

Pro Se

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Court Finds Claimant Credible; Holds State Liable for Assault

In *Kyle Siriani v. State of New York*, 2021 WL 3161663 (Ct. Clms. Jan. 11, 2021), a Court of Claims judge found that the claimant's testimony regarding an alleged assault by corrections officers was more credible than the testimony of the accused officers. This article discusses the trial testimony and the court's decision

Because he was scared and wanted to avoid another Tier III, when Officer F. proposed that if Siriani would agree to say that his injuries were self-inflicted, Officer F. would not write a misbehavior report, Mr. Siriani agreed that he would report that he injured himself by

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Trial Testimony

Kyle Siriani filed a claim in the New York State Court of Claims, asserting that on September 18, 2016, two officers assaulted him in the Mid-State SHU. At trial, Mr. Siriani testified* that Officer F. ordered him to stop talking because "There is no talking in SHU." When Mr. Siriani responded that there was no rule against talking in SHU, Officers F. and S. entered his cell and Officer F. grabbed his right arm, punched him the ribs and cut his shoulder with a sharp metal object. At the same time, Officer S. grabbed his left arm, which was in a sling following recent shoulder surgery, after which Mr. Siriani fell on the bed where the two officers continued to punch and kick him. Because of the aggravation of the injury to his left shoulder, Mr. Siriani screamed in pain when the officers twisted his arms and forced his hands behind his back to cuff him and dragged him roughly 35 feet to a holding cell.

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What's in a Name? More Than Shakespeare Would Have Us Believe

A Message from the Executive Director, Karen L. Murtagh

Shakespeare, in *Romeo and Juliet*, poses the question, “What’s in a name?”

His quizzical answer?

“That which we call a rose by any other name would smell as sweet.”

I’ve been thinking about the meaning of that answer a lot lately, especially in light of a recently enacted NYS law that replaces the word inmate with “incarcerated individual” in state law. The bill, S3332/A2395 sponsored by Senator Rivera and Assembly Speaker Pro Tempore Aubry, replaces all instances of the words or variations of the words “inmate” or “inmates” with the words “incarcerated individual” or “incarcerated individuals” or variation thereof.

The quote from “*Romeo and Juliet*” would imply that Shakespeare believed that a name means very little; what matters more is the worth of an individual.

Hard to quibble with that.

But the law just enacted is a testament to the notion that a name carries intrinsic value – and is often directly tied to one’s self-worth and how we are viewed by others. The justification for the bill highlights this fact:

“Penological terms such as felon, inmate, prisoner, offender, and convict have long been noted by many impacted by the criminal legal system as dehumanizing, degrading, and as importing the idea that incarcerated people should be permanently demonized and stigmatized. Such words are often used to discriminate against people who are or have been involved in the criminal legal system. Using terms such as “incarcerated individual” recognizes the humanity of people and exemplifies the redeemable value of human beings. Trending studies have shown these terminologies have an inadvertent and adverse impact on individuals’ employment, housing and other communal opportunities. This can impact one’s transition from incarceration, potential for recidivism, and societal perception. As a result, this bill seeks to correct outdated terminology used to refer to incarcerated individuals.”

The issue of what terminology is best is not a simple one as was demonstrated in 2015 when “The Marshall Project” sponsored a “callout” asking the best way to refer to people behind bars. The Project received over 200 responses in which, of the options offered, 38 percent preferred “incarcerated person,” 23 percent liked “prisoner” and nearly 10 percent supported use of the word inmate. Thirty percent selected “other” (“person in prison,” “man or woman,” “the person’s name.”)

But there is no doubt that the majority of terms that have been used in the past to refer to people in prison have negatively impacted those individuals. A few highlights from those who responded to the Marshall Project’s survey and shared their personal and/or professional experience say it best:

“As a formerly incarcerated person, the term inmate feels disparaging. We were often called this by officers with a tone of disgust. I think it’s important to use the term incarcerated person, however clunky, because it is so easy to forget that we are talking about people when we use words like inmate or prisoner.” – Jacqueline Conn

“Nomenclatures are important and exist to clarify the world around us . . . my preference is to keep the terms simple while simultaneously remembering that there is a human being on the flip side of that word.” – Trish Navaratnasingam

“It would be ridiculous to label each of us based on the worst moments of our lives. It’s equally ridiculous, and cruel, to make people forever bear labels that define them first and foremost as their crime.” – Katherine Katcher, Founder & Executive Director, Root & Rebound: Reentry Advocates Berkeley, CA

“The criminal justice system is meant to – or purports to – keep our society safe. If that is truly our objective, we should do everything within our power to ensure that it works towards those aims without creating (or perpetuating) a permanent class divide. Inmate, felon, and prisoner are just the latest epithets in a long and ugly history.” – Jonathan Stenger, Vice President, External Affairs at The Osborne Association, Inc.

In the same spirit, while many refer to DOCCS security personnel as “guards,” I make every effort to use the term “Corrections Officers.” I do this as much out of respect for a fellow human being as I do out of personal and professional decorum.

Regardless of what label we are placing on another human being, the message is the same: words matter; names matter; results matter. How we are labeled influences how we view ourselves which often translates into how others view us which, in turn, dictates the odds of success when attempting to chart a better course for ourselves, our families and society.

The aforementioned legislation is now the law in New York State. It may seem like a small achievement, but it so much more than that; it is a truly visionary, transformative effort that carries the potential for the successful reintegration of the formerly incarcerated.

Kudos to the sponsors and all those who have fought for years to make this difference.

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running into a cell door. Mr. Siriani followed through with this agreement; the investigating sergeant noted in the incident report that the injuries were self-inflicted and Mr. Siriani’s medical records reflected that this is what Mr. Siriani told the examining nurse.

Five days later, Mr. Siriani wrote the Commissioner to say that he had been assaulted by officers for talking on the gate. He was taken to medical, where he reported that Officer F. and another officer had assaulted him. The report of that meeting noted multiple areas of bruising. A few days later, Officer W. offered Mr. Siriani a transfer to a different prison in exchange for a letter stating that he had not been assaulted. The claimant wrote the letter and said he had run into his cell door. After he was transferred, Mr. Siriani wrote to the Mid-State Superintendent and said he had written the letter to get a transfer.

