

Pro Se

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IG CONCLUDES DOCCS MISHANDLED DRUG TESTING IN 2019

On January 4, 2022, New York State Inspector General (IG) Lucy Lang held a press conference to announce the results of the IG investigation into the 2019 DOCCS drug testing program. At the IG's invitation, PLS Executive Director Karen Murtagh and Bianca Tylek, Executive Director of Worth Rises, also attended and spoke at the press conference.

While lauding DOCCS for cooperating in the investigation, IG Lang found that the drug testing program had a been a failure and that over 1,500 unjust hearings based on positive test results for buprenorphine use, and an unspecified number of hearings for synthetic marijuana use, had been reversed. This did not, IG Lang stated, remedy the harm caused by DOCCS' failure to properly develop a drug testing program and to train and supervise the staff who performed the tests. PLS Executive Director Murtagh reiterated this point, stressing that the impact of the wrongfully imposed penalties was difficult to overstate. "The psychological and physical damage caused by solitary confinement, the loss of family visitation, the lack of proper programming, lost work release and educational opportunities, all of which combat recidivism, adds to the ledger for which we as a society need to take account."

The following are among the facts which the IG revealed in her report. As a result of the inadequate drug testing procedures, between January and August 19, 2019, 1,632 incarcerated New Yorkers were unjustly punished for using buprenorphine. On September 10, 2019, the related hearings were reversed and over the next five weeks the 140 individuals who remained in restrictive custody due only to those the unreliable drug tests were released to general confinement. On December 31, 2019, flaws similar to those in testing

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Solitary Confinement in New York State: A Look Back and A Look Ahead

A Message from the Executive Director, Karen L. Murtagh

In 1821, 80 people were placed in solitary confinement at Auburn prison in upstate New York as an experiment to test “punitive” versus “rehabilitative” approaches to prison reform. The experiment drew world-wide attention and, in 1833, French political scientists Alexis de Tocqueville and Gustave de Beaumont toured the facility and described their experience this way:

“In order to reform them, [the incarcerated individuals] had been submitted to complete isolation; but this absolute solitude, if nothing interrupts it, is beyond the strength of man; it destroys the criminal without intermission and without pity; it does not reform, it kills.”

These dire warnings were buttressed by earlier admonitions from Benjamin Franklin in 1787 and later ones by Charles Dickens following his visit to the United States in 1842.

Tocqueville and Beaumont also noted that “this system, fatal to the health of the criminals, was likewise inefficient in producing their reform” since, within a short time of their release, most had committed new offenses. These warnings led to the abandonment of solitary confinement at Auburn and other prisons within a few years. Unfortunately, prisons in America slowly returned to the practice of confining large numbers of individuals in solitary confinement. The reasons were numerous, but were all grounded in the dramatic rise in our rate of incarceration, which ultimately made America the most incarcerative country in the world (per capita).

The causes for our increased prison population stemmed from a number of factors, culminating in the late 1970s when the United States largely abandoned the notion of rehabilitation in prison, poorly planned the release of institutionalized people with mental illness, increased the criminalization of many forms of human behavior, lengthened sentences and diminished opportunities for parole.

The need to better manage an increasingly large and potentially volatile prison population took center stage and the result, predictably unenlightened, ushered in a return to old ways. The concept of the “supermax” prison sprang from these roots as the answer to how best to protect “keepers and kept” from the “worst of the worst.” Sadly, and again predictably, solitary confinement became a control strategy of first resort in most of the country’s prisons and jails – and not just for the “worst of the worst.”

Incarcerated people were placed in isolation – usually 23 out of 24 hours a day – for months or years, the vast majority for non-violent behavior for which prison officials served as prosecutor, judge, jury and often witnesses, in largely unmonitored proceedings held in the cloistered environs of the prisons themselves in the absence of counsel for the accused.

Even the nomenclature changed: “administrative segregation” (or “ad seg”), “restrictive housing” and “special housing unit” took the place of the “hole”, the “box”, or “solitary” as the words of the day.

From 1995 to 2000 alone, the number of individuals held in solitary increased by 40 percent. Five years later, the U.S. Bureau of Justice Statistics found that more than 81,622 people were held in “restricted housing” within the country’s state and federal prisons.

Since 2005, much has been researched and written about the effects of solitary confinement on the human condition and the prospects for successful reintegration upon release from it. The evidence is unassailable and best summed up in the following excerpt from a collection of first-person accounts of those held in solitary confinement:

“Considering the damage it wreaks upon body and soul, it is hardly surprising that solitary confinement is associated with higher recidivism rates, particularly when people are released back into the community directly from solitary confinement ... (and) difficulties reintegrating into society—being in crowded places, relating to other people, or simply being touched.”

Jean Casella and James Ridgeway | Introduction to Hell Is a Very Small Place: Voices from Solitary Confinement | The New Press | February 2016

Other works tell a similar story: the 2010 Vera Institute of Justice’s “Segregation Reduction Project”; the 2011 launch of the American Civil Liberties Union’s “Stop Solitary” campaign; the 2011 initiative of the National Religious Coalition Against Torture (NRCAT) which focused on torture in U.S. prisons and jails; and the 2012 report of the New York Civil Liberties Union which laid the groundwork for reform in NYS (see “Boxed In: The True Cost of Extreme Isolation in New York’s Prisons.”)

Of particular note is the 2011 work of Juan E. Méndez, the United Nations Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, who produced a thorough report on the use of solitary confinement around the world. He recommended capping the use of solitary confinement at 15 days and requested that the U.S. government conduct fact-finding visits to all of its state and federal supermax prisons. His requests were then denied or ignored.

I have been immersed in these issues for so long that I was surprised to learn how little most of my contemporaries – inside and outside of the corrections field – knew of the full magnitude of the problem. I have heard it said, and now totally agree, that “solitary confinement was the most pressing domestic human rights crisis that most Americans had never heard of.”

Thanks largely to the work of Mr. Mendez, I am pleased to report that, since his seminal report in 2011, the need for solitary confinement reform has entered the collective consciousness of the country and we are all the better for it.

Against this backdrop, the New York State Bar Association had good “bones” on which to build support for its 2013 House of Delegates resolution restricting the use of solitary confinement and adopting the 15-day cap recommended by the Special Rapporteur. I served on the Bar’s Civil Rights Committee that drafted the report and resolution, presented the matter to the House of Delegates and shepherded its adoption, and was very proud to be a part of that effort.

Since that time, the case against solitary confinement has only grown, and various pieces of legislation have been introduced throughout the country placing limits on its use. Just last year, New York State enacted into law the Humane Alternatives to Long-Term Solitary Confinement Act (the “HALT” Act) that, among other things, adopted the 15-day cap on solitary confinement. The HALT Act will go into full effect this April.

Many “luminaries” also weighed in on the issue, including Pope Francis, former Supreme Court Justice Anthony Kennedy, former U.S. Senator John McCain and former President Barack Obama. The former President, in a 2015 speech on criminal justice reform, ordered a “review of the overuse of solitary confinement across American prisons” stating that “social science shows that an environment like that is often more likely to make inmates more alienated, more hostile, potentially more violent. Do we really think it makes sense to lock so many people alone in tiny cells for 23 hours a day for months, sometime for years at a time? That is not going to make us safer.”

But for all the progress, much work remains. Tens of thousands of incarcerated individuals remain in solitary confinement throughout the country. And, here in NYS, an effort is already underway to “claw back” provisions of the “HALT” Act.

The “HALT” Act is opposed by the union representing correctional officers (NYSCOPBA) and, in a federal lawsuit filed last year, it claimed that “HALT” violated their members’ 14th Amendment rights by failing to guarantee them a workplace safe from dangerous conditions. Union officials claim that, absent the use of solitary confinement, there is no fear of punishment among those incarcerated and that, as a result of this legislation, inmate violence against corrections officers has already grown.

Admittedly, claims in lawsuits such as this are difficult to validate. Solitary units, be they in state prisons, local jails or federal “supermax” facilities, have been called “virtual black holes”, where data is largely off limits to the public and the press. What can be said with certainty is this: the “HALT” legislation won’t take effect until April of this year and will take time to fully implement. Hence, claims that “HALT” is already responsible for an increase in violence are specious at best. Like many old tropes, these claims sound familiar but, upon closer inspection, fail to ring true. Measures to safeguard “keepers and kept” will be adopted by the Department of Corrections and Community Supervision (DOCCS) along the way, and abandoning a long-fought-for reform before it even begins is foolhardy governance at its core.

Sadly, this is but another example of what routinely happens when there exist major disagreements over public policy – differences which too often break down on ideological and political lines.

For example, those agreeing with a particular public policy (e.g., the death penalty, gun ownership, “three strikes” sentencing, solitary confinement, etc.) are quick to deflect criticism (for a wrongful conviction, unjust sentence, mass shooting, etc.) as an exception worth the price in order to maintain a policy they deem better for the public good.

