

Pro Se

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Governor Hochul Signs “Less Is More” Parole Reform Bill

Individuals subject to community supervision – the new term for parole – have much to celebrate. The 2021 Parole Reform Bill, known as the “Less is More” Act, significantly modifies how releasees – the term which the law uses instead of the term “parolees” – will be treated while they are being supervised. The law takes effect on March 1, 2022.

Perhaps most significantly, the law almost completely does away with reincarceration for many sustained technical violations. Also, significant, for every 30 days that a releasee successfully spends on community supervision, the maximum term of their sentence is credited with an additional 30 days of service. Further, the law does not permit DOCCS to include as a condition of supervision a prohibition on “being in the presence of” or “fraternizing with” people whom the releasee knows have criminal records or have been adjudicated youthful offenders.

Finally, a releasee may not be violated for lawful cannabis-related conduct. To give you some basic information about the provisions of the new law, this article discusses some of the law’s most noteworthy features.

Earned Time Credits

When an incarcerated individual is released to community supervision, they immediately begin to collect “Earned Time Credits” (ETC). People serving

life sentences or who have lifetime supervision are not eligible to earn ETC.

Earned Time Credits are awarded after each completed 30-day period that a releasee complies with their terms of community supervision. The ETC are applied to the unserved portion of the maximum that remains on their sentence or, if the maximum term has expired, to the term of post release supervision.

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ALBANY UPDATE

A Message from the Executive Director, Karen L. Murtagh

The 2021 Legislative Session ended in June, so this may seem an unusual time to provide the readership with an “Albany Update.” But these are indeed unusual times and “with all things Albany,” we’ve come to expect the unexpected.

I’ve heard it said that, “in Albany, there are only two speeds: fast or slow.” Over the past few months, Albany entered the fast lane and hasn’t shown any signs of slowing down. This past August, a scant two months after the last scheduled legislative session day of 2021, New York witnessed the installation of a new Governor and Lieutenant Governor. Since then, as expected, there’s been a “changing of the guard,” with new staff hired and a different agenda promised.

What that means for this readership is not entirely settled, but there are indicators. Chief among them is the September 17th signing by Governor Hochul of the so-called “Less is More” legislation (S.1144A – Benjamin / A.5576A – Forrest.)

This legislation, prime sponsored by new Lieutenant Governor (Brian Benjamin) when he was a State Senator, would reduce the number of people re-incarcerated for technical parole violations.

Said then-Senator Benjamin earlier this year in urging passage of his legislation: “Too many people are being sent back to prison for non-criminal parole violations. I find it very troubling that more than a third of the time someone is sent to prison, it’s for a non-criminal parole violation. It is a waste for everyone. And, as we see time and again in the criminal justice system, the racial disparities are glaring. We can do better. We must do better. My legislation, which was crafted with input from directly impacted people, community corrections leaders, judges and law enforcement, will put a stop to this, improve public safety, strengthen the reentry process, and save taxpayers millions every year.”

Advocates for the legislation have long argued that passage of the legislation would go far to relieve jail and prison overcrowding, enhance efforts at successful re-entry, reduce recidivism, relieve parole officer caseloads, reduce strains on jail and prison administrators dealing with Covid-19 and other health-related concerns and, as Lieutenant Governor Benjamin pointed out, indeed save millions of dollars for the state of New York.

These same advocates provided the following data-driven, “by the numbers” argument that was ultimately adopted by the bill’s sponsors as further justification for enactment of the legislation:

6,300

Of people on parole whom New York sent back to prison in 2016, over 6,300 or 65% were reincarcerated for technical parole violations.

1/3

Nearly 1/3 of the new admissions to state prisons are due to people reincarcerated for technical violations of parole.

86%

86% of people on parole who were reincarcerated were not convicted of a new crime.

12X

Persons of color are incarcerated in New York City jails for technical parole violations at more than 12 times the rate of similarly-situated whites.

Upon signing the legislation, Governor Hochul said: “Parole in this state often becomes a ticket back into jail because of technical violations,” which she cited as one of the primary contributors to jail overcrowding at Rikers and other facilities.

The bill applies to all persons subject to community supervision (parole, presumptive release, conditional release, and post-release supervision) and, according to the sponsors, would not only reduce the number of people held in jail and prison in New York but also facilitate their positive reintegration into society by:

- (1) allowing people subject to community supervision to receive "earned time credits," to help encourage positive behavior by accelerating discharge from supervision;
- (2) raising the standard for parole officials to issue a notice of violation or warrant for someone accused of a parole violation (as well as the standard for determining a violation);
- (3) ensuring that people who are alleged to have violated the terms of their community supervision receive a hearing before criminal court to determine whether they should be detained in jail pending adjudication of the alleged violation;
- (4) limiting the circumstances under which people subject to community supervision may be re-incarcerated for violations of the terms of community supervision and capping the length of such re-incarceration for technical violations;
- (5) shortening the timeframe for adjudicatory hearings; and
- (6) establishing a new right for a person on community supervision, found to have committed conduct that is equivalent to a misdemeanor or felony, to have a de novo review of the parole hearing officer's finding (and any time assessment) by appeal to a criminal court and thereafter to the Appellate Division.

Those interested in learning more specifics on the bill, see:

https://nyassembly.gov/leg/?default_fld=%0D%0A&leg_video=&bn=S1144&term=2021&Summary=Y&Actions=Y&Memo=Y&Text=Y.

Based on the above information, it is not altogether surprising to learn that the bill garnered support from nearly 230 community, advocacy and faith groups, as well as seven District Attorneys (from the counties of Albany, Bronx, Brooklyn, Manhattan, Tompkins, Ulster, & Westchester), two county sheriffs (from Albany and Erie Counties) and a growing slate of community corrections officials.

The law itself does not go into effect until March of 2022 but, upon signing the legislation, the Governor ordered the state parole board to immediately release 191 individuals, move 200 more to state prisons and promised additional steps to relieve overcrowding in the state's jails, noting that many other inmates met "that threshold" of having technically violated parole without committing a separate offense.

What to expect next on the criminal justice front is difficult to predict. Parole reform advocates are indeed heartened by the signing into law of the "Less is More Act" which itself reflects the successful partnership of the new Governor and Lieutenant Governor who both tout criminal justice as a "core" issue. Indisputable is that both Executive leaders have expressed a desire for transparency and demonstrated a willingness to listen to those impacted by the criminal justice system. By any measure, that is public service worth heralding.

As we head into the 2022 legislative session, reform advocates continue to promote a number of measures for consideration. Among them are the Clean Slate Act, which would erase the public criminal record of most people convicted of a crime after serving their time (S1553B/A6399A); the Elder Parole bill, which would make certain incarcerated people over the age of 55 eligible for parole (S15A/A3475A); and the Fair and Timely Parole Act, which would remove key impediments to parole release (S1415A/A4231A). All three measures did not pass either the State Assembly or Senate in 2021, but may be legislative priorities in 2022.