At the trial, the officers’ version of events differed from Mr. Siriani’s. Officer S. testified that he and Officer F. went into Mr. Siriani’s cell because he was threatening

self-harm. Mr. Siriani was compliant with their directions and was escorted to a holding pen without incident. Officer S. also testified that when Mr. Siriani entered the holding cell, he became verbally abusive and thrashed about, butting his head against the walls and kicking the door, and refused to comply with orders to stop. Officer F.’s testimony was consistent with Officer S.’s, except that he testified that he arrived at the cell after Officer F. did and did not observe any signs that Mr. Siriani was trying to hurt himself.

The Court’s Decision

Mr. Siriani’s claim alleged that the officers were liable for tort of assault and battery. The tort of battery is the unjustified touching of another person without that person’s consent with the intent to cause bodily contact that a reasonable person would find offensive. The tort of assault involves putting a person in fear of a battery. In prisons, the court wrote, citing Correction Law §137(5), “the use of force is specifically permitted in self-defense or to suppress a revolt or insurrection [and] . . . to maintain discipline, to secure the persons of the

offenders and to prevent any such attempt or escape.” The use of force is further limited by 7 NYCRR §251-1.2(b) which provides, that “where it is necessary to use force, only such degree of force as is reasonably required shall be used.”

The court then assessed the credibility of the opposing narratives. In their reports, the court wrote, neither officer mentioned the claimant’s self-injurious behavior nor did the reports state that the claimant had injured himself. Nonetheless, at trial, the officers testified that they observed the claimant injure himself. In addition, the claimant, who had recently had shoulder surgery, testified that as the restraints were applied, he screamed in pain. Officer F. testified that the application of restraints was without incident.

The court found that when an individual who had had shoulder surgery within the last month has his hands restrained behind his back, it was more likely that he would scream at the top of his lungs than be silent. The court also found that such an individual was not likely to engage slamming his head – and shoulders, as one officer testified at his deposition – into cell bars. For these reasons, the court found that the claimant was telling the truth and the officers were lying. The court therefore ruled in the claimant’s favor with respect to the assault and battery claim.

The State of New York argued that the officers’ conduct was outside of the scope of their employment and therefore it was not liable for the officers’ conduct. The law provides that an employer will be liable for the torts of its employees when the employees’ conduct is within the scope of their employment. Here, the court found, the officers’ conduct was performed in the ordinary course of their employer’s business. The incident arose when the claimant questioned Officer F.’s order directing him to stop talking. The officers’ assault on the claimant was in furtherance of the employer’s interests in maintaining order in the prison.

This facts in this case, the court noted, were unlike the facts in *Rivera v. State*, 34 N.Y.3d 383 (2019) where the officers first mocked the claimant for wearing a medically issued helmet and then removed the helmet and assaulted him. In *Rivera*, the court wrote, the beating had no connection to the employer’s interest. In *Siriani*, the attack was in furtherance of the claimant’s refusal to follow the order to stop talking. Because maintenance of prison safety and security is among an

officer’s primary duties, it cannot be said that their conduct was outside the scope of their employment.

* The facts set forth in this article are based on the trial judge’s account of the testimony at trial.

David Roche, LLP, represented Kyle Siriani in this Court of Claims action.

News & Notes

Merit Time and College Credit

On July 16, 2021, the Governor signed an amendment to Corrections Law §803(1)(d)(iv) adding “obtaining 18 college credits” to the list of activities that can lead to merit time allowance. The 18 hours of credit must be from “a program registered by the State Education Department from a degree-granting higher education institution.”

The Mailing Address of the Plattsburgh Office of PLS Has Changed!

The Plattsburgh Office of PLS handles legal issues arising at the following prisons: Adirondack, Altona, Bare Hill, Clinton, Franklin, Moriah Shock, Ogdensburg, Riverview and Upstate. If you would like legal assistance for issues arising at any of these prisons, please send your request for assistance to the Albany Office of PLS at this address:

Prisoners’ Legal Services
41 State Street, Suite M112
Albany, NY 12207

STATE COURT DECISIONS

COVID-19 Issues

Plaintiffs Voluntarily Dismiss Complaint Challenging Conditions at Adirondack

On June 23, 2021, based on two developments, the plaintiffs in the class action challenge to COVID-19 related conditions at Adirondack C.F. agreed to voluntarily dismiss their complaint. See, *Allen Harper v. Andrew Cuomo*, 21-cv-19 (N.D.N.Y. June 23, 2021). First, after the case was filed, incarcerated individuals in state custody were added to the list of people who are eligible to receive the vaccination under the New York State COVID-19 Vaccination Guidelines. Second, the defendants had shown that they had begun vaccinating incarcerated people at Adirondack and were committed to offering the vaccine when it is available and consistent with guidance issued by the United States Center for Disease Control and the New York State Department of Health.

The conditions challenged in the *Harper* lawsuit included allegations that social distancing was not possible, the transport of individuals to Adirondack took place under unsafe conditions, staff at Adirondack did not wear masks and there was inadequate COVID-19 testing at the prison.

The Prisoners' Rights Project of the Legal Aid Society and lawyers from Relman Colfax, PLLC, represented the plaintiffs in this federal lawsuit.

Third Department Affirms Dismissal of COVID-19 Habeas Petition

In *People ex rel. Payne v. McIntosh*, 148 N.Y.S.3d 407 (3d Dep't, 2021), the petitioner alleged that his continued confinement at Bare Hill C.F. during the pandemic was unconstitutional. Specifically, he alleged it was impossible to maintain social distance because the prison is too crowded and this placed him at risk of contracting COVID-19. The respondents denied that the conditions violated the petitioner's Eighth

Amendment right to be free from cruel and unusual punishment and noted that there had been no documented cases of COVID-19 among the incarcerated population at Bare Hill. The lower court dismissed the petition, finding that the petitioner had not demonstrated an entitlement to immediate release.