Those disagreeing with a particular public policy (e.g., bail reform, parole reform, Rockefeller Drug reform, solitary confinement reform, etc.), are equally quick to “Hortonize” any bad act that can attach to it – no matter it’s comparative rarity – and call for abandonment of the policy despite its merit, the singularity and circumstances of the act or the underlying injustices sought to be corrected by the policy itself.

It is axiomatic that critics and supporters of any public policy, especially with regard to criminal justice, can find justification for their arguments either to stay, or change, the course. But public policy shouldn’t be made at the end of a yo-yo string, and we should resist the temptation to allow an “exception to swallow a rule” if a policy is sound and just and its deficits are greatly outweighed by its benefits.

I would argue that the public policy supporting strict reductions in the use of solitary confinement is as sound and “data-rich” as it gets. The need for management tools in prison to safeguard both “keepers and kept” from truly dangerous incarcerated individuals can be more than adequately addressed by DOCCS’ policies that remove and separate those individuals from general population while maintaining rehabilitative programming and avoiding the deleterious and irreversible consequences of solitary confinement.

If, as Dr. King said, “the arc of the moral universe . . . bends toward justice,” then we must insist that reforms that correct past injustices are not abandoned in the absence of overwhelming evidence of a need to do so. We, as a society that has recognized the dangers of solitary confinement to both the individual and community, should never again allow a retreat to policies based on fear and frustration, especially when armed with viable alternatives.

As New Yorkers, we are better and smarter than that.

The echoes and lessons of the past – the voices of Franklin, Tocqueville, Beaumont and Dickens – form the basis of over 200 years of evidence to prove that solitary confinement is a public policy that diminishes us all.

We need only listen.

. . . *Continued from Page 1*

for buprenorphine were determined to also have affected testing for synthetic cannabinoids and in accordance with instructions from the New York State Inspector General, DOCCS reversed all 2019 synthetic cannabinoid use hearings that relied on urinalysis testing.

How did this situation come about? It began in January 2019, when DOCCS introduced a new drug testing device – the Indiko Plus – to be used at all prisons. The manufacturer’s instructions for the device clearly state that the test results are only preliminary and must be confirmed by a more specific alternative chemical test. Alternative tests include gas chromatography – mass spectrometry (GC-MS) and liquid chromatography – tandem mass spectrometry. DOCCS ignored the confirmatory test requirement and disciplined incarcerated individuals based on positive results from two preliminary tests. Because the results of the preliminary tests were extremely unreliable, many individuals who had never tested positive for drugs were charged and found guilty of having used buprenorphine.

As increasing number of incarcerated people were falsely accused of having used drugs, many reached out to PLS. In June 2019, PLS wrote DOCCS, reporting that PLS had 4 reports of false positive drug tests from incarcerated women at Albion. None of the women had a history of drug use in prison and, PLS pointed out, all of the women knew that they were to be tested, so they were unlikely to have engaged in drug use. Thus, the letter concluded, either the devices were malfunctioning or the results were affected by operator error.

PLS wrote DOCCS again in July 2019 reporting that it had received numerous additional complaints of false positive tests from incarcerated individuals at seven DOCCS facilities. Again, many of the individuals had little or no prior history of substance abuse or drug related misconduct. In this letter, PLS asked DOCCS to look into whether the drug testing devices had an operation issue or technical fault. In addition, PLS reminded DOCCS of the detrimental consequences of false positive drug test results, including that people stop taking prescribed medical

and mental health medications out of fear that the medications were causing the false positives.

In the July letter, PLS asked DOCCS to initiate an investigation into the false positive issue and warned that if DOCCS took no action to address this matter, it would be unnecessarily exposing incarcerated individuals to undeserved punitive sanctions which adversely affects their disciplinary records and impacts consideration of their applications for parole release.

Not having received a response from DOCCS, in September, PLS wrote a final letter, advising DOCCS of numerous additional reports of false positive drug tests and putting DOCCS on notice that it must deal with the issue of unreliable drug testing immediately or PLS would be forced to take appropriate action.

In November, not having received a response from DOCCS, PLS and Emery Celli Abady Ward & Maazel, LLP, filed a class action lawsuit known as *Steele Warrick v. Microgenics and Thermo Fisher* in the federal district court for the Eastern District of New York. The complaint alleges that due to cross-reactivity issues – that is where an innocuous substance or prescribed medication reacts with the analyzer (a chemical) to produce a false positive result for a prohibited drug – hundreds of incarcerated New Yorkers tested positive for drugs they had not actually taken. The complaint further alleges that at prison disciplinary hearings, the defendants’ representatives testified that the Indiko Plus device was reliable, despite knowing it was manufactured to be used only as a preliminary screening tool and positive test results from the Indiko Plus device require confirmatory lab testing to corroborate the positive results. The lawsuit seeks damages for the class members for the harm caused by the wrongful punishment.

After investigating DOCCS’ 2019 Drug Testing Program, the IG concluded that in July and August 2019, there were several occasions on which either DOCCS and/or Microgenics/Thermo Fisher retested the urine samples that, based on analysis by the Indiko Plus device, were positive for drug use. In a large percentage of these cases, the original result

was found to be a false positive. Nonetheless, after determining that the result was unreliable, DOCCS did not immediately take steps to reverse these individuals' hearings and restore them to their prior status.

The IG also found that:

- In spite of instructions that positive urinalysis testing results obtained using the Indiko Plus drug testing device were preliminary and had to be confirmed by a more specific alternative drug testing method, DOCCS failed to confirm the preliminary test results and penalized incarcerated individuals on the basis of unreliable results;
- DOCCS failed to take prompt corrective action after discovering in August 2019 that five incarcerated individuals who had tested positive for buprenorphine had no detectable buprenorphine in their urine.
- Despite learning in August 2019 that Community Supervision, a Division of DOCCS, does not act against parolees unless either the parolee admits to drug use or their preliminary positive test results are confirmed by an outside laboratory using a more specific alternative method, DOCCS took no action to revise its drug testing procedures.

The IG's report was also critical of Microgenics role in failing to run a reliable drug testing program. Among the more damning findings was that Microgenics representatives "provided misleading and inconsistent statements during disciplinary hearings for individuals incarcerated with DOCCS." With respect to this, the IG found that:

- Even where incarcerated individuals pointed out at their hearings that confirmation testing was mandated by the instructions provided with all Microgenics tests, Microgenics representatives failed to verify that positive preliminary drug screening test results had to be confirmed by a more specific alternative method.

- During an interview with the IG, a Microgenics representative stated that confirmation testing was not required.
- The same Microgenics representative stated that they had been instructed that DOCCS does not perform confirmatory testing and therefore such testing should not be discussed by the representatives when they testify at DOCCS disciplinary hearings.

DOCCS terminated the contract with Microgenics on January 15, 2021. In February 2021, DOCCS resumed its Incarcerated Individual Drug Testing Program. The program now requires that all initial positive test results be sent to an outside laboratory for confirmation testing.

News & Notes

Settlement Limits Parole Restrictions on the Use of Social Media and Computers

We are pleased to report that attorneys from the New York Civil Liberties Union, the Rutgers Law School Constitutional Rights Clinic, and Prisoners' Legal Services of New York have reached a settlement with the state in *Jones, et. al v. Stanford and Annucci*.

The case was filed in March 2020, to challenge two related parole release conditions imposed on sex offenders. The first challenged condition is the mandatory social media ban set forth in Executive Law §259-c(15). Under that provision, if a person is serving a sentence for a sex offense, and the victim was under 18 years of age, or the individual is a Level 3 sex offender, or if the internet was used to facilitate the crime, the Parole Board is required to impose a release condition, known as "E-stop," that bans the individual from accessing commercial social media websites. The other condition at issue arises from Directive 9202. That Directive requires DOCCS'

staff to impose on virtually all sex offenders a release condition that, in the absence of written permission from the parole officer, bars:

- 1) possession or use of computers, computer devices and electronic storage devices, or
- 2) accessing the internet.

As previously explained in *Pro Se*, in 2020 after the complaint was filed, plaintiffs' attorneys filed a motion for a preliminary injunction, asking the court to **enjoin** (bar) the state from imposing the E-stop social media ban, while the case proceeds. In September 2020, the Court issued a preliminary injunction. In granting the preliminary injunction the Court relied heavily on the decision in *Packingham v. North Carolina*, 137 S.Ct. 1730 (2017), where the Supreme Court found that a North Carolina provision almost identical to New York's E-Stop social media ban was in violation of the First Amendment. The Supreme Court recognized in *Packingham* that the internet and social media are at the core of First Amendment free speech in the twenty-first century, and therefore held that restrictions on social media access must be narrowly tailored to further the state's compelling interests. Despite the *Packingham* decision, New York parole officials continued to impose the E-Stop social media ban until September 2020 when the preliminary injunction was issued in *Jones*.