Time will tell the fate of these and other criminal justice measures. No doubt, 2022 promises to be an eventful year so, together, let's all stay tuned!

Protecting Your Wishes for Medical Care

“What happens if I am get sick or injured and can’t make medical decisions for myself?” It’s a question we hear often and for good reason. Many people will become sick, unconscious, or injured at some point in their lives, and this may impact their ability to make decisions or communicate. For some this is temporary (such as during surgery or after an accident), while for others this may be more long-lasting (such as dementia). It is understandable to be worried about what would happen in this situation. Can I trust that the doctors would do what is best for me? Will my values and wishes be honored? Who will advocate for me? How can I make sure I still have control over medical decisions?

Fortunately, in New York there is something you can do to protect yourself – completing a Health Care Proxy Form. The right to appoint someone to make health care decisions for you if you become incapacitated and are unable to do so is protected by the New York Health Care Proxy Law. In New York, all adults with the ability to make decisions for themselves have the right to use this form to appoint someone they trust to make medical decisions for them in case one day they lose the ability to do so for themselves. When we say “ability to make decisions for themselves” we mean those *without* a condition (such as advanced dementia) that impacts their ability to clearly make decisions. The person you choose can be a family member, a friend, an adult child, or someone else. Whomever you choose becomes your voice if you are unable to communicate your wishes, and medical professionals must honor this person’s decisions as if you (their patient) were the one making decisions for yourself.

If you *do not* complete the Health Care Proxy Form, then a New York law called the Family Health Care Decisions Act determines who is allowed to make decisions for you. This law lists categories people in order of priority. Medical professionals (doctors, nurses, etc.) will go down this list until they are able to speak with someone. At the top of this list is a legal guardian, which most people do not have. The next person on the list is a spouse or domestic partner, then an adult child, then parent, then adult brother or sister, and then a close friend. Even if this list includes someone you would want to make decisions for you, the person the medical professionals end up speaking with may not be that person. It also means that there may be disagreement between family members if, for example, you have more than one adult child and they disagree with each other. For these reasons, it better to appoint someone using the Health Care Proxy Form, rather than assuming this law will result in what is best for you.

To officially select a person to become your decision-maker, you must complete a Health Care Proxy Form. The person you select is called your *health care agent*. Your health care agent becomes your trusted advocate, and has authority to make decisions for you based on your wishes and values, should the need arise. Your health care agent will only be allowed to make medical decisions for you if you cannot make decisions for yourself. For example, if you are very sick and unable to make decisions, but later you regain your decision making ability, your health care agent will only make decisions for you while your decision-making ability is impaired. When your Health Care Proxy Form authorizes your health care agent to make health care decisions for you, your agent is allowed to decide to start or stop a treatment and choose among different treatments based on your wishes and interests. Your health care agent is not allowed to make any other kinds of decisions for you, only medical decisions.

Thankfully, the Health Care Proxy Form is short and very easy to complete. You can request the form from your medical provider, any nurse in the medical unit, or from your Offender Rehabilitation Coordinator (ORC). After you have filled in the form, be sure give a copy to your health care agent and to DOCCS medical staff to be filed in your DOCCS medical record.

If you change your mind about who would you like to be your health care agent, you can fill out a new Health Care Proxy Form. Just make sure you let your new and former health care agent know so there is no confusion. If you wrote your medical wishes on the form, you can also change this later by creating a new form and also discussing your wishes with your health care agent. You may also want to discuss your medical wishes with your primary care provider if you have one and feel comfortable doing so.

... *Continued from Page 1*

People who are on community supervision on March 1, 2022 will receive up to two years of retroactive ETC. Retroactive ETC will not be awarded to any releasee who on March 1, 2022 is serving a term of reincarceration for a parole violation. Individuals who are serving a term of reincarceration for a parole violation will begin accruing ETC when they are next released to community supervision. People serving life sentences or who have lifetime supervision are not eligible to receive retroactive ETC.

Technical Violations

The Less is More law amends Executive Law (EL) §259 to define “technical violations.” A technical violation is defined as conduct that violates the conditions of community supervision in an important respect, other than the commission of a new felony or misdemeanor under the Penal Law.

Non-Technical Violations

Non-technical violations include the commission of a new felony or misdemeanor. Also included is conduct by a releasee who is serving a sentence for an offence defined in Penal Law (PL) Article 130 (sex offenses), or incest in the first or second degree, where the alleged conduct violates a specific condition reasonably related to such offense and efforts to protect the public from the commission of a repeat offense.

Absconding

Another important amendment to EL §259 is the addition of a definition of absconding. A releasee has absconded when they intentionally avoid supervision by failing to maintain contact or communication with their community supervision officer (CSO) – the term which replaces parole officer – or the area bureau office and to notify the CSO/area bureau office of a change in residence, when reasonable efforts by the CSO to re-engage the releasee have been unsuccessful.

Consequence of Sustained Technical Violations

- Incarceration will not be imposed for any technical violation except as provided by EL §259-i(3)(f)(xi). See below.

- For each sustained violation, no ETC will be awarded for 30 days.
- For any sustained absconding violation, no ETC will be awarded for the entire time period during which the releasee was found to have absconded.

Executive Law §259-i(3)(f)(xi): Reincarceration

(1) Absconding:

- 1st violation: incarceration of up to 7 days;
- 2nd violation: incarceration of up to 15 days; and
- 3rd and subsequent violations: incarceration of up to 30 days.

(2) Reincarceration shall not be imposed for technical violations that involve:

- Violating curfew;
- Alcohol use unless the releasee is on community supervision for a DUI-alcohol conviction;
- Drug use unless the releasee is on community supervision for a DUI-drugs conviction;
- Failing to notify the CSO of a change in employment/program status;
- failing to pay surcharges or fees;
- obtaining a driver’s license or driving a car with a valid license unless either action is explicitly prohibited by the releasee’s conviction;
- failing to notify the CSO of contact with any law enforcement agency unless the releasee intended to hide illegal behavior; and
- failing to obey other special conditions unless the failure cannot be addressed in the community and all reasonable community-based means to address the failure have been exhausted.

(3) Sanctions for all other technical violations:

- No reincarceration may be imposed the 1st and 2nd technical violation for which incarceration may be imposed;

- Up to 7 days reincarceration may be imposed for the 3rd technical violation for which incarceration may be imposed;
- Up to 15 days reincarceration for the 4th technical violation for which incarceration may be imposed; and
- Up to 30 days reincarceration for the 5th and subsequent technical violation for which incarceration may be imposed.

News and Notes

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

Pro Se Victories!