Citing *Peo. ex rel. Carroll v. Keyser*, 184 A.D.3d 189, 192-193 (3d Dep't 2020) and *Peo. ex rel. Figueroa v. Keyser*, 193 A.D.3d 1148, 1149-1151 (3d Dep't 2021), the court affirmed the lower court decision, finding that the petitioner had failed to meet his burden of showing that his confinement at Bare Hill C.F. was illegal or unconstitutional.

James Payne represented himself in this Article 70 proceeding.

Court Finds COVID-19 Habeas Petition Is Moot

While Duone Morrison was at Sullivan C.F., he filed a habeas petition asserting that the conditions and safety practices at Sullivan placed him at a high risk of contracting and experiencing serious complications from COVID-19, thereby violating the Eighth Amendment prohibition on cruel and unusual punishment. The Supreme Court, Sullivan County, denied the application.

On appeal, in *Peo. ex rel. Morrison v. Keyser*, 148 N.Y.S.3d 397 (3d Dep't July 22, 2021), the Court, citing *Peo. ex rel. Williams v. Keyser*, 194 A.D.3d 1295, 1296 (3d Dep't 2021), ruled that because the petitioner was no longer at Sullivan C.F., the appeal was moot and must be dismissed. A case is moot when there is no longer a case or controversy. Here, because the petitioner had been transferred from Sullivan C.F., conditions at Sullivan no longer impacted him. Thus, the Court had no reason to review and decide the issues raised in his petition.

Duone Morrison represented himself in this Article 70 proceeding.

Disciplinary & Administrative Segregation

Challenging Hearings Based on Confidential Information

A recent Third Department case, *Matter of Carbuccia v. Venettozzi*, 194 A.D.3d 1179 (3d Dep't 2021), highlights the pitfalls in challenging a disciplinary determination based on evidence supplied by a confidential informant. Other cases, discussed below, point the way to successful challenges of disciplinary determinations based on such evidence.

In *Carbuccia*, the Court considered evidence relating to an extortion plan. Among the rules alleged to have been violated were the making of threats, the possession of stolen property and involvement in a gambling ring. Relying on evidence supplied by a confidential informant, the hearing officer found Mr. Carbuccia guilty of the charges. Mr. Carbuccia then challenged the disciplinary determination on the grounds that the hearing officer lacked a basis for determining the credibility and reliability of the informant.

The Third Department rejected Mr. Carbuccia's arguments, finding that "the Hearing Officer was able to independently **gauge** [assess] the credibility and reliability of the confidential informants **via** [by means of] evidence corroborating aspects of their accounts and the confidential testimony of the investigating officer regarding their past reliability and their current lack of motivation to lie." In other words, courts will credit evidence that the accused individual is not permitted to review if other proof supports the confidential account and it appears that the confidential source lacked a motive to lie and otherwise had a track record for reliability.

The decision in *Carbuccia* presents an obvious problem for individuals seeking to challenge disciplinary determinations based on confidential evidence. Because the evidence is not shown to the accused individual and the identity of the source of the evidence remains undisclosed, it is hard to frame an argument attacking the credibility of the evidence and the reliability of its source. Still, several cases reversing

disciplinary determinations suggest winning appellate arguments.

At the outset, it is important to recognize an argument that will *not* succeed when confidential information is relied upon by the hearing officer: "Objection, hearsay!" While hearsay evidence is generally disfavored in criminal cases, hearsay evidence is admissible in prison disciplinary hearings. Thus, individuals challenging disciplinary hearings will not succeed on the argument that the officer who presents the confidential information lacks first-hand knowledge of the facts he or she is presenting to the hearing officer and that such information constitutes hearsay.

This is the basic principle governing the use of hearsay evidence in disciplinary hearings: "A disciplinary determination may be based upon hearsay confidential information provided that it is sufficiently detailed and **probative** [worthy for consideration as proof] for the Hearing Officer to make an independent assessment of the informant's reliability." *Matter of Fields v. Annucci*, 153 A.D.3d 1544 (3d Dep't 2017).

In *Fields*, the Third Department annulled a disciplinary determination because "the substance of the information **gleaned** (picked over in a search of relevant material) from the informant was too vague and insufficiently detailed to allow the Hearing Officer to independently assess the reliability or credibility of the informant."

Where the reliability and credibility of the confidential witness is not established and confidential information is "instrumental" in the finding of guilt, a disciplinary determination cannot be said to be supported by "substantial evidence." *Id.* It has long been held that an "alleged violation of a prison disciplinary rule must be supported by substantial evidence." *Matter of Witherspoon v. LeFevre*, 82 A.D.2d 959 (3d Dep't 1981). The term "[s]ubstantial evidence has been defined as such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact." *Matter of Tevlin v. Board of Education of Great Neck Union Free School District*, 191 A.D.3d 892 (2d Dept. 2021). As a standard of proof, substantial evidence is "less than a preponderance of evidence." *Id.*

Even though the standard of proof in a prison disciplinary case is low (much lower than proof beyond a reasonable doubt in a criminal case), disciplinary

determinations based on confidential evidence may be successfully challenged. In a case involving the smuggling of drugs, the Third Department, in *Matter of Brown v. Annucci*, 182 A.D.3d 885 (3d Dep't 2020), annulled the determination of guilt on several grounds.

In *Brown*, confidential information asserting that the accused individual had smuggled drugs in the visiting room stood in contrast to the evidence showing he had not been in the visiting room in the three weeks prior to the incident. The *Brown* Court also noted that the author of the misbehavior report had failed to disclose the basis for the information relied upon or the results of his investigation. "In view of the foregoing," the Court wrote, "neither the testimony or evidence at the hearing was sufficiently detailed or probative for the Hearing Officer to assess the reliability or credibility of the confidential informant. As such, we find that determination with respect to those two charges is not supported by substantial evidence and, therefore, must be annulled." *Id.*

In a case involving assault and related charges where the disciplinary determination was based on confidential information, the Court in *Matter of Bridge v. Annucci*, 132 A.D.3d 1197 (3d Dep't 2015), annulled the finding of guilt. "Petitioner contends that the determination is not supported by substantial evidence because the Hearing Officer did not independently assess the reliability of the confidential information." The Court agreed with the argument presented by Mr. Bridge.

