found no need to apply the six-month time limit to Correction Law §73(10).

The Court’s majority expressed concern that if DOCCS’ authority to confine sex offenders in RTF ended after the first six months of PRS, then DOCCS would be required to release into the community SARA restricted sex offenders who had no approved SARA-compliant housing.

According to the Court, if sex offenders were released without approved housing they could immediately be in violation of the mandatory SARA condition, and therefore they could be subject to immediate reincarceration. The Court found that prospect of immediate reincarceration for violating the SARA condition supports DOCCS' use of Correction Law §73(10) to confine sex offenders after the first six months of PRS and as long as necessary until SARA-compliant housing has been found.

The dissenting opinion found that there was no evidence that Correction Law §73(10) was ever intended to confine sex offenders beyond the first six months of PRS. The dissent further noted that if the legislature ever intended Correction Law §73(10) to authorize long-term confinement of sex-offenders beyond the initial six months, that authority ended with the passage of Penal Law §70.45(3) in which the six-month time limit on RTF confinement is “notwithstanding any other provision of law...”

In *McCurdy* the Court of Appeals upheld DOCCS' use of Correction Law §73(10) and so the decision will not lead to any change in DOCCS' current policies regarding RTF confinement.

People ex. Rel. Johnson v. Superintendent, Adirondack Correctional Facility and People ex. Rel. Ortiz v. Breslin

In the *Johnson* and *Ortiz* cases, two men challenged DOCCS' refusal to release them at the times when they would otherwise have been released to community supervision, because they did not have approved SARA-compliant housing. Both the *Johnson* and *Ortiz* cases allege that confinement beyond the dates when they should have been released was unconstitutional. The Court of Appeals addressed these two cases together in one decision.

Johnson received a sentence of 2 to life in 2004. In 2017 he appeared before the parole board and was granted a parole open date. A

parole open date means that person can be released on or after that date if plans for release are in order. Johnson was not released following his open date because he did not have SARA-compliant housing. Since he had a life sentence an open date was his only path to release; there is no CR or ME date on a life sentence. He remained incarcerated for more than two years after his open date before he was eventually released to a SARA-compliant shelter in New York City. Ortiz received a 10-year determinate sentence with 5 years PRS. In 2018 Ortiz completed his determinate sentence and then was placed in Fishkill RTF to begin serving his period of PRS.

Johnson argued that DOCCS' refusal to release him after he was given a parole open date was in violation of his substantive due process right to be free from confinement. Ortiz argued that after the ME date of his determinate sentence he had a substantive due process right to be released from DOCCS' custody, and to serve his period of PRS in the outside community. He argued that his confinement in RTF status was in violation of his substantive due process right to be released at the end of his sentence, and his eighth amendment right to be free from cruel and unusual punishment.

In the *Johnson* and *Ortiz* case the Court of Appeals split 5-2, with a five-judge majority rejecting the constitutional challenges and upholding DOCCS' authority to confine Johnson despite his open date, and to confine Ortiz in an RTF after the expiration of his determinate prison sentence.

The Court held that substantive due process rights are not all the same. Under a “strict scrutiny” test the state may not infringe on a “fundamental” liberty interest unless the infringement is narrowly tailored to serve a compelling state interest. The Court, however, held that Johnson's interest in being released to parole is not a “fundamental” liberty interest.

Therefore, the Court applied a “rational basis” test,” under which the state’s action is valid if it is rationally related to legitimate government interests. Applying the “rational basis” test, the Court found it was lawful for DOCCS to continue to confine Johnson beyond his open date.

The Court held that Ortiz presented a closer, more difficult question of whether his RTF confinement after the expiration of his determinate sentence was in violation of a fundamental liberty interest. Ultimately the Court held that Ortiz did not have a fundamental liberty interest in being released to the outside community, and that under a “rational basis” test, Ortiz’ confinement in RTF status after the ME date of his determinate sentence was lawful.

Two judges wrote separate thoughtful dissenting opinions in the *Johnson* and *Ortiz* cases. Judge Rivera focused on the constitutional standard that was applied. She argued that the rational basis test applied by the majority was not protective enough of the individual’s right to be released. She argued that intermediate scrutiny is the appropriate standard in cases such as this, where there is an important constitutional right as well as a clearly legitimate state interest. Judge Rivera found that if intermediate scrutiny were applied, incarceration of people who are otherwise entitled to release, due to the lack of approved SARA-compliant housing in the community, would be unconstitutional.