In its preliminary injunction decision, the *Jones* Court held that imposing the social media ban on a "wholesale" basis, on broad categories of sex offenders who had not used the internet to facilitate crimes, violates the First Amendment. The Court did, however, permit DOCCS to impose the social media prohibition on people who previously had used the internet to facilitate crimes, or where there are specific circumstances that suggest a person might use social media to engage in sex offenses. We have been told that DOCCS has changed its policies to comply with the preliminary injunction and is no longer imposing the social media ban on sex offenders on a "wholesale" basis.

The state did not appeal the preliminary injunction decision. Soon after that decision was issued, the state indicated it would work with plaintiffs' lawyers to negotiate a permanent settlement for both parts of

the case, the social media ban, and the restriction on computers and the internet. The settlement negotiation was difficult and time-consuming. Since the Court, in its preliminary injunction decision, found that DOCCS properly can impose a social media ban where warranted by specific circumstances, the key to the settlement was agreeing on the circumstances in which DOCCS can use discretion to impose social media and internet bans. The settlement has now been completed.

One important piece of the settlement is that the preliminary injunction will be converted into a permanent injunction. That means the statutory mandatory social media ban will no longer be imposed, but the Parole Board and parole officers may impose a discretionary social media ban on individual sex offenders who have used the internet to facilitate past crimes, or, "where there are articulable registrant-specific circumstances that: 1) raise a legitimate and particularized concern about the Registrant's risk of reoffending by using social media, and/or 2) indicate that restrictions on a Registrant's access to social media will be the most suitable, least restrictive means of ensuring compliance with a specific goal of rehabilitation. Any such restrictions should be narrowly tailored and the least restrictive method of promoting these goals." In this context, "Registrant" refers to a person required to register under the Sex Offender Registration Act (SORA).

The settlement applies the same standard to the condition that prohibits possession of computers and access to the internet. Under the settlement, the blanket ban on possession of computers and access to the internet required by Directive 9202 will no longer be imposed or enforced. Instead, parole officials will have discretionary authority to impose computer and internet restrictions on sex offenders who have used the internet to facilitate crimes, and "where there are articulable registrant-specific circumstances that: 1) raise a legitimate and particularized concern about the Registrant's risk of reoffending by using social media, and/or 2) indicate that restrictions on a Registrant's access to social media will be the most suitable, least restrictive means of ensuring compliance with a specific goal of rehabilitation. Any such restrictions should be

narrowly tailored and the least restrictive method of promoting these goals.” Sex offenders who have not used the internet to facilitate crimes will be presumed to have internet access, and will no longer need prior approval from a parole officer.

In cases where, based on the new discretionary criteria, social media or internet restrictions are imposed, those restrictions can be appealed through the Parole Grievance Program set forth in Directive 9402. However, the deadline for filing a Parole Grievance has been modified for purposes of challenging internet or social media restrictions imposed pursuant to the *Jones* settlement. Pursuant to Directive 9401(VI)(A)(2), a Parole Grievance must be filed, with the senior parole officer, within 30 days of the “alleged incident.” Under the terms of the settlement, the phrase “alleged incident” “shall mean either when the Registrant received the written notification of the restriction from their parole officer or when they requested a modification of the restriction and were actually or constructively denied.” Running the 30-day deadline from when the condition was imposed, or from when the individual requested a modification of the condition and was denied, ensures that people will be able to challenge internet restrictions through the Parole Grievance process, and will not be time-barred by the 30-day Parole Grievance deadline.

Parole Grievances that challenge social media or internet conditions will be handled through the provision on emergency grievances set forth at Directive 9204(VI)(B)(4). Under that section the senior parole officer is required to forward the grievance to the Bureau Chief within 24 hours of receipt, and the Bureau Chief is required to respond “immediately.” Treating internet and social media grievances as emergency grievances ensures that such grievances are treated seriously and promptly.

The Parole Grievance process will give people a way to challenge social media, computer, and internet restrictions. If the Parole Grievance process is completed, or exhausted, and the condition remains in effect, a person would be able to challenge the condition by filing an Article 78 in state court. When such a case gets to court, the court will be able to apply the standard set forth in the settlement, to determine whether the condition is proper.

The settlement agreement was signed or “so-ordered” by Judge Raymond Dearie on January 21, 2022. The settlement will become effective 120 days after it was signed by Judge Dearie. As part of the settlement DOCCS has agreed to provide training to parole officers and other relevant staff on sex offenders’ First Amendment rights to access the internet and social media, and on the *Jones* settlement. The settlement also requires DOCCS to provide a series of reports to plaintiffs’ lawyers to document its compliance with the settlement.

The *Jones* settlement precludes DOCCS from the wholesale imposition of social media, computer, or internet restrictions on people convicted of sex offenses. However, DOCCS will be able to impose similar restrictions, in its discretion, based on the criteria in the settlement. Our hope is that the new discretionary conditions will be only rarely imposed.

Steele Warrick v. Microgenics Urinalysis Class Action Update

As previously reported in *Pro Se*, in January 2019, DOCCS began using a new urinalysis drug testing device in New York State prisons. The device was called the Indiko Plus urinalysis analyzer (Indiko Plus). DOCCS soon discovered that the test results were unreliable. Due to the unreliability, in January 2020 DOCCS reversed all 2019 disciplinary dispositions for drug use where an Indiko Plus urinalysis test result was positive.

Prisoners’ Legal Services of New York (PLS), working with the law firm of Emery Celli Brinckerhoff Abady Ward & Maazel (“Emery Celli”) then filed a putative (proposed) class action lawsuit, in November 2019. Known as *Nadezda Steele-Warrick v. Microgenics Corporation and Thermo-Fischer Scientific, Inc.*, the lawsuit alleged negligence claims against the companies that provided DOCCS with the Indiko Plus. Shortly after filing, the defendants moved to dismiss the lawsuit and to **strike** (remove) the class action allegations.

In our last update, we reported that in March 2021, the Court issued a decision denying defendants’ motions to dismiss the lawsuit and to strike the class action allegations. In April 2021, PLS and Emery

Celli amended the lawsuit to include Section 1983 claims against the defendants. As amended, in addition to the prior allegations of negligence, the complaint now alleges that the defendants' conduct violated the 8th Amendment rights of incarcerated persons to be free from cruel and unusual punishment as well as their 14th Amendment rights to due process of law. Put another way, the new claims allege that the defendants were deliberately indifferent to the risk that the Indiko Plus would lead to false positive test results and to the resulting harm to the incarcerated population – namely that individuals were subjected to unjustified disciplinary sanctions.

In August 2021, the defendants moved to dismiss the Section 1983 claims from the amended complaint. PLS and Emery Celli opposed the motions. As of February 17, 2022, the Court had not decided the defendants' motions.

While the motions to dismiss were pending, in January 2022, the New York State Inspector General (IG) released the results of her office's investigation of DOCCS' use of the Indiko Plus device. The report found that various DOCCS officials and Microgenics employees planned to use the Indiko Plus despite the risk of it producing false positive results, which ultimately led to hundreds of people being disciplined without an adequate legal basis.

Following the release of this report and its profoundly significant findings, in February 2022, PLS and Emery Celli moved to amend the complaint to add senior DOCCS employees as defendants. In addition to the prior claims, the proposed amended complaint added allegations that supervising DOCCS staff, despite lacking the scientific and legal background to do so, decided to use the Indiko Plus without confirmatory lab testing. This decision, the proposed amended complaint alleges, resulted in the unwarranted imposition of disciplinary punishment to many incarcerated persons, thereby violating their 8th and 14th Amendment rights. Neither the additional DOCCS defendants nor Microgenics and Thermo-Fischer have yet responded to the latest motion to amend the complaint.

Updates on the Status of the Steele-Warrick

PLS continues to receive many inquiries about the status of the *Steele-Warrick* case. Unfortunately, since the unreliable drug testing affected over a thousand individuals, we are unable to respond to letters or phone calls about the status of the case. Here are answers to some of the most common questions.

At this time:

- **There is no defined class;**
- **You are not a party to the action; and**
- **We do not have the resources to respond to individual inquiries regarding the status of the case.**

As soon as the Court decides whether to grant class action status and defines the class we will report the development in *Pro Se* and on the PLS website.

How do I join the class?

First, please understand that the lawsuit is still a “putative” class action. This means that while PLS and Emery Celli have filed the complaint with an intent to litigate the claims on behalf of a **class** (group) of individuals, the Court has not yet decided whether to let the action proceed as a class. If the Court determines that class action status is warranted, it will also define who is in the class. PLS and Emery Celli have proposed a class definition that includes incarcerated and formerly incarcerated persons who in 2019 had a positive urinalysis result obtained from an Indiko Plus device. If you meet these criteria, you are currently part of the proposed class. If you have not already contacted PLS to report that you believe you are a potential class member and to provide your contact information, please send this information to:

ATTN: Ann Ferrari, Staff Attorney
Prisoners' Legal Services of New York
114 Prospect St.
Ithaca, NY 14850

If you provide us with your contact information, we will only use this information to communicate with you in the event that a class is certified.