The Court noted that the correction officer who authored the misbehavior report failed to testify with sufficient "specificity or detail regarding the substance of the information that was provided." Thus, the Hearing Officer was unable to independently assess the informants' reliability or credibility. Given that the confidential information was instrumental in finding the petitioner guilty, the Court found that substantial evidence does not support the determination and it, therefore, must be annulled.

Anthony Carbuccia represented himself in this Article 78 proceeding.

Petitioner Waived Right to Call Witnesses

The Third Department stayed on course in prison disciplinary cases with its decision in *Matter of Akili Nix v. Donald Venettozzi*, 2021 WL 2956056 (3d Dep't July 15, 2021). At Mr. Nix's hearing, two incarcerated witnesses requested by Mr. Nix refused to testify. When the hearing officer asked him about his witnesses, he replied, "Unfortunately they refused," and did not otherwise challenge the witnesses' refusal or ask the hearing officer to determine the reason for their refusal. Accordingly, the Third Department ruled that the "[Mr. Nix had] waived any challenge to the refusal of two witnesses to testify at the hearing"

Nix provides an example of the "use it or lose it" approach the courts take when it comes to situations in which an individual accused of violating DOCCS rules fails to sufficiently assert the right to call a witness. For example, the Third Department found the accused individual had waived his right to a witness when, after being informed that an incarcerated witness had refused to testify, he stated "That's alright." *Matter of Cosme v. NYS DOCCS*, 168 A.D.3d 1327 (3d Dep't 2019). Mr. Cosme, the Court noted, "did not otherwise contest the Hearing Officer's handling of this request [for an incarcerated witness]." And thus Mr. Cosme failed to sufficiently assert a well-established right in his prison disciplinary hearing.

"It is well settled that an [incarcerated individual] has a conditional right to call witnesses at a disciplinary hearing provided their testimony would not jeopardize institutional safety or correctional goals." *Matter of Peterson v. Annucci*, 141 A.D.3d 1051 (3d Dep't 2016). But there is no violation of this right where there exists a hearing record of the refusal and the prospective witness has not previously agreed to testify.

Inquiry by the hearing officer, however, is required when the record presents a reason for refusal that is "clearly **specious** [misleading]." *Id.* In *Peterson*, the prospective witness stated "I know nothing" in his refusal form. The Court found this statement misleading because of evidence placing the witness at the scene of the offense. Even though the record cast doubt about the "authenticity" of the reason for refusal, the hearing officer failed to conduct "any further inquiry." *Id.* Thus, the *Peterson* Court concluded that

“petitioner’s right to call witnesses was violated” and therefore the matter was remitted for a new hearing.

What the courts are telling us is that both the charged individual and the hearing officer bear a responsibility for making sure that the right to present a call witnesses is sufficiently asserted and protected.

Akili Nix represented himself in this Article 78 proceeding.

Sentence & Jail Time

Drug Law Reform Act Resentencing

In 2000, Otien Williams was convicted of criminal possession of a controlled substance in the first and third degrees, A-I and C felonies, respectively. He received an indeterminate sentence. It was his third felony drug conviction. In 2019, he asked the County Court in Dutchess County to resentence him under the Rockefeller Drug Law Reform Act (DLRA). The DLRA allows courts to imposed determinate sentences on certain individuals with drug law convictions who were originally sentenced to indeterminate terms. The County Court denied his motion.

The provisions of the DRLA was enacted in 2004, 2005 and 2009 through a series of statutory amendments. The 2004 DLRA allows courts to resentence individuals serving indeterminate sentences for Class A-I drug felonies to shorter determinate terms with periods of post release supervision.

In *People v. Williams*, 194 A.D.3d 758 (2d Dep’t 2021), after setting forth the facts and the law, the Court noted that “where, as here, a defendant is eligible for resentencing relief pursuant to the 2004 DLRA and Criminal Procedure Law 440.46, there is a statutory presumption in favor of resentencing (*see People v. Simmons*, 112 A.D.3d 654 [2d Dep’t 2013]; *People v. Beasley*, 47 A.D.3d 639 [2d Dep’t 2008]).” The Court went on to say that “although resentencing is not mandatory, there is presumption that the defendant is entitled to benefit from the reforms enacted by the Legislature based on its judgment that the prior sentencing scheme for drug offenses like those

committed by the defendant was excessively harsh (see *People v. Green*, 110 A.D.3d 826 [2d Dep’t 2013]).” The Court then found, citing *People v. Simmons*, that the factors relied upon by the County Court for denying the defendant’s application – his criminal and prison disciplinary history and the quantity of drugs involved in the underlying offenses, were insufficient to overcome the statutory presumption.

For this reason, the Court granted defendant’s motion and remitted the matter to the County Court for resentencing.

At the resentencing hearing, Mr. Williams’ sentence was reduced to 18 years. He was released to parole supervision on July 8, 2021.

Thomas N. Angell, Jennifer Burton of counsel, represented Otien Williams in this appeal from the denial of a resentencing motion.

Court of Claims

Damages Awarded Where DOCCS Negligence Caused Death

When Darrick Griffin was incarcerated at Green Haven C.F., he died after an aneurysm in his brain burst. His wife, Desiree Griffin, filed a claim asserting that had her husband received proper medical treatment, he would not have died or even been incapacitated. When her case went to trial in 2020, expert medical testimony convinced the judge that DOCCS medical staff had provided negligent medical treatment and were 100% liable for Mr. Griffin’s death. See, *Desiree Griffin as the Administrator of the Estate of Darrick Griffin v. State of New York*, Clm. No. 130890 (Ct. Clms. Jan. 9, 2020).