In a separate dissent Judge Wilson focused on the role of the New York City shelter system. DOCCS and New York City have an agreement to place a limited number of SARA restricted sex offenders in SARA compliant shelters each month. People who are held past release dates due to not having SARA-compliant housing are placed on a waiting list for SARA-compliant shelter spots. It can take one to two years for a person to reach the top of the waiting list, and it is only then that the person will be escorted to an

intake shelter, and from there placed in a SARA-compliant shelter. Judge Wilson argues that, under the Callahan consent decree, New York City has an enforceable legal obligation to provide housing to every person who applies. If DOCCS permitted people to appear at a New York City intake shelter, and apply for housing, the City would have a legal obligation to provide housing. He concludes that it is unconstitutional for DOCCS to confine people due to their inability to find SARA-compliant housing, because, if DOCCS would simply permit people to appear at an intake shelter, they would have a legal right to housing, and they would be housed.

The Legal Aid Society represented the petitioners in all four cases. Prisoners Legal Services and the Center for Appellate Litigation appeared as amicus curiae in *McCurdy*, and Appellate Advocates appeared as amicus curiae in *Ortiz*.

The Danger of Abandoning FOIL Requests

Some people think that if their FOIL request is denied and they decide not to challenge the denial in an Article 78 proceeding, they can later make a second request for the same records and, if the records are again denied, pursue an Article 78 challenge to the denial of the second request. The decision in *Matter of United Probation Officers Association v. City of New York*, 187 A.D.3d 456 (1st Dep’t 2020), explains why a challenge to the second request will be unsuccessful. In *United Probation Officers*, the records at issue were “documentation that includes certain information about individuals employed from 1/1/07 through the present in the NYS Administration of Children’s Services, the Department of Probation, and the Department of Correction.” The petitioners originally requested these records in the case in November 2017 (2017 Request). They made a second request for the same records in June 2018 (2018 request).

The only records included in the 2018 request that were not included in the 2017 request were the records for the period between November 2017 and June 2018.

With respect to the records in the 2018 request that were included in the 2017 request, the court found that the Article 78 was untimely. The agency's determination with respect to those record was final in December 22, 2017, the date of the final agency determination denying petitioner's 2017 Request. The statute of limitations for challenging that denial expired four months later. As this proceeding was not commenced until September 2018, the court ruled it was untimely.

With respect to the records which were not included in the 2017 Request, the court agreed with the lower court's ruling that the request called for the creation of new records which "exceeds the scope of the respondents' obligations in response to a FOIL request."

The Kurland Group, Erica T. Healey of counsel, represented the petitioners in this Article 78 proceeding.

IMMIGRATION MATTERS

Second Circuit Strongly Affirms Immigration Detention Is Subject to Constitutional Limitations

The federal government has vastly expanded the use of immigration detention over the past 25 years, with the average daily population of detained noncitizens increasing

from approximately 5,000 in 1994, to 19,000 in 2001, to over 50,000 in 2019. As a result, federal courts have increasingly been flooded with habeas corpus petitions filed by noncitizens seeking to challenge the constitutionality of their detention. In *Velasco Lopez v. Decker*, 978 F.3d 842 (2d Cir. 2020), an appeal arising from an immigration habeas corpus petition filed in New York, the Second Circuit issued an important decision which strongly affirms that immigration detention is subject to constitutional limitations and that noncitizens must be afforded due process while confined in civil immigration detention.

Velasco Lopez arose in the context of Section 236(a) of the Immigration and Nationality Act ("INA"), which empowers the Department of Homeland Security ("DHS") to detain any noncitizen "pending a decision on whether the alien is to be removed from the United States." Once DHS detains an immigrant under INA §236(a), the immigrant can request a bond hearing before an Immigration Judge ("IJ"). At a bond hearing, the immigrant bears the burden of proving that she deserves to be released, which generally requires proving that he or she is (1) not a flight risk, (2) not a danger to the community, and (3) not a national security risk. *See Matter of Guerra*, 24 I. & N. Dec. 37, 38 (BIA 2006). If the immigrant does not meet that burden of proof, she will remain detained for the duration of her removal proceedings unless she can show that "[her] circumstances have changed materially since the prior bond redetermination" such that a second bond hearing is required. INA §236(e).

The underlying facts of *Velasco Lopez* demonstrate how difficult it can be for immigrants in detention to prove that they

deserve to be released. Petitioner Carlos Velasco Lopez was born in Mexico in 1995 and came to the United States in 2000, when he was four years old. Living in Westchester County with his family, Mr. Velasco Lopez was a member of the youth group at his family's church, frequently placed on the honor roll, and received awards for perfect attendance at his school. He also participated in extracurricular activities, including band, track, and soccer, and he was a caretaker to his mother, who suffers from a number of health conditions. In 2012, during his last year of high school, Mr. Velasco Lopez submitted an application under the Deferred Action for Childhood Arrivals program. His application was approved in 2013, and after completing courses at a culinary institute following high school, he began working as a sous chef for a local catering company.