Again, we unfortunately cannot respond to written inquiries or acknowledge receipt of contact information.

How much money will I receive in damages?

It is still too early in the litigation to assess the potential damage awards or even how they may be calculated.

How much longer will it take resolve the case?

This case is still in the beginning stages. Because of their inherent complexity, class actions tend to move slowly than individual actions. The pandemic has further slowed the operation of most courts. As a result, it can take several years to conclude a class action lawsuit.

I heard the case was settled. When will I receive my share of the damages?

The case has not settled. If you have heard the case was settled, there is no truth to what you heard. Any settlement in the future will be announced in *Pro Se* and on the PLS website.

PLS' Family Matters Unit Expands Services to Five Additional Counties

PLS' Family Matters Unit, which is funded by a grant from the Judiciary Civil Legal Services, was established in 2017 to assist incarcerated parents with certain family law matters. Originally, the services that the Family Matters Unit offered were limited to incarcerated parents convicted in, or with children currently residing in, the eight counties of *Albany, Bronx, Erie, Kings, Nassau, New York, Queens, and Richmond*.

Thanks to increased funding from the Judiciary Civil Legal Services, the Family Matters Unit will now also be able to assist qualified individuals convicted in, or whose children currently reside in, five additional counties: *Dutchess, Monroe, Onondaga, Orange, and Suffolk*.

In light of this expansion, you are now eligible for services from PLS' Family Matters Unit if:

- You are an incarcerated individual whose county of conviction is *Albany, Bronx, Dutchess, Erie, Kings, Monroe, Nassau, New York, Onondaga, Orange, Queens, Richmond, or Suffolk*; **OR**
- You have a child visitation or child support issue involving minor children who currently reside in *Albany, Bronx, Dutchess, Erie, Kings, Monroe, Nassau, New York, Onondaga, Orange, Queens, Richmond, or Suffolk County*; **AND**
- You are interested in seeking a court order for child visitation; **OR**
- You are interested in seeking modification of an existing child support order; **OR**
- You are seeking access to family court records; **OR**
- You have been subjected to a recent prison disciplinary proceeding that resulted in suspension or termination of visits, or interference with communication, with your minor children.

If you would like the assistance of the Family Matters Unit and you meet the above eligibility requirements, please write to the Family Matters Unit at: Prisoners' Legal Services of New York, Family Matters Unit, 41 State Street, Suite M112, Albany, NY 12207.

COVID News

Program Pause

In an effort to slow the spread of COVID-19 in the state prisons, as of January 5, 2022, DOCCS paused programming. DOCCS will assess the need for continuing the pause on a bi-weekly basis. The

facility “pause plans” that were used previously when it was necessary to implement such a measure are the plans that will be used now. To the extent possible, programming will be continued as cell study with materials distributed and collected by the educational staff.

Visiting Protocols

Effective January 11, 2022, DOCCS staff will provide all visitors to NYS prisons with COVID-19 test kits. Any visitor who either refuses to take the test or who tests positive will not be allowed to enter the prison. In addition, no physical contact is allowed during visits.

Pro Se Victories!

Jessie J. Barnes v. Captain Jolly, et al., 2021 WL 5989777 (W.D.N.Y. Dec. 16, 2021). In 2010, Jessie Barnes sued various jail officials of the Monroe County Jail with respect to incidents that occurred in 2008 and 2009. After Mr. Barnes notified the Court of his interest in mediation of his claims, a settlement conference was held and the parties agreed on a monetary settlement and an agreement that Mr. Barnes did not owe any money to the County from his prior detention and that if Mr. Barnes returns to the jail, he will not be required to serve any remaining SHU time. Subsequently, Mr. Barnes asked the Court to order that payment be made to an individual to whom Mr. Barnes had given power of attorney. The Magistrate Judge denied the motion and directed the defendants to make the settlement payment to Mr. Barnes’ DOCCS account. After the Court’s order, Mr. Barnes moved for sanctions against the defense counsel, claiming that he had engaged in unlawful conduct by refusing to release the settlement to the plaintiff’s designated third party.

The Court disagreed with Mr. Barnes’ interpretation of the settlement agreement. First, the Court noted, the parties had reached a valid settlement agreement and the courts cannot alter or go beyond the express

terms of the agreement, or impose obligations on the parties that are not mandated by the unambiguous terms of the agreement. Here, the Court went on, the terms of the agreement did not impose on defendants an obligation to make the settlement payment to any party other than Mr. Barnes. In the absence of an agreement by the parties, the Court held, it is not the court’s role to dictate that the defendants pay the settlement to a third party rather than directly to the plaintiff. For these reasons, the Court denied Mr. Barnes’ motion to order the defendant to send the check for damages to a third party and his motion for sanctions.

STATE COURT DECISIONS

Disciplinary and Administrative Segregation

Court Again Skirts Issues Raised by Absence of Video Evidence

At the hearing reviewed by the Third Department in *Matter of James R. Pine v. Anthony J. Annucci*, 200 A.D.3d 1270 (3d Dep’t 2021), the petitioner was charged with harassment and making threats after he allegedly cursed at an officer and threatened to break his jaw. At his hearing, the petitioner denied that he had engaged in the charged conduct and called three incarcerated individuals who testified that the officer had cursed at the petitioner and called him derogatory names but that the petitioner had not responded or cursed the officer. The only evidence against the petitioner was the misbehavior report.

The petitioner was found guilty and the determination of guilt was affirmed on administrative appeal. The petitioner then filed an Article 78 challenge to the hearing, arguing that the determination of guilt was not supported by substantial evidence and that the report had been fabricated in retaliation for a

grievance that the petitioner had filed against the author of the misbehavior report.

In its decision, the Third Department found that the misbehavior report **constituted** (was) substantial evidence that the petitioner had engaged in harassment and made threats. The Court also concluded that it was within the Hearing Officer's authority to make credibility determinations, that is, to decide which was more believable, the misbehavior report or the petitioner and his witnesses.

While the opinion noted that the petitioner had requested the footage of the incident recorded by the officer's body camera, because the officer was not wearing his body camera, there was no footage to produce. Judges Lynch and Garry filed a concurring opinion in which they wrote that the officer's failure to wear the body camera was an issue that the hearing officer should have addressed. In the petitioner's brief, the Judges wrote, he argues that there is a policy that when an officer leaves the bubble and monitors the hallway, he is required to wear a body camera. So why, the petitioner wrote, was he not wearing it during the incident? The answer, according to the hearing officer, was that the officer had not been issued a camera that day.

Addressing this point, Judges Lynch and Garry referenced the Court's decision in *Matter of Anselmo v. Annucci*, 176 A.D.3d 1283 (3d Dep't 2019). In *Anselmo*, Judge Garry, in a concurring and dissenting opinion, discussed the benefits of using video recording technology for resolving fact issues in prison disciplinary hearings and the need to investigate why such videos either are not made or, when they are made, disappear. In *Pine*, Judges Lynch and Garry wrote, "[a]lthough we can accept the explanation that the correction officer had not been assigned a body camera on the day of the incident, the perplexing question that remains is why not? A recording of actual events would certainly assist in resolving credibility disputes such as the one at hand, either exonerating or condemning the actions of the facility's employees."

In spite of legislation introduced in the State Assembly and Senate to amend the Correction Law to require DOCCS to establish a body camera for correction officers pilot program at maximum

security prisons, the judges wrote, no comprehensive body camera program has been adopted. Such a program, they concluded, could greatly facilitate the resolution of disputes arising between correction officers and incarcerated individuals, and arguably even prevent such altercations from arising in the first place. Judges Lynch and Garry ended their opinion by encouraging DOCCS and the Legislature to further address this issue.

James R. Pine represented himself in this Article 78 proceeding.

Under Certain Circumstances, the HO is Not Required to Provide a Written Reason for Denying a Witness

According to a misbehavior report, an officer observed Paul Grant bullying other incarcerated individuals who were intimidated by Mr. Grant. The officer ordered Mr. Grant to stop his behavior, the report continued, whereupon Mr. Grant "became argumentative and aggressive" with the officer and refused to leave the officer's desk area. The officer charged Mr. Grant with harassment and disobeying a direct order. The misbehavior report did not name the individuals whom the officer alleged Mr. Grant had been bullying.

At the hearing, the Hearing Officer, due to security concerns, refused to call the individuals whom the officer alleged Mr. Grant had been bullying. The Hearing Officer thought that if Mr. Grant had access to the names of the individuals, he would retaliate against them. The Hearing Officer, however, did not provide a written statement of the reasons that he was not calling these individuals as witnesses. The Hearing Officer found Mr. Grant guilty of the charges.