A second trial was held on April 7, 2021 to determine the amount of damages that the court should award. At this trial, the Ms. Griffin and a doctor specializing in internal medicine testified.

Ms. Griffin testified that she and the couple’s three children loved Mr. Griffin and he had loved them. While her husband had struggled with drug addiction,

when sober he contributed to the support of the household by barbering.

The doctor testified about the last ten days of Mr. Griffin's life, during which Mr. Griffin first experienced the frightening effects of a brain bleed and then of the burst aneurysm. His testimony was based on a review of DOCCS medical records, the death certificate, hospital records from two hospitals where Mr. Griffin was treated, the DOCCS Health Services Manual and the NYS Commission of Correction Report. His testimony established that Mr. Griffin was born with an aneurysm. Aneurysms often (but not always) burst. Bursts are often preceded by bleeds when blood leaks out of aneurysm. The bleeds result in severe headaches, known as "thunderclaps."

According to the doctor, Mr. Griffin had a bleed on May 11, 2017 which caused him to faint and have a severe headache. Between May 11 and May 18, he was in the infirmary at Green Haven, treated with over the counter pain killers and eventually high blood pressure medication. On the 18th, he was found on the floor, disoriented and confused, with weakness in his legs. He was taken by ambulance to Putnam Hospital Center and from there, to Vassar Hospital. When he reached the hospital, he had very limited neurological function.

Based on his review of the records, the doctor concluded that around May 15, when Mr. Griffin was described as having an "unbalanced state of mind," the aneurysm had burst. This is also the date upon which Mr. Griffin began to run a fever. On May 17, Mr. Griffin's temperature was 102.5. On May 18, he was disoriented and his legs were floppy. At Vassar Hospital, due to the amount of pain he was in, he received Fentanyl.

The doctor testified that Mr. Griffin suffered from severe headaches between May 11 and May 18. He also had pain in his neck. During this period, his mental state was deteriorating and his blood pressure rising.

As stated in *Melito v. Genesee Hosp.*, 167 A.D.2d 843 (4th Dep't 1990), "an award of damages is limited to the injuries and pain and suffering caused by the defendant's negligence." Here, the claimant had to show that Mr. Griffin was conscious of his pain and suffering. See, *Williams v. City of New York*, 71 A.D.3d 1135 (2d Dep't 2010). The court found that the doctor's testimony and the medical records established by a

preponderance of the evidence that Mr. Griffin consciously suffered a severe headache beginning on May 11 and continuing until at least May 21 when he stopped responding to pain stimuli.

In determining damages for conscious pain and suffering experienced between injury and death, the degree of consciousness, severity of pain, apprehension of impending death, along with duration are all elements to be considered by the fact finder (jury or judge), here the judge. See, *Ramos v Shah*, 293 A.D.2d 459, 460 (2d Dep't 2002). Here, the court found, it had no doubt that Mr. Griffin experienced some degree of conscious pain and suffering. The court found that there was insufficient evidence at trial upon which to conclude that Mr. Griffin knew that he was dying. The court awarded \$125,000 for ten days of conscious pain and suffering. The court awarded interest on the pain and suffering award to run from October 17, 2019 (the date of the decision granting summary judgment on liability) to the date of judgment.

In a case for wrongful death, the damages include "fair and just compensation for the 'pecuniary [financial] injuries resulting from the decedent's death to the person for whose benefit the action is brought." See, *Estates, Powers and Trust Law (EPTL) § 5-4.3(a)*. As stated in *Johnson v. Richmond Univ. Med. Ctr.*, 101 A.D.3d 1087 (2d Dep't 2012), "the essence of the cause of action for wrongful death . . . is that the [claimant's] reasonable expectancy of future assistance or support by the decedent was frustrated by the decedent's death." In *Griffin*, the court noted, while the claimant did not submit evidence of specific financial loss, there was testimony about a loving relationship with his children and his financial contributions through his barbering skills. The court therefore awarded \$25,000 in wrongful death damages. The court also awarded interest on this portion of the award for the period between May 22, 2017 and the date of judgment.

Brian Dratch, of the Dratch Law Firm, P.C., represented Desiree Griffin in this Court of Claims action.

Miscellaneous

Court Sides with Petitioner in Challenge to Grievance Denial

Although prison officials have great **latitude** (leeway, discretion) when it comes to making decisions affecting the lives of people in their custody, that authority is not unlimited. Inmate Grievance Resolution Committees (IGRCs), established by Correction Law §139 and regulated under 7 NYCRR 701.1, impose some limits on the exercise of authority by prison administrators. And when a Central Office Review Committee (CORC) decision is not in the grievant's favor, the courts – in limited circumstance – are willing to step in.

A recent Third Department case, *Matter of Sanchez v. NYS DOCSS*, 194 A.D.3d 1170 (3d Dep't 2021), illustrates how an irrational decision by prison administrators can be challenged.

In *Sanchez*, the mail room barred an inmate from receiving index cards that were mailed to him. It appears that the index cards at issue were the same as those sold in Staples and other office supply stores. Mr. Sanchez filed a grievance protesting the decision to prohibit the cards. The grievance was denied at the facility level. The grievant appealed to CORC which affirmed the denial even though, as pointed out by the grievant, DOCCS Directive 4911 expressly allows inmates to receive “writing or drawing” paper.

Agreeing with the argument submitted by Mr. Sanchez, the Court noted that “Directive No. 4911 allows inmates to receive greeting cards and drawing paper, both of which are also made of a heavier material.” The Court also observed that “CORC did not articulate any security justification when denying petitioner's grievance. Accordingly, CORC's determination was irrational.”

Sanchez is one of a handful of decisions overturning the denial of a grievance and as such it deserves study by incarcerated individuals who use the inmate grievance procedure. Keep in mind the minimal test prison officials need to satisfy for courts to uphold denial of a grievance.