On February 1, 2018, Mr. Velasco Lopez was arrested and issued appearance tickets for aggravated unlicensed operation of a vehicle, driving while intoxicated, and consumption of alcohol in a motor vehicle. At the time of his arrest, he was subject to pending criminal charges related to an incident in March 2017 at a bar in White Plains, New York, where a fight broke out between an off-duty police officer and other bar patrons. Mr. Velasco Lopez also has a prior conviction from October 2016 for driving while ability impaired.

The day after his February 1, 2018 arrest, Mr. Velasco Lopez was transferred to immigration detention, where he was detained for three and half months before receiving his initial bond hearing on May 14, 2018. After the bond hearing at which Mr. Velasco Lopez bore the burden of proof, the IJ denied bond, relying in part on the fact that

the March 2017 and February 2018 criminal charges remained pending in criminal court. When Mr. Velasco Lopez was finally able appear in criminal court for the March 2017 case, the charges were dismissed, and so he requested a second bond hearing in immigration court based on a material change in circumstances. He was given a second bond hearing in October 2018 but the IJ again denied bond, this time because the February 2018 charges still remained pending.

In April 2019, having been detained for fourteen months, Mr. Velasco Lopez filed a petition for a writ of habeas corpus challenging the procedures employed in his two bond hearings. The district court granted his petition and ordered a new hearing at which DHS, not Mr. Velasco Lopez, bore the burden of proving by clear and convincing evidence that he was either a flight risk or a danger to the community. A new bond hearing was held, and after DHS made its presentation, the IJ concluded that DHS failed to establish that Mr. Velasco Lopez was either a flight risk or dangerous. The IJ therefore ordered him released on a \$10,000 bond, which he posted.

The federal government appealed the district court's decision to the Second Circuit, which found no error in the district court's decision. The Court analyzed the district court's decision under the three-factor balancing test of *Mathews v. Eldridge*, 424 U.S. 319 (1976), which requires a court to weigh (1) "the private interest that will be affected by the official action;" (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;" and (3) "the Government's interest, including the

function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” *Id.* at 335.

The Court found that each of these factors weighed heavily in Mr. Velasco Lopez’s favor. First, the Court found that Mr. Velasco Lopez’s private interest was “the most significant liberty interest there is – the interest in being free from imprisonment,” *Velasco Lopez*, 978 F.3d at 851, and that his deprivation was particularly substantial because he was detained by DHS in a county jail, where “[h]e could not maintain employment or see his family or friends or others outside normal visiting hours,” *id.* at 852. Second, the Court found that there was a serious risk of an erroneous deprivation of liberty when Mr. Velasco Lopez bore the burden of proof since he was confined in county jail and lacked resources to gather evidence. Third, the Court found that placing the burden of proof upon DHS was not unfair to the federal government. As the Court stated, “[w]hen the Government incarcerates individuals it cannot show to be a poor bail risk for prolonged periods of time, as in this case, it separates families and removes from the community breadwinners, caregivers, parents, siblings and employees. The Government articulates no public interest that any of this serves and we see none.” *Id.* at 855.

Notably, *Velasco Lopez* does not address INA § 236(c), a separate statutory provision under which immigrants convicted of certain crimes are subject to mandatory detention without bond. That statutory provision has also been the subject of extensive habeas corpus litigation, and there are several habeas appeals arising under INA § 236(c) which are

now pending before the Second Circuit, and which may ultimately result in additional procedural protections for immigrants subject to that provision. For now, though, *Velasco Lopez* strongly affirms that the United States Constitution imposes significant and meaningful limits upon the federal government’s ability to detain noncitizens during their removal proceedings.

Notices

Your Right to an Education



If you have a learning disability, need a high school diploma, or have questions about access to academic or vocational programs please write for more information to:

Maria E. Pagano
 Education Unit
 Prisoners’ Legal Services of New York
 14 Lafayette Square, Suite 510
 Buffalo, New York 14203
 (716) 854-1007

Pro Se
114 Prospect Street
Ithaca, NY 14850

PLS Offices and the Facilities Served

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

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

Prisons served: Bedford Hills, CNYPC, Coxsackie, 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
(12/28/2020)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.

CARES ACT UPDATE: Verifying Your Identity

Below is a notice that DOCCS provides to individuals who, after submitting an application for a CARES Act payment, receive a request from the IRS to verify their identity. Your ORC can assist you with the process of verifying your identity.

You have received a letter from the IRS (4883C or 5071C) in response to your application for Economic Impact Payments (EIPs) under the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (March 27, 2020). If you require assistance, contact the Guidance Unit in writing within five business days of receipt of your letter, and a Guidance Unit staff member will place you on a call-out.

You **MUST** bring with you the IRS 4883C or 5071C letter and any of the documents listed below that you have in your possession.