Mr. Grant filed an Article 78 challenge, alleging that the failure to provide him with the names of the allegedly bullied individuals deprived him of adequate notice of the charges and that the Hearing Officer's failure to give him a written reason for denying the witnesses violated his right to call witnesses.

In *Matter of Grant v. Capra*, 200 A.D.3d 1443 (3d Dep't 2021), the Court rejected the petitioner's arguments. The Court wrote that it was "unpersuaded" by the petitioner's argument that the misbehavior report was so lacking in details and that he did not get adequate notice of the charges and was unable to prepare a defense. It reached this result knowing that the petitioner was never informed of the identities of the individuals he was accused of bullying.

The Court also rejected the he argument that the Hearing Officer had violated the petitioner's right to call witnesses, finding that the Hearing Officer's conclusion that calling these individuals would threaten prison security. Finally, the Court wrote, because the reason that the Hearing Officer was refusing to call the witnesses was "evident from the record," failing to provide a written reason for the refusal did not warrant annulment.

Paul Grant represented himself in this Article 78 proceeding.

Guilty Plea Precludes Challenge to Evidentiary Sufficiency

In *Matter of Estrada v. Annucci*, 199 A.D.3d 1145 (3d Dep't 2021), the Third Department **reiterated** (restated) the principle that an incarcerated individual is barred from challenging a determination of guilt to a charge to which they pleaded guilty. In *Estrada*, the petitioner entered a plea of guilty to refusing a direct order. That plea, the Court ruled, "precludes him from now challenging the evidentiary basis for that charge."

But a plea of guilty to one charge does not necessarily bar an incarcerated individual from challenging other charges **adjudicated** (decided) by the hearing officer at the same hearing. In *Estrada*, the Court allowed the petitioner to challenge the factual basis of the following charges: attempted assault, interfering with an employee, creating a disturbance, non-compliance with strip frisk procedures and violent conduct. In other words, the petitioner was not **precluded** (barred) from contesting these charges just because he had entered a plea of guilty to refusing a direct order.

Although a plea of guilty to *one* charge does not preclude a challenge to *other* related charges, as a practical matter a single admission of guilt may tend to undermine the petitioner's arguments with respect to other charges. This is especially true where the pled to charge is closely related to the contested charges. For example, admitting the charge of refusal to obey a direct order invites the conclusion that the incarcerated individual also failed to comply with frisk procedures. In any event, the *Estrada* Court found substantial evidence supporting the charges.

Incarcerated individuals should note the difference between criminal court practice and Tier III disciplinary hearings. It is common in criminal cases for a plea of guilty to one of the less serious charges to "cover" other more serious charges relating to the same incident. These other charges are dismissed, thus bringing a clear benefit to the defendant. But plea-bargaining practice used in criminal court is not normally used in Tier III hearings. In such hearings, a plea to one charge typically does not include the dismissal of the remaining charges.

Finally, note that courts reviewing Tier III hearings will not entertain claims about the improper denial of evidence where a petitioner fails to ask for that evidence during the hearing. In *Estrada*, the Court noted that the *pro se* petitioner failed to ask the hearing officer for a videotape and therefore his claim that evidence was improperly denied was not preserved for appellate review.

Pedro Estrada represented himself in this Article 78 proceeding.

Court Reverses Hearing Due to Failure to Call a Witness

When a hearing officer proceeds without a witness requested by an incarcerated individual, that restriction on the right to present a defense must be supported by sufficient facts documented in the hearing record. In *Matter of Douglas III v. Annucci*, 199 A.D.3d 1108 (3d Dep't 2021), the Court annulled a disciplinary determination on the grounds that the hearing record did not "reflect whether reasonable and diligent efforts were made" to secure

the testimony of the witness requested by the charged incarcerated individual.

Here are the facts. The petitioner, charged with fighting and related charges for slashing Bell (another incarcerated individual), sought the testimony of Johnson (a third incarcerated individual) who was also involved in the incident. Bell was seen making slashing motions towards Johnson's face. Both Bell and Johnson sustained facial lacerations.

The petitioner denied attacking Bell with a weapon and based his defense on the claim that other incarcerated individuals inflicted the injury to Bell. "In support of his defense, petitioner sought Johnson's testimony, as an eyewitness of and participant in the incident, to establish how Bell was assaulted and received the laceration...."

In denying the petitioner's request for Johnson's testimony, the hearing officer simply stated that Johnson was unavailable. The Court noted that the hearing record did not demonstrate the date and time of most of the efforts to secure Johnson's testimony. Finally, the Court found, the Hearing Officer did not complete a witness denial form setting forth any further detail regarding his attempts to contact Johnson or the reasons for Johnson's unavailability.

The Court ruled that the hearing officer improperly denied the petitioner the right to secure Johnson's testimony but also concluded that a "good-faith" reason supported that denial. Because there was a "good-faith reason for denying the witness," the Court ordered a new hearing rather than dismissing the charges.

Jerome Douglas, III, represented himself in this Article 78 proceeding.

Retaliation Defenses Can Be Tricky

Retaliation as a defense in a prison disciplinary proceeding constitutes an uncertain basis for contesting the charges. As *Matter of Fulton v. Capra*, 199 A.D.3d 1139 (3d Dep't 2021), makes clear, a finding of guilt will be upheld where there exists substantial evidence of misconduct by an incarcerated individual. Allegations of retaliatory

motive by the author of a misbehavior report do not necessarily undermine the hearing officer's conclusion that substantial evidence supports the charges. A petitioner's claim that a misbehavior report was written in retaliation, the *Fulton* Court wrote, presents the hearing officer with a credibility determination. That is, the hearing officer must decide who is telling the truth: the officer who wrote the misbehavior or the accused individual who says the report was written to punish him for other conduct that angered the officer.

Nothing in the *Fulton* decision suggests that the petitioner alleged that officers or other prison staff expressed a retaliatory motive for writing a misbehavior report. Without such an allegation it is difficult to prevail on a claim of retaliation. Retaliation can be established circumstantially even when officers remain silent about their motive. But in *Fulton*, it does not appear the petitioner produced circumstantial evidence of retaliation.

On February 4, 2019, Petitioner Fulton was charged with misconduct with respect to a physician's assistant. Several weeks later, a correction officer wrote a misbehavior report alleging that the petitioner, while out of his cell, exchanged items with incarcerated individuals secured in their cells. The petitioner was charged with making threats and related rule violations. Because the two incidents involved different members of the prison staff, it was hard to prove that the officer involved in the second incident possessed a retaliatory motive originating in the first incident. Denying the Article 78 petition, the Court did not credit the petitioner's "claim that both reports were written in retaliation for prior altercations...."

Moreover, the petitioner's complaint about the author of the second misbehavior report was found irrelevant "considering that the petitioner's grievance against the officer was not filed until *after* [emphasis supplied] the incident in question." *Id.*

And in the matter concerning the first incident, the Court found that the production of the grievance and the complaint against the physician's assistant was unnecessary where the hearing officer accepted "the fact that petitioner had previously filed them." Note that the existence of a grievance against the author of

a misbehavior report does not, by itself, establish a retaliatory motive. An officer might be angry that an incarcerated individual filed a grievance against them; nonetheless, it is also possible the officer actually observed the incarcerated individual engage in the charged misconduct. Thus, typically, to prove that the charges were fabricated in retaliation for engaging in protected conduct, an incarcerated individual must, in addition to producing evidence of retaliatory motive, produce additional evidence that undercuts the evidence supporting the charges, such as proof that the accused individual was elsewhere at the time of the incident.

In cases in which an incarcerated individual asks a court to review the hearing officer's failure to consider documentary evidence, such a claim must be preserved for appellate review. This claim, the *Fulton* Court found, "is unpreserved for our review, as review of the record reveals that petitioner never requested to present that document."

Alvin Fulton represented himself in this Article 78 proceeding.

Violent Conduct Includes Conduct Involving the Threat of Violence

When an Article 78 petitioner challenges a disciplinary determination on the grounds that the charged conduct does not fall within the conduct prohibited by the rule that the petitioner was charged with having violated, it is necessary to carefully review the rule. That is the lesson of the decision in *Matter of Chung v. Annucci*, 199 A.D.3d 1147 (3d Dep't 2021). Here, the *pro se* petitioner argued that the charged misconduct – being part of a group "aggressively chasing after another incarcerated individual with their fists clenched" – lies outside the scope of the rule prohibiting violent conduct. In *Chung*, the petitioner asserted "that his behavior did not constitute violent conduct because no one was injured...."

The Court, however, was unpersuaded by the petitioner's argument, noting that the rule prohibiting violent conduct specifically prohibits "conduct involving *the threat* of violence" [emphasis added],

irrespective of whether injury results. This definition of violent conduct is set forth in Rule 104.11. Plainly, the aggressive chase of another incarcerated individual involves the threat of violence and for that reason the Court upheld the disciplinary determination pertaining to violent conduct.