Courts will overturn the denial of an inmate grievance only when the determination of prison officials is “arbitrary and capricious,” a phrase that is used in *Sanchez* and many other cases. In other words, the decision to deny a grievance must merely be “rational,” a test with a very low standard, requiring only that the denial furthers a legitimate correctional goal in a reasonable way. If that minimal standard is met, the determination of prison officials will be upheld even if the court might favor a different approach to the grievance. *Matter of Nunez v. White*, 133 A.D.3d 1053 (3d Dep't 2015).

Still, courts have reversed the denial of grievances where prison officials acted without justification. For example, the Third Department found that a ban on the delivery of *flavored* cigars was arbitrary and capricious given that packages containing *unflavored* cigars were allowed. *Matter of James v. Fischer*, 102 A.D.3d 1019 (3d Dep't 2013).

In its decision, the *James* Court wrote that prison officials “did not articulate a safety or security justification for drawing this distinction [between flavored and unflavored cigars] and we decline to perceive one.” The *James* Court also noted that the Directive allowing the delivery of cigars “does not contain a prohibition for cigars that are flavored.” Accordingly, the Court reversed the denial of the grievance.

Similarly, the Third Department reversed the denial of a grievance challenging a ban on the delivery of cigarette “tubes.” *Matter of Eastwood v. Fischer*, 80 A.D.3d 1122 (3d Dep't 2011). Reversing the denial, the Court found no “rational basis” for the prohibition of packages containing such tubes given that the facility allowed the delivery of related tobacco products. “...[I]nmates are permitted to possess cigarettes, cigarette rollers, cigarette papers and loose tobacco, substantially similar to the confiscated items here” and therefore “we find that the Central Office Review Committee has not **articulated** [stated] the grounds for denial with sufficient **particularity** [detail] to determine whether such decision has a rational basis.”

In another case, the Third Department found it was arbitrary and capricious for DOCCS to deny a grievance challenging the requirement that the grievant submit documentation of his Native American ancestry as a requirement to practice his faith or possess related religious items. *Matter of Santiago v. Fischer*, 105

A.D.3d 1223 (3d Dep't 2013). Prison officials "failed to articulate any legitimate **penological** [correctional] interest served by the documentation requirement." The Court nullified denial of the grievance and remitted the matter to CORC to come forward with an argument justifying imposition of the documentation requirement.

As opposed to the cases cited above, the following decisions uphold the denial of grievance.

In a case in which the individual grieved the processing of mail from the courts as "general incoming correspondence" rather than as "privileged legal correspondence," the Third Department affirmed the denial on the grounds that DOCCS' rules authorized the procedure challenged by the petitioner. *Matter of Johnson v. Annucci*, 153 A.D.3d 1059 (3d Dep't 2017). "As the letters were processed in accordance with the applicable directive, the denial of petitioner's grievance had a rational basis and was neither arbitrary nor capricious."

Similarly, the Third Department affirmed the denial of a grievance challenging the prohibition against possession of an electronic music keyboard. *Matter of Kairis v. Fischer*, 149 A.D.3d 1427 (3d Dep't 2017). Because the keyboard "was capable of producing life-like sounds," the Court agreed that the instrument "presented legitimate security concerns." The decision of the Central Office Review Committee "was based upon the safety and security of the facility, which may regulate and restrict what personal property is permitted."

Concerns about safety and security also resulted in a court decision upholding the denial of a grievance challenging the termination of the petitioner's library job assignment. *Matter of Rodriguez v. Central Office Review Committee*, 153 A.D.3d 1545 (3rd Dep't 2017). The facility removed the petitioner from his job because of his "disruptive behavior" even though neither a misbehavior report nor a written counseling form had been filed. It does not appear that termination was based on allegations about specific incidents that were documented by correction officials as to date, time and the nature of the disruptive behavior. Rather it was more broadly alleged that Mr. Rodriguez "was causing unnecessary conflicts [that] threatened the safety and security of himself and other [incarcerated individuals] in the [l]aw [l]ibrary."

The Court tossed aside Mr. Rodriguez's challenge, which was based on the failure of officials to follow procedures set forth in the facility's operations manual. "Even assuming that a technical violation of the facility's internal policies occurred, we nonetheless find that the denial of petitioner's grievance was rational. We note that petitioner has no right to a particular job assignment."

To sum up: in a case like *Sanchez* (the case about index cards), where the DOCCS rules seem to support the grievant's challenge and prison officials fail to come forward with some security-based argument, courts seem willing to reverse the denial of a grievance. But in cases where DOCCS makes some plausible argument involving institutional safety or refers to directives supporting the denial, it seems unlikely that courts will second guess a determination made by prison officials.

Joseph Sanchez represented himself in this Article 78 action.

Executive Orders Tolling Statutes of Limitation During the Pandemic

In June 2021, the Second Department ruled that the Executive Orders extending the state's statutes of limitations between March 7 and November 2, 2020 had tolled the statutes of limitation. *Brash v. Richards*, 195 A.D.3d 582 (2d Dep't June 2, 2021). In reaching this result, the Court noted that in Executive Order No. 202.8, issued on March 7, the Governor, used the word "toll" in the paragraph extending the state's statutory limitations periods. Executive Order 202.8 extended the time within judicial actions may be filed by 30 days. Subsequent Executive Orders extending the provisions Executive Order 202.8 beyond its initial 30-day period did not use the word toll. The Court found that nonetheless, there was language in the extensions that showed the Governor's intent to extend Executive Order No. 202.8 with the same terms, including tolling. Therefore, the Court found that the subsequent Executive Orders continued to toll the statutory time limits.

The Court also ruled that the Governor has the statutory authority to toll statutory periods of limitation. Language in Executive Law §29-a(2)(d), the Court wrote, allows the Governor to change the requirements

of a statute. Therefore, the Court wrote, when the Governor has declared a state of emergency, he has the authority to toll statutes of limitation during that emergency.