Iris Vazquez v. State of New York, Claim No. 136316, M-96844 (Ct. Cl. June 24, 2021). The court denied the defendant's motion to dismiss. In its motion, the defendant argued that because the Claim was unverified, the court did not have **jurisdiction** (authority to hear the case) and the Claim must be dismissed. Ms. Vasquez asked that the court allow her to cure the defect and accept the Amended Claim that she attached to her motion papers, served on the Attorney General and filed with the court clerk. The court, citing *Lepkowski v. State*, 1 N.Y.3d 201 (2003), ruled that the failure to formally verify a pleading is not a jurisdictional defect. As the State did not argue that it was

prejudiced (hurt in its ability to defend the case) and Civil Law and Procedure (CPLR) 2001 permits an omission or defect to be corrected "on such terms as are just" the court denied the motion to dismiss, considered the Verified Claim submitted by Ms. Vasquez to be an amended claim and ordered that the Amended Claim be filed and the defendant to submit a response.

Matter of Joseph Gentile v Edward Burnett, Index No. 390/21 (Sup. Ct. Dutchess Co. Aug. 31 2021). **By producing evidence – United State Postal Services (USPS) cards – showing that the respondent had received mail sent by the petitioner certified mail, return receipt requested, Joseph Gentile was able to defeat the motion to dismiss for failure to serve the respondent.** The USPS cards, the court found, refuted the respondent's affirmation that no mail from the petitioner had been received at Fishkill C.F. In addition, the court noted that although the respondents had failed to file an answer to the petition, they admitted having received the Order to Show cause signed by the court which provided them with notice of the return date. Further, the affirmation in support of the respondent's motion to dismiss was not signed and thus did not lay a foundation for the exhibits attached to the motion.

STATE COURT DECISIONS

Disciplinary and Administrative Segregation

The Retaliation Defense

A long series of cases establish that an incarcerated individual challenging the evidentiary sufficiency of a determination of guilt made at a disciplinary hearing will not often prevail by attributing a misbehavior report to a correction officer's retaliatory motive. This was the defense presented in *Matter of Tigner v. Rodriguez*, 196 A.D.3d 982 (3d Dep't 2021). The Third Department rejected Mr. Tigner's defense, holding that the claim of retaliation "presented a credibility issue for the Hearing Officer to resolve." Thus, in *Tigner*, the appellate court

considered the claim of retaliation and found the evidence in the record was sufficient to support the conclusion that the hearing officer's determination of guilt was supported by substantial evidence.

Like the Court in *Tigner*, the Court in *Matter of Striplin v. Griffin*, 164 A.D.3d 1347 (2d Dep't 2018), also concluded that "[t]he petitioner's contention that the hearing officer failed to consider his retaliation defense is without merit. The record reflects that the hearing officer considered the petitioner's testimony, which included his testimony that the correction officer who authored the inmate misbehavior report did so in retaliation against him." See also, *Matter of Kennedy v. Annucci*, 185 A.D.3d 1371 (3d Dep't 2020) (affirming disciplinary findings notwithstanding claims of retaliation) and *Matter of White v. Fischer*, 87 A.D.3d 1249 (3d Dep't 2011) (same).

Courts will, however, reverse a disciplinary determination if it appears that the hearing officer improperly blocked the petitioner from submitting evidence about retaliation. In other words, a challenge based on the hearing officer's failure to follow proper procedures with respect to obtaining evidence of retaliation has a greater likelihood of success than actual evidence of retaliation has of defeating an argument that a determination of guilt is supported by substantial evidence.

For example, in a case involving an administrative segregation recommendation, the subject of the recommendation asserted that the author of the recommendation had acknowledged a retaliatory motive to an incarcerated witness. *Matter of H'Shaka v. Fischer*, 100 A.D.3d 1056 (3d Dep't 2012). The witness had initially agreed to testify but subsequently was reported to have refused to do so. The hearing officer then failed to conduct an inquiry about why the witness had changed his mind. "Under these circumstances, the Hearing Officer was required to personally ascertain the reason for the inmate's unwillingness to testify, and the failure to do so violated the petitioner's conditional right to call witnesses." Accordingly, the Third Department reversed the disciplinary determination and remitted the case for a new hearing.

The right to call witnesses to testify about retaliatory motive also arose in *Matter of Lopez v. Fischer*, 100 A.D.3d 1069 (3d Dep't 2012), another case involving a retaliation defense. Here, the hearing officer denied the petitioner's request to present two witnesses who could testify about the retaliatory motivation of the author of the misbehavior report, who had been the target of the petitioner's grievances. "...[W]e find that the Hearing Officer improperly denied the requested witnesses. Given the close proximity (in time) between the filing of the grievances and the issuance of the misbehavior report...we find that the testimony was material to the petitioner's claim of retaliation." Having made that finding, the Third Department annulled the determination of the hearing officer.

Derrick Tigner represented himself in this Article 78 proceeding.

Redundant Testimony and the Right to Call Witnesses

The Third Department has again considered an incarcerated individual's right to call witnesses at a Tier III proceeding where the hearing officer finds that the requested testimony would be merely "redundant" and therefore unnecessary. *Matter of Cendales v. Annucci*, 196 A.D.3d 1069 (4th Dep't 2021). This case demonstrates the obstacles that incarcerated individuals face when confronted with a hearing officer who conducts a proceeding in the absence of all the witnesses that the charged individual requested.

In *Cendales*, the petitioner claimed that his employee assistant failed to interview every prisoner who may have been present at the scene of the incident. Rather than taking steps to obtain information from *every* witness, the hearing officer took testimony from *some* (five) witnesses, all of whom denied having seen the assault. It was on this basis that the Third Department concluded "the requested witnesses would have provided testimony that was either irrelevant or **redundant** [repetitive, cumulative]."

This conclusion is hard to justify in the absence of information about what the other witnesses observed. How can it reliably be said that the testimony of Witness B would be no different from the testimony of Witness A if the information possessed by Witness B remains unknown? Despite this obstacle, Tier III petitioners have prevailed on claims that their right to call witnesses was violated when the hearing officer wrongfully found the testimony of the proposed witness to be redundant. These cases are discussed below. But first, some background.

Incarcerated individuals have a constitutional and regulatory right to call witnesses at prison disciplinary hearings provided “their testimony is material, is not redundant, and doing so does not jeopardize institutional safety or correctional goals.” 7 NYCRR 253.5(a) (previously codified as 7 NYCRR 254.5). See also *Matter of Cortorreal v. Annucci*, 28 N.Y.3d 54 (2016) (recognizing the constitutional stature of the regulatory right). “A hearing officer’s actual outright denial of a witness without a stated good faith reason, or lack of any effort to obtain a requested witness’s testimony constitutes a clear constitutional violation.” *Matter of Benito v. Calero*, 102 A.D.3d 778 (2d Dep’t 2013).

Although the regulatory and constitutional requirements promote the same objective, there exists an important distinction between the two that bears on the remedy available to petitioners challenging prison disciplinary hearings. When a court finds a constitutional violation – also known as the violation of a fundamental right – annulment of the determination of guilt and expungement of the charges from the petitioner’s institutional records has been found to be the appropriate remedy. But when a court finds only a regulatory violation, remittal of the case for a rehearing is the preferred remedy (in the absence of circumstances dictating a different result). Whenever a Tier III petitioner can plausibly allege a constitutional violation, they should do so and ask for annulment and expungement.