- A copy of the Form 1040 that you filed for the stimulus money.
- Your prior year's income tax return if you filed a return or one was filed for you. If someone filed a return for you, or included you on their return, please immediately notify them of the letter you received.
Note: A Form W-2 or 1099 is not an income tax return.
- Any supporting documents for your previous year's tax return (Forms W-2 or 1099, Schedules C and F, etc.)

The Department will **NOT** be making any phone calls or sending any emails to the IRS. The IRS has set up a simplified process for the Department to respond on your behalf. The information collected by the Guidance Unit staff will be forwarded to the IRS for validating identity.

A continuación se muestra un aviso que DOCCS proporciona a las personas que, después de presentar una solicitud de pago de la Ley CARES, reciben una solicitud del IRS para verificar su identidad. Su ORC puede ayudarle con el proceso de verificación de su identidad.

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 December 28, 2020, and supersedes prior versions of this message.

Usted ha recibido una carta del IRS (4883C o 5071C) en respuesta a su solicitud para Pagos de Impacto Económico (EIP) bajo la Ley de Ayuda por Coronavirus, Remedio y Seguridad Económica, *Pub. L. No. 116-136, 134 Stat. 281 (March 27, 2020)*. Si necesita ayuda, contacte a la Unidad de Consejería por escrito dentro de cinco días laborales de recibir su carta y un empleado de la Unidad de Consejería lo anotará para una cita institucional.

Usted TIENE QUE llevar los siguientes documentos:

- La carta 4882C o 5071C del IRS.
- Una copia del Formulario 1040 que usted sometió para el dinero del estímulo.
- La planilla de contribución sobre ingresos que sometió o que fue sometida por usted. Si alguien sometió una planilla por usted o lo incluyó en la planilla de él/ella, favor de notificarle inmediatamente sobre la carta que recibió.
Nota: un Formulario W-2 o 1099 no es una planilla de contribución sobre ingresos.
- Cualquier documentación de apoyo de la planilla del año pasado (Formularios W-2 o 1099, *Schedules C and F*, etc.)

El Departamento NO hará ninguna llamada telefónica ni enviará emails al IRS a nombre suyo. El IRS ha establecido un proceso simplificado para que el Departamento responda a nombre suyo. La información recogida por el personal de la Unidad de Consejería se enviará al IRS para validar la identidad.

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 nonviolent 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 whom DOCCS will consider for early release.

Visitation: Due to an increasing number of infections in the community and among DOCCS staff and the incarcerated population, on December 28, visitation was suspended until further notice at all DOCCS facilities.

Five Free Stamps: Due to the suspension of visits at all DOCCS facilities, each week, DOCCS will provide 5 free postage stamps to all incarcerated individuals. Unused stamps will not be rolled over to the next week.

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.

Transfers: On December 14, due to the increase in COVID-19 cases in the community and within DOCCS facilities, transfers of individuals from the county jails to DOCCS was suspended. The decision will be reviewed on or about January 14. On the same date, transfers from one prison to another were slowed down.

Testing For COVID-19: In consultation with the NYS Department of Health, DOCCS has recently developed an asymptomatic surveillance testing plan. This plan calls for testing a number of incarcerated individuals from each facility every weekday, from multiple housing units, in order to avert potential outbreaks and target resources to facilities and housing units identified as a potential problem. This asymptomatic surveillance testing plan is in addition to testing individuals who display symptoms and those who are identified as part of a contact trace.

While tests are voluntary, as a precaution, DOCCS will place individuals who refuse the test in isolation for 14 days.

COVID-19 in the Prisons

On or about December 16, an individual in DOCCS custody at Woodbourne C.F. died. He was the nineteenth person in DOCCS custody to die from COVID-19. We do not have any additional information about the person who died or the circumstances of his death.

On or about December 21, an individual in DOCCS custody at Clinton C.F. died. He was the twentieth person in DOCCS custody to die from COVID-19. We do not have any additional information about the person who died or the circumstances of his death.

On December 24, there were 683 individuals in DOCCS custody who were infected with COVID-19. This number includes only people who have tested positive and who have not yet recovered. According to DOCCS statistics, the prisons with the highest number of infected individuals are Attica (19), Auburn (28), Bare Hill (27), Cayuga (19), Clinton (33), Coxsackie (32), Gouverneur (20), Gowanda (18), Groveland (56), Lakeview (19), Mohawk/Walsh (45), Orleans (25), Wende (63), Woodbourne (90), Wyoming (10).

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 at PLS 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 led to the release of one New York State prisoner; the court granted bail pending appeal to an individual in DOCCS custody. The defendant has a medical condition that, if he is infected with COVID-19, is likely to cause his death. The case is reported in *Pro Se*, Vol. 31, No. 1.

The reasoning used by the courts to deny release 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 continue to monitor the situation in the NYS prisons and are 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, to the greatest extent possible, the protection of the health and safety of the incarcerated population.