The respondents argued that the statutes of limitation had not been tolled but rather had been suspended. There is a difference between tolling and suspending statutes of limitations. “A toll suspends the running of the applicable period of limitation for a finite time period, and the period of the toll is excluded from the calculation of the relevant time period” *Chavez v Occidental Chem. Corp.*, 35 N.Y.3d 492, 505 n 8 (cleaned up). “Unlike a toll, a suspension does not exclude its effective duration from the calculation of the relevant time period. Rather, it simply delays expiration of the time period until the end date of the suspension.” *Foy v State of New York*, 71 Misc.3d 65 (Ct. Clm. 2021).

Had statutes of limitation been suspended, all statutes of limitation that would otherwise have expired between March 7 and November 2 – the dates on which the Executive Order 202.8 went into effect and expired – would have expired on November 2. By finding that statutes of limitation were tolled between March 7 and November 2, the court extended the periods of limitation by roughly 7 months and 25 days. At this point, because over 7 months and 25 days have passed since November 2, 2020, all of the statutes of limitation that were tolled as a result of the Executive Order have expired.

Goldstein & Goldstein, P.C., Benjamin S. Goldstein of counsel, represented the plaintiff in this Article 78 proceeding.

IMMIGRATION MATTERS

On July 1, the Second Circuit Court of Appeals issued a precedential decision in *Brathwaite v. Garland*, 3 F.4th 542 (2d Cir. 2021), resolving the vexing question of whether a noncitizen can be deported based on a criminal conviction that is being challenged on direct appeal. This column summarizes the Court’s decision and explains its relevance for noncitizens facing the possibility of deportation based on criminal offenses that are pending on direct appeal. In the interest of full disclosure, I was one of the attorneys from the

Prisoners’ Legal Services of New York team that litigated *Brathwaite* before the Second Circuit, along with my co-counsel Joseph Moravec and John Peng, who argued the case before the Court on January 5, 2021.

The Brathwaite decision focuses on the definition of “conviction” as that term is used in the Immigration and Nationality Act (“INA”), the federal statute governing immigration cases. Prior to 1996, the INA contained no statutory definition of the term “conviction,” and courts generally assumed that a conviction on direct appeal was not final for immigration purposes. This assumption stemmed from the 1955 Supreme Court case *Pino v. Landon*, 349 U.S. 901 (1955), a decision in which the Supreme Court reviewed a deportation order **predicated** (based) on a conviction that was pending on direct appeal at the time of the removal proceedings. In *Pino*, the Court concluded that “we are unable to say that the conviction has attained such finality as to support an order of deportation within the contemplation of . . . the Immigration and Nationality Act[.]” *Id.*

In 1996, Congress enacted a statutory definition of “conviction” as part of the Illegal Immigration Responsibility and Immigrant Responsibility Act (“IIRIRA”), a statute which amended many aspects of the INA. In drafting the IIRIRA, Congress took the definition of “conviction” almost verbatim from a Board of Immigration Appeals (“BIA”) case called *Matter of Ozkok*, 19 I. & N. Dec. 546 (BIA 1988). In *Ozkok*, the BIA attempted to fashion a uniform procedure for determining the immigration consequences of an increasingly complex array of state criminal court adjudications. Responding to procedural **innovations** (novel changes) like “deferred adjudication,” which allow a judgment to be “suspended” or “deferred” after an initial finding of guilt, *Ozkok* fashioned a three-part definition for “conviction.” In a footnote, however, the Court acknowledged that “[i]t is well established that a conviction does not attain a sufficient degree of finality for immigration purposes until direct appellate review of the conviction has been exhausted or waived.” *Id.* at 552 n.7. Congress took the first two parts of *Ozkok*’s three-part definition of conviction, but **struck** (removed) the last prong dealing with deferred adjudications. It explained in the House Conference Report that it was doing so in an attempt to “broaden[] the scope of the definition of ‘conviction’ ” because *Ozkok* did “not go far enough to address situations where a judgment of guilt or imposition of sentence is

suspended, conditioned upon the alien's future good behavior." H.R. Conf. Rep. No. 104-828, at 224 (1996).

Notably, in a move that would ultimately engender (create) much confusion, Congress's final definition of "conviction" in the IIRIRA did not explicitly state whether a conviction being challenged on direct appeal was final for immigration purposes. Thus, for several years following the enactment of the IIRIRA, federal courts came to differing conclusions about whether a conviction pending on direct appeal was final for immigration purposes. For example, in *Orabi v. Att'y Gen. of the U.S.*, 738 F.3d 535 (3d Cir. 2014), the Third Circuit found that a conviction on direct appeal could not serve as the basis for an order of deportation. The Ninth Circuit came to the opposite conclusion in *Planes v. Holder*, 652 F.3d 991 (9th Cir. 2011).

In 2015, the BIA attempted to resolve this confusion by issuing *Matter of J.M. Acosta*, 27 I. & N. Dec. 420 (BIA 2018). In *J.M. Acosta*, the BIA affirmed that "the long-standing requirement that a conviction must **attain** [reach] sufficient finality before immigration consequences attach has survived the enactment of the IIRIRA." *Id.* at 431. However, the BIA reasoned that this principle only applies where a noncitizen is seeking review "on the merits of the conviction." *Id.* at 432. The BIA concluded that once the Department of Homeland Security has established that a noncitizen has a criminal conviction and that the time for filing an appeal has passed, "a presumption arises that the conviction is final for immigration purposes." *Id.* The noncitizen may rebut the presumption by "present[ing] evidence that the appeal relates to the issue of guilt or innocence or concerns a substantive defect in the criminal proceedings." *Id.*

In *Brathwaite*, Judge Calabresi – writing for a three-judge panel which included Judge Raggi and Judge Chin – struck down *J.M. Acosta*'s so-called "presumption of finality" principle as an arbitrary and unreasonable interpretation of the INA. The Court noted that petitioner Aldwin Junior Brathwaite was a longtime lawful permanent resident of the United States who was facing deportation solely because of criminal convictions which were pending before the New York State appellate courts. During his removal proceedings, Mr. Brathwaite argued that his convictions were not final for immigration purposes; however, he was unable to provide evidence relating to his appeal because he had not yet been appointed

appellate counsel and had not yet received the trial court record. Applying *J.M. Acosta*'s presumption of finality, the Immigration Judge ordered him deported and the BIA affirmed the order of deportation, finding that Mr. Brathwaite had not sufficiently overcome the presumption of finality.