So, what’s the distinction between a constitutional and regulatory right to call a witness? Generally, courts will find a constitutional violation in cases where the hearing officer made very little or no effort to arrange for the testimony of a requested witness and the record reveals no explanation for the absence

of the witness. On the other hand, a regulatory violation is likely to be found where, for example, the hearing officer failed to “give the inmate a written statement stating the reasons for denial,” see 7 NYCRR 253.5(a), but otherwise demonstrated compliance with the rules by trying to obtain the requested testimony. *Matter of Teixeira v. Fischer*, 26 N.Y.3d 230 (2015).

Affirming the decision of a lower court order directing remittal, the *Teixeira* Court left in place an order allowing a rehearing, finding that the hearing officer took some steps to make a witness available. The Court reasoned, “because the hearing officer had made some effort to obtain the witness, and did not initially deny the witness outright without a stated good faith reason, respondent [DOCCS] only violated petitioner’s regulatory right, thus warranting a new hearing.”

In a case in which the hearing officer violated the Tier III petitioner’s right to call witnesses, the Third Department found only a regulatory violation given that “a good faith reason for denying the witnesses appears in the record....” *Matter of Adams v. Annucci*, 158 A.D.3d 1091 (4th Dep’t 2018) (remitting the matter for a new hearing). Contrast *Matter of Adams* with *Matter of Samuels v. Fischer*, 98 A.D.3d 776 (3d Dep’t 2012), where the record of the proceedings gives “no indication” that “any effort was made by the Hearing Officer to either identify those [requested] inmates or inquire as to their willingness to testify....” In addition, the record does not show “that the Hearing Officer provided petitioner with any reason for denying the testimony of those inmates.” In light of these circumstances, the *Samuels* Court held that “the Hearing Officer’s actions deprived petitioner of his right to call witnesses and require expungement, rather than remittal.”

The Third Department issued a similar ruling in *Matter of Doleman v. Prack*, 145 A.D.3d 1289 (3d Dep’t 2016), where the hearing officer reported that two of the requested witnesses had refused to testify. With respect to these two witnesses, the court noted, there were no witness refusal forms nor any evidence in the record that anyone had asked them why they were unwilling to testify. “Since the record does not reflect that the Hearing Officer made any effort to

secure the testimony of these witnesses or to ascertain if they refused to testify, this situation is comparable to the outright denial of a witness and resulted in the denial of petitioner's constitutional right to call witnesses, making expungement rather than remittal for a new hearing the appropriate remedy."

The hearing officer must create a written record when a witness refuses to testify. The Court of Appeals has held, "as a general rule," that in such a case "a simple statement by the inmate on a refusal form that he or she does not want to be involved or does not wish to testify is sufficient to protect the requesting inmate's right to call that witness." *Matter of Cortorreal v. Annucci* (cited above). The hearing record must explain a witness' refusal to testify. "...[W]here the record does not reflect any reason for the witness' refusal to testify, or that any inquiry was made of him as to why he refused or that the hearing officer communicated with the witness to verify his refusal to testify, there has been a denial of the inmate's right to call witnesses as provided in the regulations." *Matter of Barnes v. LeFevre*, 69 N.Y.2d 649 (1986).

When a refusing witness has not previously agreed to testify, a signed refusal form constitutes a sufficient record of the proceedings. *Matter of Randolph v. Annucci*, 190 A.D.3d 1196 (3d Dep't 2021). But where a refusal follows a prior willingness to testify, the hearing officer must create a more detailed record. "When an inmate witness previously agreed to testify, but later refuses to do so without giving a reason, we have consistently held that the hearing officer is required to personally ascertain the reason for the inmate's unwillingness to testify." *Matter of Hill v. Selsky*, 19 A.D.3d 64 (3d Dep't 2005).

A practice point for Tier III petitioners emerges from this discussion of the cases. In preparing papers for appeal to DOCCS or the courts, the petitioner should draw attention to a failure by the hearing officer to present a "written statement," see 7 NYCRR 253.5(a), explaining the reasons for the denial of permission to call a witness. When a witness refuses to testify, the procedural requirements set forth in *Barnes* provide a road map for the *pro se* litigant.

Pointing out the hearing officer's failure to create an on-the-record explanation for the exclusion of a requested witness preserves this issue for appellate review. Lack of preservation may (and usually does) result in the rejection of a claim without consideration of the merits.

For example, the petitioner's failure to ask the hearing officer "to ascertain the reason for the inmate's refusal" resulted in the court's rejection of the right-to-a-witness claim because it had not been preserved for review by the court. *Matter of Randolph v. Annucci* (cited above). In legal language, litigants are said to have "preserved" an issue when they raise the issue in a timely way in the proceedings. For example, the Appellate Division would likely reject a claim on preservation grounds if the petitioner raised the issue for the first time in that court.

An issue involving the right to call a witness can be preserved by raising it "during the course of the administrative appeal." *Matter of White v. Annucci*, 182 A.D.3d 684 (3d Dep't 2020). The request for a witness should be made before or during the hearing. 7 NYCRR 254.6(c). The bottom line is this: present your challenge to the hearing officer's exclusion of a witness at the earliest possible opportunity and persist in pressing that point at subsequent stages in the hearing and on administrative appeal.

Returning to the issue of whether proposed testimony would be considered "redundant." When considering this issue *pro se* litigants should ask themselves whether the absence of certain evidence had the potential for affecting the outcome of the hearing. If evidence cannot be so characterized, common sense tells us that its introduction at the hearing would be considered redundant.

For example, the exclusion of the petitioner's medical records and photographs of his injuries was found to be permissible because this documentation "has no relationship to the charges set forth in the misbehavior report." *Matter of Dumpson v. Mann*, 225 A.D.2d 809 (3d Dep't 1996). Similarly, the exclusion of the testimony of a nun did not violate the petitioner's right to call a witness because "the nun lacked direct knowledge of the incident" and her

testimony “would only serve to corroborate other testimony that petitioner told others.” *Matter of Fletcher v. Selsky*, 199 A.D.2d 865 (3d Dep’t 1993). In a case where the hearing officer acknowledged that the X-ray report did not disclose evidence of contraband, the court found that exclusion of this evidence did not violate the rights of the petitioner. *Matter of Gren v. Annucci*, 119 A.D.3d 1307 (3d Dep’t 2014).

It seems plain that in the three cases discussed above, where the petitioners did not persuasively argue that the requested evidence had the potential to affect the outcome of the Tier III hearing, their right to call witnesses was not violated.

The opposite conclusion has been reached where the hearing officer excluded testimony without proper consideration of the relevance of the requested evidence. For example, in *Matter of Paddyfote v. Annucci*, 154 A.D.3d 1224 (3d Dep’t 2017), the hearing officer impermissibly excluded testimony from a representative of the drug testing company about the calibration of the machine used in a urinalysis test. The *Paddyfote* court found a correction officer’s testimony insufficient as to the accuracy of the device. “It is unclear as to whether the correction officer’s testimony regarding how the machine was calibrated was in accord with or was a departure from the recommendation in the manufacturer’s procedural manual.”