Separately, the *Chung* Court rejected the petitioner's claim that the disciplinary determination should be set aside on the grounds that the misbehavior report used incorrect DOCCS identification numbers for the petitioner and two others involved in the incident. This "clerical error" did not warrant annulment of the disciplinary determination, the Court wrote, because the hearing evidence clearly established the identity of the individuals involved in the incident.

Sean Chung represented himself in this Article 78 proceeding.

Solicitation Includes Efforts to Obtain Information

In *Matter of Killimayer v. Annucci*, 199 A.D.3d 1151 (3d Dep't 2021), the petitioner was charged with threats and solicitation. The charges were based on confidential information that the petitioner had threatened another incarcerated individual in order to obtain documentation about an incident that the individual was involved in at another prison and about whether his protective custody status was voluntary or involuntary. According to the confidential information, until the individual provided the documents, he would not be allowed to use the certain phones in the prison yard.

In assessing the petitioner's arguments, the Court found that the misbehavior report, the testimony of the author of the misbehavior report who investigated the matter, and the confidential information was substantial evidence of guilt. It also found that the confidential information was reliable and credible, and that conflicting testimony of the petitioner and his witnesses "presented credibility issues for the hearing officer to resolve."

Finally, the Court rejected the petitioner's argument that his conduct did not fall within the conduct

prohibited by Rule 113.27. Rule 113.27 provides that, “An inmate shall not solicit, possess or exchange any disciplinary or grievance document pertaining to another inmate, or any document which contains crime and sentence information pertaining to another inmate who is not a codefendant, without authorization from the superintendent.” The Court held that petitioner’s efforts to obtain another incarcerated individual’s protective-custody documentation constitutes solicitation. [It is unclear how the Court found that asking for documents relating to an individual’s protective custody status violated a rule prohibiting soliciting “disciplinary or grievance documents” or “documents which contain crime and sentence information pertaining to another.”].

Having found that attempting to obtain another individual’s protective custody documentation violated Rule 113.27, the Court cryptically – in that this holding seems to contradict the holding in the previous sentence – wrote that petitioner’s “further assertion that protective custody documentation does not fall within the ambit of rule 113.27 is unpreserved for review given petitioner’s failure to raise it at the administrative level.”

Joseph Killimayer represented himself in this Article 78 proceeding.

Court of Claims

DOCCS’ Failure to Maintain Stairs Results in Finding of Liability

In *William Robinson v. State of New York*, Claim No. 131273 (Ct. of Clms. Nov. 4, 2021), the claimant alleged that as a result of DOCCS’ negligence with respect to maintaining a loading dock and a set of stairs, he had slipped on the stairs and injured his knee. At a trial on the issue of liability only – the Court would hold a second trial on damages if the plaintiff won the liability issue – the claimant testified that he had been working in the storehouse

at Auburn C.F. for four months when the accident occurred. On the day of the accident, the claimant was walking down the stairs. There were four steps and no railing. One of the steps was not deep enough to fit his entire foot and he slipped from the stairs to the pavement, landing with his weight on his left leg. No one saw the fall. The claimant had used the stairs many times without falling. He had never complained to his supervisor, about the stairs or the absence of railings.

The supervisor of the work crew testified as a witness for the plaintiff and the defense. He had worked at the storehouse for many years, agreed that there were no hand railings on the steps and did not know of any incarcerated individual who had fallen on the stairs.

In assessing the evidence, the Court first reviewed the law. The State, it wrote, citing *Preston v. State of New York*, 59 N.Y.2d 997 (1983), has a duty to maintain its facilities and with respect to the safety of persons on its property, the duty of the State is one of reasonable care under the circumstances.

Further, the Court wrote, citing *Martinez v State of New York* 225 A.D.2d 877 (3d Dep’t 1996), DOCCS owes a duty to provide a reasonably safe workplace and reasonably safe work equipment to incarcerated individuals assigned to work. But countering this point, an incarcerated individual is responsible for exercising reasonable care and is liable if they do not. This includes a duty to observe their surroundings to avoid accidents.

Finally, the Court pointed out, to win his case, the claimant must prove by the preponderance of the evidence that:

- a dangerous condition existed;
- the State either:
 - created the dangerous condition; or
 - had actual or constructive notice of the condition;
 and failed to **alleviate** (fix) the condition within a reasonable time;
- the dangerous condition was a proximate cause of the accident; and
- the claimant sustained damages.

The defendant will be found to have constructive notice of the dangerous condition if it is visible and apparent and has existed for a sufficient length of time before the accident to give the defendant sufficient time to discover and remedy the condition. While the visibility of a dangerous condition does not relieve the State of its duty to maintain the premises in a reasonably safe condition, the claimant's familiarity with the defective condition may be considered with respect to whether the claimant is comparatively negligent.

The Court found that the stairs, "with a shortened step and no railing, clearly constituted a dangerous condition [and that t]he defendant created the dangerous condition both by constructing inadequate stairs and by failing to install a railing. Further, the Court found that the defects were apparent and present for many years. Against these findings, the Court balanced the fact that the claimant had worked at the location, and regularly used the stairs, for several months. Based on these findings, the Court found that the defendant was 80% liable for the claimant's injury and the claimant was 20% liable. This means that after the parties agree on an amount of damages, or if they cannot agree, and the Court decides what the damages are, the plaintiff will be awarded 80% of the damages.

Brian Dratch, of The Dratch Law Firm, PC, represented William Robinson in this Court of Claims action.

Destruction of Evidence Leads to Sanctions

In *Raymond Lewis v. State of New York*, 2021 WL 5995251 (Ct. Clms. Dec. 8, 2021), the claimant sought damages for injuries resulting from DOCCS' negligent maintenance of the equipment in his cell. Claimant Lewis alleged that on December 1, 2015, when, as he was moving his possessions into a new cell, a shelf that was supposed to be bolted to the lockers fell when he leaned against one of the lockers. The shelf struck the claimant in the head and neck, following which he was treated by the prison medical staff.

Destruction of Evidence

On February 11, 2016, the claimant served what the parties agreed would be treated as a Notice of Intention alleging that DOCCS' negligent failure to secure the shelf was the cause of his injuries. After filing of the claim and an answer, the parties engaged in discovery in the course of which the defendant revealed that:

- The shelf that fell on the claimant had been destroyed in May 2016;
- There are no documents setting forth the dimensions or weight of the shelf;
- There is no way to know if the locker now in the relevant cell is the same locker that was there on the day that the shelf fell; and
- Cell inventory sheets, work orders and prior grievances about the cell where the shelf fell were destroyed by DOCCS prior to the date on which the discovery demands for them were made.

Having received the defendant's responses to his discovery request, the claimant moved to strike the defendant's answer as a sanction for **spoliation** (destroying evidence). The Court denied the motion to strike, but finding that the defendants had disposed of relevant evidence, **precluded the defendant from** (denied the defendant the opportunity of) offering certain evidence at trial and found that the claimant is entitled to an "adverse inference."

Entitlement to Spoliation Sanctions

In reaching this result, the Court first set forth what a party must prove to show entitlement to sanctions for spoliation of evidence:

- That at the time of its destruction, the party having control of the evidence was obligated to preserve the evidence;
- That the evidence was destroyed with a "culpable state of mind;" and
- That the destroyed evidence was relevant to the party's claim or defense such that the **trier of fact** (judge or jury) could find that the evidence would support that claim or defense.

With respect to these points, the Court noted the following:

- The obligation to preserve evidence arises when a party is on notice that the matter will likely result in litigation;
- A “culpable state of mind” for the purpose of spoliation includes ordinary negligence;
- The evidence is presumed to be relevant where it is determined to have been intentionally or willfully destroyed. If the evidence was negligently destroyed, the party seeking spoliation sanctions must establish that the destroyed evidence was relevant to the party’s claim or defense.

Applying the Law to the Facts

Here, where the accident occurred on December 1, 2015, and the Notice of Intent was filed on February 11, 2016, the Court found that the defendant knew or should have known that it was under an obligation to preserve evidence no later than February 11, 2016. In spite of this obligation, the defendant disposed of the shelf in May 2016, never acted to preserve or identify the locker that was in the claimant’s cell at the time of the accident, and destroyed the cell inventory sheets, prior grievances and work orders in accordance with routine document retention and destruction policies at some point between 2016 and 2019.

Once a party reasonably anticipates litigation, the Court noted, it is required to suspend routine destruction policies and put in place a litigation hold to ensure the preservation of relevant documents. Here, the Attorney General wrote to DOCCS on December 1, 2017, asking DOCCS to ensure that a litigation hold was put in place in connection with Mr. Lewis’s claim. Had such a hold been effectively put in place, the Court commented, many of the relevant documents would have been preserved. Thus, the Court concluded that the defendant should have been aware of the likelihood of litigation at the time that the shelf and documents were destroyed and should have preserved or otherwise identified the locker. The Court also concluded that the defendant knew or should have known that the items were relevant to the claim and were reasonably calculated to lead to the discovery of admissible evidence and it

was reasonably likely that the claimant would request them in discovery.