Reviewing the relevant statutory and administrative history, Judge Calabresi agreed that "as a general matter, a conviction may not trigger deportation until it is final; that is, until appellate review is waived or exhausted." 3 F.4th at 553. However, Judge Calabresi found that *J.M. Acosta*'s presumption of finality was unreasonable because "meeting the BIA's requirement to show at the notice of appeal stage that a pending appeal relates to the issue of guilt or concerns a substantive defect is frequently impossible[.]" *Id.* at 554. This is so because the criminal appeal process can be a lengthy process: "It can take considerable time for appellate counsel to be appointed for an indigent defendant. And even when appellate counsel is appointed, counsel's ability to identify substantive defects turns on another frequently delayed process: the production of the criminal court record, which can take anywhere from two months to two years. . . . And this says nothing of the time required for counsel to review and analyze the trial record once it is obtained." *Id.* Thus, Judge Calabresi concluded, "the BIA's interpretation of the IIRIRA to require a noncitizen pursuing a late-filed appeal to show the BIA that the appeal is merits-based at the time the appeal is noticed and by the production of a filed appellate brief is arbitrary and unreasonable." *Id.* at 555.

In sum, *Brathwaite* stands as a clear and forceful statement on the importance of the principle of finality in immigration proceedings. The Court's decision will positively impact the removal proceedings of noncitizen criminal defendants in New York, Connecticut, and Vermont, ensuring that noncitizens can pursue appellate review of their criminal convictions without being deported prior to the resolution of their criminal appeals.

WHAT DID YOU LEARN?

1. In *People v ex rel. Payne v. McIntosh*, the Court found that the petitioner was not entitled to COVID-related release from custody because:

- a. the incarcerated population was given the option of receiving the vaccine.
- b. social distance was maintained among the incarcerated population.
- c. there had been no documented cases among the incarcerated population.
- d. the petitioner was no longer incarcerated at Bare Hill C.F.

2. In a prison disciplinary hearing, prison officials must prove the guilt of the accused individual by presenting facts showing:

- a. guilt beyond a reasonable doubt.
- b. some evidence of guilt.
- c. a predominance of evidence establishing guilt.
- d. substantial evidence of guilt.

3. Confidential hearsay evidence may be sufficient to establish guilt in a prison disciplinary hearing when the hearsay:

- a. is based on a witness whose identity is disclosed to the accused individual.
- b. merely relates to the disciplinary history of the accused individual.
- c. presents enough detail to allow the hearing officer to evaluate the credibility of the confidential witness.
- d. is supported by a non-confidential witness who can support every detail presented by the hearsay evidence.

4. Which argument would *most* likely persuade a court that the hearing officer was justified in limiting an incarcerated individual's right to call witnesses?

- a. When asked if he is willing to testify, the witness says that if he is called, he will assault the hearing officer.

- b. The witness would contradict the testimony of the officer who wrote the misbehavior report.
- c. The witness had lied in a prior hearing concerning a different witness.
- d. The witness had been transferred to SHU because he possessed drugs.

5. In a disciplinary hearing in which a witness could cast doubt about the truth of a misbehavior report, it would be *most* effective for the accused individual to first assert the right to call a witness:

- a. in an Article 78 proceeding.
- b. in an appeal pending before the Appellate Division.
- c. when the employee assistant asks the accused individual who they want to call as a witness;
- d. when appealing the disciplinary determination to the DOCCS Central Office.

6. Where a defendant was sentenced for a drug offense covered by the 2004 Rockefeller Drug Law Reform Act, they are entitled to a presumption favoring resentencing if prior to January 13, 2005 they were:

- a. recommended for resentencing by the DOCCS Central Office.
- b. originally sentenced to a determinate term in prison that is no longer authorized under the Penal Law.
- c. convicted of any felony relating to controlled substances.
- d. sentenced to an indeterminate term for the conviction of an A-I drug felony.

7. In *Kyle Siriani v. State of New York*, 2021 WL 3161663 (Ct. Clms. Jan. 11, 2021), the court expressed doubts about the credibility of the testifying officers because:

- a. video evidence contradicted their narratives.
- b. a civilian witness testified that the officers were not present at the time Mr. Siriani was attacked.
- c. The officers testified at trial that Mr. Siriani's injuries were self-imposed but did not write this in their reports.

d. the officers claimed that Mr. Siriani had suffered no injury at any time.

8. In the negligence case involving the death of Derrick Griffin, what factor counted *least* or *not at all* in determining the amount of damages the court awarded?

- a. The use of an ambulance to transport Mr. Griffin to the Putnam Hospital Center.
- b. The severity of pain experienced by Mr. Griffin.
- c. The duration of the pain experienced by Mr. Griffin.
- d. Mr. Griffin’s conscious state during a 10-day period.

9. When considering whether prison officials impermissibly denied an incarcerated individual’s grievance, courts will *most* likely consider whether the determination by DOCCS:

- a. can be considered the best policy choice available under the circumstances.
- b. is in line with prior DOCCS decisions on the same or similar issue.
- c. furthers a legitimate correctional goal in a reasonable way.
- d. enhanced the individual’s prospect for rehabilitation.

10. When DOCCS denies a grievance and the decision conflicts with directives in the facility’s operations manual, courts will:

- a. uniformly reverse denial of the grievance.
- b. consider whether denial of the grievance was rationally based.
- c. determine whether the operations manual presented the best guidance to DOCCS employees.
- d. direct DOCCS to clarify the procedures recommended in the operations manual.

Answers

- 1. a
- 2. d
- 3. c
- 4. a
- 5. c
- 6. d
- 7. c
- 8. a
- 9. c
- 10. b

NOTICES

Your Right to a Education



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Maria E. Pagano – Education Unit
Prisoners’ Legal Services of New York
14 Lafayette Square, Suite 510
Buffalo, New York 14203
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