The right to call witnesses was also violated where the hearing officer excluded the testimony of a mess hall cook about whether she had received a packet of Kool-Aid from an officer. *Matter of Gross v. Yelich*, 101 A.D.3d 1298 (3d Dep’t 2012). The misbehavior report alleged that the charged individual had been found in possession of this contraband and that a correction officer had turned over the packet to the cook after conducting a frisk of the inmate. The court found that the hearing officer’s denial of the charged individual’s request that the cook be called as a witness violated petitioner’s right to call witnesses. “It is possible that the witness would testify that she did not receive a packet of Kool-Aid from the officer at the date and time alleged, thereby supporting petitioner’s claim of innocence.”

Notice the low threshold for the admission of requested proof. Evidence is admissible when it is merely “possible” that it would support a claim of innocence. The Third Department could have insisted on a higher standard of proof such as “reasonably likely” or “probable,” but it protected the charged individual’s rights more fully by setting the bar for admissibility quite low— the evidence might *possibly* support a claim of innocence.

In a case where many incarcerated individuals were present at the time of an incident, it was impermissible for the hearing officer to exclude the testimony of all of these individuals. *Matter of Marriott v. Konigsmann*, 149 A.D.3d 1440 (3d Dep’t 2017). “In our view, petitioner was improperly denied the right to call a reasonable number of these witnesses, who were all housed in the same cellblock and should have been easily identifiable. Although calling all 50 witnesses would be impractical and unnecessary, the requested testimony was not irrelevant or redundant and the Hearing Officer’s blanket denial of these witnesses was therefore improper.”

In another case involving multiple witnesses, the hearing officer allowed just three of the 13 witnesses requested by the Tier III defendant. *Matter of Payton v. Annucci*, 139 A.D.3d 1223 (3d Dep’t 2016). The hearing officer justified his exclusion of these witnesses “stating he was not going to allow redundant testimony.” But he “never explained the reason that the testimony would be redundant and this is not clear from the record. Under these circumstances, we find the denial of the remaining witnesses was error.” The *Payton* Court also noted the hearing officer’s failure “to provide a written statement setting forth the reasons for the denial as required by 7 NYCRR 245.5[a].”

Where an incarcerated individual was charged with forcing contraband into a storm drain, it was error for the hearing officer to exclude the testimony of a maintenance staff employee “as to the procedures followed by facility staff regarding the watch room drains.” *Matter of Medina v. Five Points Correctional Facility*, 153 A.D.3d 1471 (3d Dep’t 2017). This testimony could have refuted the correction officer’s testimony about the drains and

therefore “the testimony would not be redundant and the witness was improperly denied.”

Although not spelled out in the *Medina* decision, it appears that testimony showing drain cleaning could have led to the conclusion that the contraband found in the drain had been placed there by another incarcerated individual.

In sum, when challenging a hearing based on a violation of the right to call witnesses, the *pro se* litigant must 1) preserve the issue by raising it in a timely fashion; 2) point out deficiencies in the record created by the hearing officer and 3) show how the requested evidence could possibly lead to dismissal of the charges.

Latasio Cendales represented himself in this Article 78 proceeding.

Court of Claims

Res Ipsa What-quitur? Res Ipsa Loquitur!

Sometimes the cause of an accident is so obvious that an **inference** (conclusion) can be drawn about the person responsible for the accident. Lawyers use a Latin term, “*res ipsa loquitur*,” to describe that kind of situation. The term is commonly translated as “the thing speaks for itself.”

An incarcerated individual proceeding *pro se* successfully relied upon the *res ipsa loquitur* in the Court of Claims. He was seeking compensation for the injuries he suffered when a plastic chair he was sitting on collapsed in a recreation room at Cossackie C.F. *Draper v. State of New York*, 196 A.D.3d 744 (3d Dep’t 2021).

Although the Court of Claims found the *res ipsa* doctrine inapplicable to the case, the Third Department reversed judgment for the State of New York and sent the case back to the Court of Claims for a trial on the issue of damages.

Explaining its reversal, the appellate court reviewed the elements of a claim supported by the *res ipsa* doctrine:

- “(1) [T]he event must be of a kind which ordinarily does not occur in the absence of someone’s negligence;
- (2) [The event] must be caused by an agency or instrumentality within the exclusive control of the defendant; and
- (3) [The event] must not have been due to any voluntary action or contribution on the part of the claimant.”

While the Third Department did not discuss the first and third elements, it is worthwhile to discuss their application to the *Draper* case. As to the first element, it seems plain that a chair located in a prison recreation room does not ordinarily collapse unless there has been a failure in its maintenance. And as to the third element, the proof did not suggest that the collapse of the chair was the fault of Mr. Draper.

“It is the exclusive control requirement [the second element] that is at issue here,” the Third Department noted, adding that “the evidence of defendant’s exclusive control, under the circumstances of this case, was sufficiently established.”

This element of *res ipsa* merely requires “that the **dominion** [control] be such that the defendant can be identified with probability as the party responsible for the injury produced.” *Draper*, at 746, quoting from *Quinn v. State*, 61 A.D.2d 850, 851 (3d Dep’t 1978). As an incarcerated individual, Mr. Draper exercised no control over the maintenance of the furniture within the prison. Instead, as the Third Department ruled, it was the defendant State of New York that had the “affirmative duty” to make sure that the chair was safe. The State’s case was further weakened by its failure to come forward with evidence supporting “an inference of any other possible explanation for the accident.”

Accordingly, the appeals court found “that *res ipsa loquitur* should have been applied and the Court of

Claims erred in granting defendant's [the State] motion to dismiss."

But note that courts will not apply the *res ipsa* doctrine where the injured person bears responsibility for the accident. This was the situation where an individual incarcerated at Great Meadow C.F. was injured while operating a soap press in the prison's soap factory. *Savio v. State of New York*, 268 A.D.2d 907 (3d Dep't 2000). Here, the proof suggested that Mr. Savio "may have been negligent in the manner in which he cleaned the dies." *See also, Williams v. State of New York*, 2018 WL 4957770 (Ct. Cl. 2018) (*res ipsa* inapplicable to case of incarcerated individual injured while squat lifting a 495-pound barbell).

John Draper represented himself in this appeal from a Court of Claims decision dismissing his claim.

Miscellaneous

Failure to Serve as Directed by an OSC Leads to Dismissal

A lawsuit, irrespective of its merits, is subject to dismissal if the petitioner (or plaintiff) fails to establish the court's "personal jurisdiction" over the respondent (or defendant). That is the lesson presented by the Third Department decision in *People ex rel. Curran v. Keyser*, 196 A.D.3d 980 (3d Dep't 2021).

In the legal profession, the term "personal jurisdiction" means the authority of a court to bind the parties in a lawsuit. Without personal jurisdiction over the parties, a court is powerless to resolve the issue before it and, as such, the case brought by the petitioner (or plaintiff) is subject to dismissal. If the opposing party has no notice of the lawsuit, the court does not have personal jurisdiction in the case. Notice is typically established by an affidavit showing that the opposing party has been properly and timely served with legal papers. And that was the issue in *Curran*.