The Court then found that while there was insufficient evidence to show that the defendant acted intentionally, it was clear that the loss of the shelf and the documents, and the failure to preserve or identify the locker were the product of negligence. And negligence, the Court noted, is a sufficiently culpable state of mind for the purposes of imposing a spoliation sanction.

Finally, the Court found that the destroyed evidence was relevant to the claim and would support the claim. Relevance of the shelf was supported by the claimant’s expert who stated that absent the ability to inspect the actual shelf, locker and fasteners, the expert could not determine:

- Whether the shelf had been fastened to the locker;
- How tightly the shelf had been fastened to the locker or the manner in which the shelf had been improperly fastened to the locker;
- Whether the State had failed to properly maintain the shelf and the anchor fastening it to the locker and if it was installed properly in the first place; and
- Whether the defendant used the proper anchor to fasten the shelf to the locker.

Based on consideration of these factors, the Court found that all of the destroyed evidence was relevant.

The Remedy

In fashioning a sanction for spoliation, the courts look to the extent that the destruction of evidence prejudices a party and whether striking the answer or dismissing the claim is necessary as a matter of elementary fairness.

Here the Court noted, the defendant admits that the shelf was not properly attached to the locker and concedes that it was destroyed and its dimensions and weight are unknown. Thus, the force exerted by the shelf when it struck the claimant cannot be determined. Claimant makes the same argument with respect to the locker, which the defendant also does not dispute. With respect to the destroyed grievances

and work orders, the Court found that the claimant was prejudiced because he cannot prove that the defendant had notice of the dangerous condition.

The Court concluded that the claimant's ability to prove his claim was prejudiced by the defendant's destruction of evidence and that a sanction should be imposed for the defendant's failure to preserve vital evidence. Based on this conclusion the Court **precluded** (barred) the defendant from offering at trial any evidence of the condition of the shelf or locker prior to the accident and any expert testimony regarding the shelf or locker to refute the claimant's proof. In addition, the Court precluded the defendant from offering any evidence regarding lack of notice of the condition of the shelf or locker.

The Court also ruled that at trial, the claimant was entitled to an adverse inference against the defendant on the issue of notice. The inference to be drawn was that the destroyed cell inventory sheets, prior grievances and work orders would not have supported the defendant's position on the issue of notice and would not have contradicted any evidence that the claimant offers on the issue of notice. Finally, the Court ruled that the strongest inference will be drawn against the defendant on the issue of notice. Claimant, the Court ruled, is not relieved of his burden of establishing the existence of a defect and causal relationship between the defect and the accident.

Joel Rubenstein of German Rubenstein, LLP, represented Raymond Lewis in this Court of Claims action.

DOCCS 80% Liable for Injury Caused by Cell Gate

In *Adam Kelly v. State of New York*, Claim No. 130175 (Ct. Clms. Sept. 29, 2021), a case focusing on who was liable for the injury suffered by an incarcerated individual at the Elmira Reception Center, the Trial Court summarized the evidence at trial as follows.

Adam Kelly presented evidence that he was in prison for the first time when he arrived at Elmira Reception Center in 2016. Shortly thereafter, he was given

pants that were too large for him. On the day of the incident, he had been in prison for less than two weeks. He had been housed in the cell for 3 to 4 days, and had seen the cell gate, which was controlled by an officer, open and close between 10 and 15 times. Mr. Kelly had left his cell to pick up some clothing. As he was returning to his cell, he noticed that his cell gate was closing. Fearing that he would be in trouble if he was not in the cell by the time the door was closed, Mr. Kelly ran the remaining three feet and attempted to turn sideways to squeeze through before the gate before it closed. He was not successful. His right pant leg caught in the cell gate trapping him and he was thrown to the ground and could not get up because his leg had snapped.

After this testimony, the defendant moved to dismiss the claim because, he argued:

1. the incident was not foreseeable; and
2. the claimant had presented no evidence that a state actor had caused the cell door to open and close.

The Court reserved judgment on the motion until after the State presented its defense.

Officer Wujastyk was a witness for the State. He first testified that if something was in the path of the closing gate, it would stop moving. Later he testified that to the contrary; if something was in the path of the gate, it would keep pushing against the object, but not with crushing force. This was the only testimony presented by the State.

In addition to the testimony of the claimant and the officer, two videos and many photos of the gallery were submitted into evidence. The videos showed that the gate opens and closes "at a measured pace, not slowly and not quickly." In addition, the area in front of the claimant's cell can be seen clearly from the position from which the officer would operate the switch to open and close the gate.

Before ruling on the issue of liability, the Court reviewed the law. The State must use reasonable care to protect incarcerated individuals from the foreseeable risk of harm. The claimant must prove:

- The defendant owed a duty to the claimant
- There was a breach of that duty;
- The claimant's injury was proximately caused by the breach; and
- The harm suffered was a reasonably foreseeable consequence of a state actor's acts or failures to act.

Applying the law to the facts, the Court made the following findings:

- DOCCS owed the claimant a duty not to close the gate while he was entering the cell.
- The officer responsible for opening and closing the gate could and should have seen the claimant was about to enter the cell and should not have started closing the gate.
- The officer's action was the proximate cause of the claimant's injuries.
- The injury could have been prevented if the officer had watched what was happening in front of the claimant's cell, which he had an obligation to do.
- While it is unlikely, it is still foreseeable that someone could be injured if they were standing "in the in a doorway as a large, mechanically operated iron gate was closing."

In addition to these findings against the State, the Court also found that the claimant had to take some responsibility for walking into his cell as the gate was closing. Even so, the Court found that the claimant's fear that he would get in trouble if he was not in his cell when the door closed **mitigated** (reduced) the claimant's responsibility.

Based on the above analysis, the Court found that the State was 80% liable for the claimant's injuries and the claimant was 20% liable. This means that when damages are determined, the State will be required to pay 80% of the damages.

Brian Dratch, of The Dratch Law Firm, PC, represented William Robinson in this Court of Claims action.

Immigration Matters

Nicholas Phillips

This month's column focuses on a recent decision from the New York State Appellate Division, Fourth Department, *People of the State of New York ex rel. Benjamin Welikson, Esq., on behalf of Dawson Sharpe, v. S. Cronin, Superintendent Groveland Correctional Facility*, 2022 WL 336315 (4th Dep't Feb. 4, 2022). The decision considers whether the New York Department of Corrections and Community Supervision ("NYDOCCS") can detain incarcerated noncitizens at the conclusion of their prison sentence in order to transfer them to Department of Homeland Security ("DHS") custody for deportation. While the Fourth Department ultimately dismissed the case on mootness grounds, the decision contains a concession by NYDOCCS with potentially important consequences for noncitizens currently incarcerated in NYDOCCS custody.

To understand the decision, some context is required. Under the Immigration and Nationality Act ("INA"), the federal statute which governs immigration cases, DHS has the authority to detain noncitizens under certain circumstances. First, under 8 U.S.C. §1226(a), DHS has discretionary authority to detain any noncitizen "pending a decision on whether the [noncitizen] is to be removed from the United States." A separate provision of the INA, 8 U.S.C. §1226(c), governs the mandatory detention of certain noncitizens convicted of criminal offenses. Under that provision, noncitizens with convictions enumerated by 8 U.S.C. §1226(c)(1) must be detained by DHS "when the [noncitizen] is released [from criminal custody.]"

This last provision raises a question: how exactly should DHS detain a noncitizen "when the [noncitizen] is released" from criminal custody? Under a straightforward interpretation of the INA, it seems that DHS officers would be required to wait until the conclusion of a noncitizen's period of criminal custody before taking that person into DHS custody. However, since noncitizens can be held in criminal custody anywhere in the United States, such an interpretation would raise significant logistical issues for DHS, which would be required to keep track of when and where noncitizens are being released from criminal custody, not to mention that it would also need to station DHS officers at the facility at the time of release.

To solve this problem, DHS created something called an “immigration detainer,” which is a request submitted to a state or local facility asking that facility to detain the noncitizen beyond the expiration of criminal custody so that DHS can place the noncitizen in immigration detention. Congress first authorized this practice in 1986, when it amended the INA to allow DHS to issue detainers for noncitizens who have been “arrested by a Federal, State, or local law enforcement official for a violation of any law relating to controlled substances.” 8 U.S.C. §1357(d). In 1997, DHS promulgated a federal regulation, 8 C.F.R. § 287.7, which contains no limitation for controlled substance offenses, but instead allows DHS officers to issue detainers for *any* noncitizen it wishes to take into custody. That regulation provides that “[u]pon a determination by [DHS] to issue a detainer . . . , such agency shall maintain custody of the alien for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays in order to permit assumption of custody by [DHS].” 8 C.F.R. §287.7(d).