In *Curran*, the petitioner filed a writ of habeas corpus seeking his release from custody for reasons related to the COVID-19 pandemic. An order to show cause signed by the lower court directed the petitioner to serve either a copy of the order or the petition itself on either the respondent party (the facility superintendent) or the Attorney General at its regional office in Poughkeepsie and do so before a specified deadline.

Seeking an order dismissing the habeas application, the respondent state officials informed the lower court that the petitioner had failed to comply with the court-ordered service requirement. Respondent's affidavit asserted that it had not received the document specified in the court order. For his part, the petitioner failed to come forward with facts contradicting the assertion set forth in the respondent's affidavit.

Reviewing these circumstances, the Third Department affirmed the order of dismissal issued by the lower court. "Petitioner did not reply to respondent's motion to dismiss and has not asserted that he was not able to comply with the service requirements. Accordingly, respondent's motion to dismiss based on lack of personal jurisdiction should have been granted."

An incarcerated individual may ask to be excused from the requirement to properly serve state officials, but in *Curran*, the petitioner "[did] not assert[] that he was unable to comply with the service requirement." The lesson here is that a petitioner must inform the court of the reasons for their failure to establish the court's personal jurisdiction over the parties through proper service of the respondent.

It is up to the petitioner to make a convincing argument about their inability to properly serve the opposing party. "It is well settled that an inmate's failure to comply with the service directives set forth in the order to show cause requires dismissal of the petition absent a showing that the prison presented an obstacle to the service requirements." *Matter of Frederick v. Goord*, 20 A.D.3d 652 (3d Dep't 2005).

This is a tall mountain to climb because, as the *Frederick* Court noted, “orders to show cause require strict compliance with their terms.” This is settled law. “The method of service provided for in the order to show cause is jurisdictional in nature and must be strictly complied with.” *Matter of McGreevy v. Simon*, 220 A.D.2d 713 (2d Dep’t 1995) (a case involving an election dispute). In other words, if in an order to show cause, the court directs “service of the signed order by mail on the Attorney General postmarked no later than January 15, 2022,” the petitioner must file and serve an affidavit of service establishing satisfaction of that requirement or risk dismissal of their petition.

The ordinary limitations imposed by prison life will not qualify as a basis for excusing a failure to establish the court’s personal jurisdiction over the parties. Even the fact of incarceration in Special Housing by itself is not enough to excuse non-compliance with court-ordered service requirements. “Although procedural requirements may be relaxed upon a showing that prison presented an obstacle beyond the inmate’s control, we are unpersuaded by petitioner’s contention that the lack of photocopying funds and his confinement in the special housing unit posed such an obstacle.” *Matter of McCorkle v. Beaver*, 16 A.D.3d 715 (3d Dep’t 2005). *See also, Matter of Short v. Goord*, 37 A.D.3d 925 (3d Dep’t 2007) (also holding that SHU confinement does not excuse non-compliance with the service requirement).

Based on this case law, an incarcerated individual who fails to properly serve the respondent because of prison conditions would be well advised to be very specific about the obstacles that prevented proper service.

A petitioner who properly serves one entity but fails to serve another will not be able to show that the obstacles presented by prison life excuse the non-compliance. That is the lesson in a case in which the petitioner timely and properly served the respondent prison superintendent but failed to satisfy that obligation with respect to the Attorney General. *Matter of Perez v. Harper*, 161 A.D.3d 1472 (3d Dep’t 2018). “Accordingly, he [the petitioner] has not demonstrated that imprisonment was an obstacle

to him complying with the service requirements, and Supreme Court properly dismissed the petition.” Status as a *pro se* litigant does not excuse the failure to establish the court’s personal jurisdiction over the respondent. “A *pro se* litigant acquires no greater rights than those of any other litigant....” *Correnti v. Suffolk County District Attorney’s Office*, 34 A.D.3d 578 (2d Dep’t 2006).

Although CPLR 306-b, permits the extension of time for the two deadlines referenced in the statute, it does not similarly excuse the service requirements imposed by a court in an order to show cause. The Third Department dealt with this issue in *State v. Robert C.* 113 A.D.3d 937 (3d Dep’t 2014).

In *Robert C.*, the petitioner argued that the provision allowing the extension of time “upon good cause shown or in the interest of justice” – as provided for in CPLR 306-b – allowed extra time for non-compliance with the service requirements stated in the order to show cause. The Third Department disagreed. “The language of that statute [CPLR 306-b]...only permits such an extension if service is not made within the time period provided for in *that* section. Thus, it does not permit an extension of time for service provided in an order to show cause.”

This interpretation of CPLR 306-b was reiterated in *Matter of Watkins v. New York State Department of Corrections and Community Service*, 159 A.D.3d 1252 (3d Dep’t 2018) (“contrary to petitioner’s contention, CPLR 306-b does not permit an extension of time for service provided in an order to show cause”).

Several practice points emerge. *Pro se* litigants should **diligently** (carefully) comply with service requirements imposed by an order to show cause or be prepared to explain to the court in some detail the obstacles to compliance. And keep in mind that CPLR 306-b does not allow an extension of time when it comes to a deadline for service set by the court in an order to show cause. If the court does not find that prison conditions made timely service impossible (or at least very difficult) there exists no “safety valve” guaranteeing an extension of time for proper service. And without timely proper service on the opposing party, there is no personal jurisdiction over that party and, therefore, no case before the

court. Meanwhile, the time limits imposed by a statute of limitations keep on ticking.

Justin Curran represented himself in this Article 70 proceeding.

Court Rules FRP Appeal Is Moot

In an Article 78 case involving an incarcerated individual's application to participate in the Family Reunion Program (FRP), the Third Department found his appeal to be "moot" and dismissed the request for relief. *Matter of Caldwell v. Smith-Roberts*, 194 A.D.3d 1215 (3d Dep't 2021). Before discussing the facts in *Caldwell*, consider the way the legal profession uses the term "moot" and "mootness."

When a case is dismissed as moot, the court is saying that the plaintiff has not presented the court with a live dispute between two parties. The dispute must not be "hypothetical or abstract" and it must affect "the legal relations of the parties having adverse legal interest." *Parry v. The County of Onondaga*, 2009 WL 4432563 (Sup. Ct. Onondaga Co. 2009). In other words, there must exist an actual legal controversy rather than one that is merely of academic interest.

A good example of a court's application of the mootness doctrine is found in *People ex rel. David v. New York State Division of Parole*, 12 A.D.3d 963 (3d Dep't 2004). Here, after his preliminary hearing on the violation, the petitioner filed an Article 78 challenge. While that action was pending, Mr. David was found guilty at the final revocation hearing. The Article 78 court then ruled that the challenge to the *preliminary* hearing was moot. The mootness doctrine applies because after the violation was sustained at the final revocation proceeding, the habeas petitioner had no real interest in the outcome of the preliminary proceeding.

Another example of the mootness doctrine can be found in *People ex rel. Morrison v. Keyser*, 196 A.D.3d 978 (3d Dep't 2021). Here, a habeas petitioner asked the court to consider the risk presented to him by COVID and to order his release from the Sullivan Correctional Facility (SCF), whose superintendent was named as the respondent. However, while this litigation was pending, DOCCS

transferred the habeas petitioner to another prison. Because of the transfer, the Third Department dismissed the petition. "As petitioner is no longer in the custody of SCF's superintendent, who is the sole named respondent, or subject to the conditions complained of at SCF, the appeal is moot and must be dismissed."

Returning now to *Caldwell*, in February 2018 the petitioner, in an administrative proceeding, unsuccessfully applied for the FRP. *See* 7 NYCRR 220.2 (governing the application for FRP participation). Supreme Court, Albany County, dismissed the petitioner's Article 78 petition. While the appeal of the dismissal was pending in the Appellate Division, the petitioner filed a second FRP application. The Third Department held that there was no reason for the Court to decide the merits of the first application. "Petitioner's subsequent FRP application renders his appeal of the denial of his February 2018 application moot and...this appeal must be dismissed."

The *Caldwell* case is right in line with Third Department precedent in FRP cases. In *Matter of Shapard v. Annucci*, 177 A.D.3d 1048 (3d Dep't 2019), the Court found that "the denial of the 2015 FRP application [the subject of the proceeding under review] is rendered moot by the subsequent 2017 FRP application...."

The reasoning relied upon by the Third Department in *Caldwell* was also relied upon by the Fourth Department in *Matter of Romano v. Annucci*, 196 A.D.3d 1176 (4th Dep't 2021). In *Romano*, the Article 78 petitioner asked the Court to annul the Parole Board's denial of his application for release to parole supervision. While that litigation was pending, the petitioner reappeared before the Parole Board and was again denied release. In view of the *second* application for parole, the Court "dismissed as moot" the litigation relating to the *first* application.

Exceptions to the mootness doctrine may lead to consideration of the challenged proceedings where the conditions challenged by the incarcerated individual are of such short duration that courts in the ordinary course of litigation will not have an opportunity to address the merits of the issues raised.

“Courts invoke the exception to the mootness doctrine to consider substantial and novel issues that are likely to be repeated and will typically evade review.” *Matter of Decarr v. Wolcott*, 197 A.D.3d 904 (4th Dep’t 2021).

An exception to the mootness doctrine can be found in *People ex rel. Johnson v. Superintendent, Adirondack Correctional Facility*, 36 N.Y.3d 187 (2020), a case involving an individual’s challenge to the practice of incarcerating level three sex offenders while they remain on a waiting list for approved housing. The respondent DOCCS official argued that the habeas petition was moot because the petitioner had been released from the Adirondack Correctional Facility.

Finding that the issue raised by the petitioner will “typically evade our review,” the Court held that the constitutional issue presented an exception to the mootness doctrine. Given that Petitioner Johnson had been released to parole supervision, the Court converted his lawsuit from a habeas petition to an action for a declaratory judgment. Having declined to dismiss the case as moot, the Court considered the merits of the petitioner’s claim that the temporary confinement of sex offenders in his situation violated the constitution. The Court of Appeals found no constitutional violation.

Moving from the question of mootness to issues involving the merits of an FRP application, note that the denial of an application will be upheld if prison officials have a “rational basis” for the decision, as the *Shapard* Court made clear. In *Shepard*, the Court concluded that an incarcerated individual’s disciplinary history and criminal record could very well provide a rational basis for denying an FRP application.

As noted above, the procedure governing an incarcerated individual’s application for FRP is set forth in 7 NYCRR 220.2. Individuals may apply if their facility offers this program, but not if they have been “denied participation by the central office.” If participation has been denied on appeal, prisoners may re-apply after two years. “Once the incarcerated individual completes the two-year period of

ineligibility, an FRP application can be submitted, if the individual meets the basic eligibility standards.”

Ricky Caldwell represented himself in this Article 78 proceeding.

IMMIGRATION MATTERS

By Nicholas Phillips, Esq.

For several years, immigration courts and the federal courts of appeal have struggled to determine whether a conviction for petit larceny under New York Penal Law (“NYPL”) §155.25 is a “crime involving moral turpitude” (commonly referred to as a “CIMT”) for immigration purposes. This column summarizes that history before recounting two important new developments in the Second Circuit and the New York Court of Appeals.

First, some statutory background is required. Under the Immigration and Nationality Act (“INA”) – the federal statute which governs immigration law – criminal convictions can have adverse consequences in several different ways. For example, certain kinds of convictions may render a noncitizen deportable, prohibit a noncitizen from applying for benefits, or bar a noncitizen from returning to the United States after departing. One kind of conviction with adverse consequences is a CIMT, which is a bar to entering the United States under 8 U.S.C. §1182, and which can also render a noncitizen deportable under certain circumstances set forth by 8 U.S.C. §1227.

The INA does not contain a precise definition of a CIMT, so the task of interpreting the meaning of “moral turpitude” has generally fallen to the Board of Immigration Appeals (“BIA”), the appellate body which presides over the immigration court system. The BIA has stated

that to be a CIMT, “an offense must have two essential elements: a culpable mental state and reprehensible conduct.” *Matter of Ortega-Lopez*, 27 I. & N. Dec. 382, 385 (BIA 2018). A culpable mental state involves “conduct committed with some degree of **scienter** [awareness], either specific intent, deliberateness, willfulness, or recklessness.” *Matter of Louissaint*, 24 I. & N. Dec. 754, 757 (BIA 2009). Conduct is “reprehensible” if it is “inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general.” *Matter of Jimenez-Cedillo*, 27 I. & N. Dec. 1, 3 (BIA 2017).

With respect to theft convictions like petit larceny, the BIA’s analysis has changed considerably over the years. In a 1973 case called *Matter of Grazley*, 14 I. & N. Dec. 330, 333 (BIA 1973), the BIA reviewed a Canada theft conviction and held that “a conviction for theft is considered to involve moral turpitude *only when a permanent taking is intended.*” (emphasis added). In 2016, however, in a case called *Matter of Diaz-Lizarraga*, 26 I. & N. Dec. 847, 853 (BIA 2016), the BIA substantially expanded its definition of a theft CIMT and concluded that “a theft offense is a crime involving moral turpitude if it involves an intent to deprive the owner of his property either permanently or under circumstances where the owner’s property rights are substantially eroded.” The BIA came to this revised conclusion because “criminal law has evolved significantly in the seven decades since we first addressed this issue. In most jurisdictions, legislation and judicial opinions have refined the distinction between substantial and de minimis takings to such an extent that the traditional dichotomy of permanent versus temporary takings has become **anachronistic** [out-dated].” *Id.* at 851.