Immigration detainers were an obscure topic until March 2008, when President George Bush enacted a program called Secure Communities with the goal of increasing immigration enforcement through data sharing between state and local jails and the federal government. Under Secure Communities, DHS created a database called IDENT, which matches a person’s fingerprint information with their immigration records and, if applicable, their criminal history. When a person is apprehended by state and local authorities and fingerprinted, that fingerprint would be sent to IDENT. If the fingerprint matched an IDENT record for a noncitizen which DHS wished to detain, DHS would then issue a detainer to the state or local facility.

As the Secure Communities program expanded under President Barack Obama, DHS’s use of detainers became the subject of numerous lawsuits, which questioned whether detainers violated the Fourth Amendment’s prohibition against warrantless arrests. One such challenge took place in New York State and resulted into a decision by the Appellate Division, Second Department, entitled *People ex rel. Wells v. DeMarco*, 168 A.D.3d 31 (2d Dep’t 2018). In that case, an Indian national named Susai Francis filed a habeas petition after he was held beyond the completion of his criminal sentence in the Suffolk County Correctional Facility in Riverhead, New York, pursuant to an immigration detainer. The Appellate Division concluded that his detention was unlawful because (a) New York State law does not authorize state or local law enforcement officers to detain persons solely for immigration purposes, and (b) while the federal government may empower state and local officers to

enforce immigration law, no such authorization existed in the circumstances of Mr. Francis’s case.

That brings us to the Fourth Department’s decision in *People of the State of New York ex rel. Benjamin Welikson, Esq., on behalf of Dawson Sharpe*. In that case, petitioner Dawson Sharpe filed a habeas petition alleging that NYDOCCS was detaining him beyond the expiration of his criminal sentence solely so that DHS could take him into immigration custody. Before the habeas petition had been decided, Mr. Sharpe was taken into DHS custody, and so the Supreme Court dismissed the petition on mootness grounds. (Mootness is a legal principle which applies when a controversy which initially exists at the time the lawsuit was filed is no longer “live” due to a change in the law or in the status of the parties involved, or due to an act of one of the parties that dissolves the dispute. When a case is moot, a court is empowered to dismiss the lawsuit because there is no live controversy remaining to be adjudicated.)

Mr. Sharpe appealed to the Fourth Department, which affirmed. In its decision, the Fourth Department noted the mootness doctrine may not apply where the legal issue (1) is likely to recur, (2) is substantial and novel, and (3) will typically evade review in the courts. 2022 WL 336315 at *1. While the Fourth Department concluded that the legal issue will typically evade review, since noncitizens would likely be detained by DHS before a court could issue a ruling, it nonetheless found that the issue was not novel considering *People ex rel. Wells v. DeMarco*’s holding that New York State cannot detain persons for immigration purposes absent specific federal authorization. Notably, the Fourth Department further concluded that the issue was not likely to recur because NYDOCCS conceded during the appeal that “it may not detain an individual solely to facilitate a transfer to federal immigration officials seeking to effectuate a final order of removal.” *Id.* In light of this decision, then, it appears that NYDOCCS agrees that it may not detain noncitizens beyond the expiration of their criminal sentences solely for immigration purposes.

NOTICE

Individuals incarcerated at Adirondack, Altona, Bare Hill, Clinton, Franklin, Gouverneur, Riverview and Upstate should now write to the Albany Office of PLS. The address of the Albany Office is on the back page of this issue of *Pro Se*.

What Did You Learn?

Brad Rudin

1. According to the Inspector General's report on faulty drug testing, the high number of false positives resulted from:
 - a. The failure of DOCCs employees to properly refrigerate test samples.
 - b. The intentional misreporting of test results by DOCCS employees.
 - c. The failure of DOCCS to submit positive test results for a more accurate second test.
 - d. The negligence of Indiko Plus employees when they subjected test samples for analysis.
2. As a result of the Inspector General's report DOCCS has terminated:
 - a. Its drug testing program until the class action lawsuit against Microgenics has concluded.
 - b. Its contract with Microgenics.
 - c. Disciplinary actions based on possession and use of legal substances such as marijuana.
 - d. Any laboratory testing of urine or blood samples by New York State agencies.
3. Plaintiff Jesse J. Barnes failed to obtain an order directing that the settlement payment be directed to a third party selected by Mr. Barnes because the settlement agreement:
 - a. Failed to include any provision regarding payment to a person designated as having a power of attorney.
 - b. Ran counter to federal law.
 - c. Included a provision that specifically prohibited the delivery of payment to any third party.
 - d. Named a third party not qualified to exercise power of attorney in a correctional setting.
4. Which conclusion about body cameras is *most* strongly supported by the majority decision in *Matter of James R. Pine v. Annucci*?
 - a. The absence of body camera evidence automatically leads to the reversal of a disciplinary determination.
 - b. The absence of body camera evidence creates the inference that the charge lacks substantial evidence.
 - c. Substantial evidence may support a finding of guilt even if the absence of body camera evidence is unexplained non-compliance with a DOCCS policy.
 - d. The Third Department has required DOCCS to equip all officers with a body camera.
5. In the case of *Matter of Grant v. Capra*, the Court wrote it was "unpersuaded" by the argument that:
 - a. Security concerns allow a hearing officer to refrain from identifying the individuals who were the subject of threats and intimidation.
 - b. The absence from the misbehavior report of the names of the intimidated individuals violated the accused's right to notice of the charges.
 - c. Concerns about prison security have a bearing on the conduct of a disciplinary hearing.
 - d. The right to call witnesses is invoked by the production of a written list of the names of the witnesses.
6. A plea of guilty to one charge at the start of a disciplinary hearing where the misbehavior report alleges the violation of several rules results in:
 - a. The dismissal of all the remaining charges.
 - b. A finding of guilt as to all the remaining charges.
 - c. The loss of the opportunity to contest the factual basis of that charge.
 - d. The right to be present for the hearing on the remainder of the charges.

- 7. In considering a claim that the hearing officer violated the accused individual’s right to call witnesses, a reviewing court will be *least* concerned with whether:
 - a. The charged individual in fact committed the offense.
 - b. The hearing officer made a reasonable effort to secure the testimony of the witness.
 - c. The hearing record reflected the date and time of efforts to find a requested witness,
 - d. The charged individual asked the hearing officer for the testimony of a witness.

- 8. When an incarcerated individual presents a defense based on an officer’s retaliatory motive:
 - a. The burden of proof shifts to the author of the misbehavior report to show that he or she was not influenced by a retaliatory motive.
 - b. The hearing officer must conduct a separate hearing on the question of retaliation.
 - c. The hearing officer may find the charged individual guilty if substantial evidence supports that determination.
 - d. The burden of proof shifts to the charged individual to establish by a preponderance of the evidence that the author of the misbehavior report was influenced by a retaliatory motive.

- 9. Both *Matter of Chung v. Annucci* and *Matter of Killimayer v. Annucci* are useful to incarcerated individuals because these two cases:
 - a. Provide a new definition of the term “substantial evidence.”
 - b. Prohibit the use of confidential information in disciplinary proceedings.
 - c. Reject the principle that it is the job of the hearing officer to resolve issues of credibility.
 - d. Encourage a careful reading of the rule charging each charged offense.

- 10. Which is *not* an essential factor for determining liability in a negligence action against the State of New York?
 - a. The injury sustained by the claimant.
 - b. Proof that a state employee actually and directly knew about the unsafe condition.
 - c. The existence of a dangerous condition.
 - d. Proof that a dangerous condition known to the State caused the accident and the claimant’s injury.

ANSWER KEY

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

Notice

PLEASE NOTE: Individuals who are incarcerated at: Bedford Hills, Sing Sing or Taconic should now write to our Newburgh office. The address for the Newburgh office is on the back page of this issue.

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PLS OFFICES

Requests for assistance should be sent to the PLS office that provides legal assistance to the incarcerated individuals at the prison where you are in custody. Below is a list of PLS Offices and the prisons from which each office accepts requests for assistance.

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

CNYPC, Cossackie, Eastern, Edgecombe, Great Meadow, Greene, Hale Creek, Hudson, Marcy, Mid-State, Mohawk, Otisville, Queensboro, Shawangunk, Sullivan, Ulster, Wallkill, Walsh, Washington, Woodbourne

BUFFALO, 14 Lafayette Square, Suite 510, Buffalo, NY 14203

Albion, Attica, Collins, Groveland, Lakeview, Orleans, Wende, Wyoming

ITHACA, 114 Prospect Street, Ithaca, NY 14850

Auburn, Cape Vincent, Cayuga, Elmira, Five Points

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

Bedford Hills, Fishkill, Green Haven, Sing Sing, Taconic

PLATTSBURGH

Please send your requests for assistance to: 41 State Street, Suite M112, Albany, NY 12207

Adirondack, Altona, Bare Hill, Clinton, Franklin, Gouverneur, Riverview, Upstate

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