The BIA’s vacillating definition of a theft CIMT has led to considerable confusion, as best illustrated by the removal proceedings of a New York resident named Clement Obeya. Mr. Obeya entered the United States as a lawful permanent

resident in 2004 and in 2008, he was convicted of petit larceny under NYPL §155.25, for which he was sentenced to three years’ probation. Shortly after his conviction, the Department of Homeland Security (“DHS”) initiated removal proceedings against Mr. Obeya on the grounds that he had committed a CIMT within 5 years of entering the country. In immigration court, he argued that his conviction was not a CIMT because New York criminalizes both permanent *and* impermanent takings, meaning the statute is broader than the federal definition. An immigration judge disagreed and ordered him deported. That decision was eventually reversed by the Second Circuit, which found that the immigration agency had ignored its own precedent, which clearly stated that theft CIMTs require permanent takings. *See Obeya v. Holder*, 572 F. App’x 34 (2d Cir. 2014) (unpublished).

After Mr. Obeya’s case was sent back to the immigration agency, the BIA issued *Diaz-Lizarraga*, and the agency again ordered him removed, relying on a New York Court of Appeals case which stated that larceny requires proof of an intent “to exert permanent or virtually permanent control over the property taken.” *People v. Medina*, 18 N.Y.3d 98, 105 (N.Y. Ct. App. 2011). Mr. Obeya again petitioned for review by the Second Circuit, which again reversed the agency’s deportation order. *See Obeya v. Sessions*, 884 F.3d 442 (2d Cir. 2018). In so holding, the Court concluded that *Diaz-Lizarraga* was a new rule which did not apply retroactively, so Mr. Obeya’s conviction should have been judged under the old pre-*Diaz-Lizarraga* standard. Applying that standard, the Court found that petit larceny applies to “virtually permanent” takings, which are less than “permanent takings,” and so the conviction is not a CIMT.

In June 2021, in *Ferreiras Veloz v. Garland*, 999 F.3d 798 (2d Cir. 2021), the Second Circuit was presented with the question left undecided by *Obeya*, namely, whether New York petit larceny

is a CIMT under the *Diaz-Lizarraga* standard. Once again, the Court declined to decide the issue. In a decision authored by Judge Calabresi and joined by Judge Katzmann, the Court reviewed New York caselaw and found conflicting evidence as to whether New York's statute encompasses conduct as minimal as "stealing something with the intent of putting it back the next day." *Id.* at 803. The Court therefore decided that the appropriate course was to certify the question to the New York Court of Appeals, so that New York's highest court could decide the question in the first instance. Judge Sullivan dissented, finding that "[i]n my view, the majority opinion takes a straightforward statutory provision that New York's highest court has repeatedly interpreted and asks it to consider the statute again. Because such a certification is unnecessary and, worse, an imposition on the New York Court of Appeals, I respectfully dissent." *Id.* at 805.

It appears that the New York Court of Appeals agreed with Judge Sullivan, because on September 9, 2021, the New York Court of Appeals took the unusual step of declining to decide the certified question. *See Veloz v. Garland*, 37 N.Y.3d 1006 (2021) ("Certification of question by the United States Court of Appeals for the Second Circuit, pursuant to section 500.27 of this Court's Rules of Practice, in the particular circumstances of this individual matter, respectfully declined."). The case will therefore be sent back to the Second Circuit for a new decision, which will hopefully end the confusion and resolve once and for all whether a New York petit larceny conviction constitutes a CIMT.

WHAT DID YOU LEARN?

By Brad Rudin, Esq.

- 1) **In the *Vasquez* case, the court held that where a petitioner or plaintiff fails to verify their pleadings, the court:**
 - a. must dismiss the lawsuit with prejudice.
 - b. must consider the failure as a jurisdictional defect.
 - c. cannot consider prejudice to the respondent or the defendant
 - d. may accept an amended claim curing the defect.

- 2) **A petitioner can defeat a motion to dismiss for failure to properly serve the respondent by:**
 - a. submitting a sworn statement that 1) the petitioner mailed the papers to the respondent and 2) the court knows this because the respondent moved to dismiss.
 - b. submitting a sworn statement that the petitioner mailed the papers to the respondent accompanied by supporting postal service documentation showing delivery.
 - c. submitting an unsworn statement of service accompanied by the postal service documentation showing delivery.
 - d. E-mailing the papers to the respondent after receiving notice of the motion to dismiss and submitting a sworn statement of service via email.

3) When an incarcerated individual claims retaliation by the author of a misbehavior report, a court will most likely reverse a determination of guilt when the claim of retaliation:

- a. is not established by a preponderance of the evidence.
- b. is not established beyond a reasonable doubt.
- c. was not considered by the hearing officer.
- d. has received some consideration by the hearing officer.

4) When a witness who said they would testify is reported to have changed their mind about testifying, the right to call witnesses at disciplinary hearings requires the hearing officer to:

- a. personally determine the reasons for the witness' refusal to testify.
- b. issue a misbehavior report if the witness persists in refusing to testify.
- c. ask a correction officer to give the witness a refusal form to fill out.
- d. postpone the hearing until the witness agrees to testify.

5) A releasee on community supervision cannot be reincarcerated for:

- a. committing a new felony.
- b. committing a misdemeanor.
- c. fraternizing with someone who has criminal record
- d. absconding.

6) A court will order a determination annulled and charges expunged when it finds:

- a. the hearing was untimely and the charged individual was not prejudiced.
- b. a DOCCS employee who witnessed the rule violation failed to endorse the misbehavior report.

- c. the determination of guilt is not supported by substantial evidence.
- d. the hearing officer took confidential testimony from the author of the misbehavior report with respect to the reliability and credibility of a confidential informant.

7) A violation of an incarcerated individual's constitutional right to call witnesses will be found where the hearing officer:

- a. fails to follow all of the applicable rules governing the calling of requested witnesses.
- b. makes no effort to arrange for the testimony of a requested witness.
- c. bars a redundant witness from testifying.
- d. bars a witness from presenting testimony irrelevant to the disciplinary charge.

8) When starting a lawsuit using an order to show cause, the petitioner must serve the respondent on or before:

- a. the date set by the court in the order to show cause.
- b. the deadline set by the Civil Practice Law and Rules.
- c. the deadline set by the New York Code of Rules and Regulations.
- d. the deadline set in a stipulation between the parties.

9) Hearing Officers are required to consider evidence if:

- a. the evidence has no relationship to the charges.
- b. the evidence has the potential to affect the outcome of the hearing.
- c. the charged individual sends the hearing officer evidence after the hearing ends.
- d. The charged individual's spouse sends the evidence to the Superintendent before the hearing ends.

10) An incarcerated individual who is released to community supervision can accrue Earned Time Credits at the rate of:

- a. 60 days a month.
- b. 90 days a month.
- c. 15 days a month.
- d. 30 days a month.

Answers

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

Notices

Your Right to a Education



- If you have a learning disability and are under 22 years old, or
- If you are an adult and have a learning disability, or
- If you need a GED, or
- If you 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

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

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