

Pro Se

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Spoliation of Evidence Results in Adverse Inference and Award of Costs

In 2010, John Willis Richard filed a Section 1983 action seeking damages for unconstitutional interference with his employment opportunities within DOCCS. The complaint alleged that the defendants had violated his Fourteenth Amendment right to equal protection by treating him differently than they treated Muslims who were not mixed-race in making job assignments and that, in violation of his First Amendment rights, one defendant had filed false misbehavior reports against him in retaliation for the plaintiff's submission of grievances challenging that defendant's treatment of the plaintiff's employment applications. Among the allegations were that:

- Defendant Digneau refused to move the plaintiff to 10 Block or to allow him to participate in jobs outside of 9 Block because of his race and religion; and

- Defendant Tanea retaliated against the plaintiff by refusing to place him on the waiting list for 10 Block.

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HELP PRISONERS' LEGAL SERVICES CELEBRATE NATIONAL PRO BONO WEEK

A Message from the Executive Director, Karen L. Murtagh

CONVICTIONS BEYOND A CONVICTION

National Pro Bono Week (October 23rd – 29th) is a time to celebrate and recognize the dedicated work of *pro bono* volunteers, as well as to educate the community about the many legal and other issues faced by our clients. PLS is happy to announce that this year we will again be celebrating National Pro Bono Week with an event highlighting our commitment to serving the incarcerated community.

This will be our 11th year celebrating pro bono work and to start off this second decade, we will also be compiling a book of poetry written exclusively by incarcerated individuals.

Inspired by Brian Stevenson's quote "Each of us is more than the worst thing we've ever done," we are asking that you send us poetry you have written that focuses on who you are apart from your conviction and incarceration. We want to help you tell people on the outside who you really are.

- *What do you believe in?*
- *What are your ambitions, hopes, and dreams?*
- *What do your children, parents, family, and friends mean to you?*
- *How have your past experiences shaped you as a person?*
- *What do you want others to know about you, beyond your conviction?*

Unlike past years where our Pro Bono Event has focused on specific topics such as solitary confinement, immigration, medical care and education, this year's theme, *Convictions Beyond a Conviction*, is purposely broad. Our goal is to give every incarcerated New Yorker a chance to contribute, express themselves, and have their voices heard. We will compile selected submissions into a book, and some of those poems will be presented by professional actors during a live performance at our National Pro Bono Week celebration.

Poems should be no more than one (1) page in length and mailed to: Pro Bono Director, Prisoners' Legal Services of NY, 41 State Street, Suite M112, Albany, New York 12207, **no later than June 30, 2022.**

By sharing the poems of incarcerated people, we hope to educate the public, and recruit attorneys to take cases *pro bono*, thus increasing access to justice for indigent incarcerated persons across the State. While we cannot guarantee that each piece will be read or included in our publication, we encourage all submissions and will do our best to integrate as many as possible in the book and our event. The book will not be sold for profit and PLS reserves the right to make editorial changes to submissions.

Please note that by sending us your submission, you are consenting to PLS publishing it in our book of poetry and using your submission during our Pro Bono Event.

If you do not want PLS to use your real name when publishing or performing your submission, please make sure to tell us so when submitting your piece. If you do not request to be anonymous, your piece, if selected, will be attributed to you.

Please note that contributing your story for the Pro Bono Event described above is not the same as seeking legal assistance/representation from PLS. If you are seeking legal assistance, you must write separately to the appropriate PLS office. (See the list of PLS offices and the prisons from which each office accepts requests for assistance on the last page of *Pro Se*).

I cannot wait to read what I already know are going to be outstanding pieces written by incredible individuals! Thank you in advance for sharing your stories and helping PLS educate people about the need for pro bono services.



...Continued from Page 1

In *Richard v. Digneau and Tanea*, 2021 WL 5782106 (W.D.N.Y. Dec. 7, 2021), the Court ruled on the plaintiff’s motion to impose sanctions on the defendants for their spoliation of evidence. Spoliation is the term that the law uses to describe a party’s destruction of evidence. In this case, the plaintiff filed his lawsuit in 2011, close to three years after the events that are at issue in the lawsuit.

In September 2016, the plaintiff filed document requests.¹ In July 2017, the Judge found that the defendants had failed to respond to many of the requests and ordered production by August 25, 2017. The defendants failed to submit any documents by that date.

Two years later, in July 2019, when the Court again addressed this issue, the defendants had still not produced the requested documents. The Court noting that a party is required to respond to a document request within 30 days of its service and thus the defendants were not in compliance with Rule 34 of the Federal Rules of Civil Procedure (FRCP) and the Court’s 2017 order, issued an order requiring the defendants to respond.

That same month, the defendants submitted some of the requested documents and stated that many of the other requested materials had been destroyed according to the schedule set by the DOCCS Record Retention Policy. Pursuant to that policy, many records are destroyed five years after they are created.

¹ The chronology of the first motion for sanctions is taken from Document 96 in the case docket found on PACER.

Referencing Rule 37 of the FRCP, the Court then considered whether the defendants should be sanctioned for failing to comply with their discovery obligations. It first noted that disciplinary sanctions for failure to comply with Rule 37 are intended to serve three purposes:

1. To prevent a party from benefitting from its own failure to comply;
2. To deter specific non-compliance and obtain compliance with a court's order; and
3. Where the party is at fault, to serve as a general deterrent in the case and in other litigation.

Here the Court wrote, the Magistrate Judge had already issued sanctions against the defendants by 1) imposing a waiver of any objection to the plaintiff's Document Request and Interrogatories, 2) requiring that they pay the plaintiff's costs in seeking sanctions and 3) warning that further discovery violations could result in serious sanctions.

While in 2019, the Court could not determine whether the defendants' failure to comply with Judge Payson's 2017 order was due to intentional obstruction or mere incompetence, the Court found that the failures were egregious and had consumed valuable judicial resources in an effort to get the defendants to comply with basic discovery obligations. However, while the Court was "extremely disturbed by Defendants' blatant disregard for court-ordered deadlines and discovery responsibilities," the only financial penalty it imposed was an award of the plaintiff's costs.

The Court did however, note that in 2017, requiring the defendants to pay the plaintiff's costs and had failed to motivate the defendants to comply with their discovery obligations. Concluding that reimbursement of litigation costs had failed to motivate the defendants in the past, the Court ordered preclusion and other spoliation sanctions. The Court delayed setting the exact terms of these sanctions.

In 2021, having conducted a hearing on the documents that were not produced, the Judge again addressed the issue of sanctions. *See*, 2021 WL 5782106 (W.D.N.Y. Dec. 7, 2021). At the hearing, the Court learned that DOCCS retained the documents requested by the plaintiff for the following periods of time:

- cell block movement sheets: five years;
- information entered into the KIPY system (an electronic program that records what job listing activities an inmate was participating in at a given time): no evidence of retention period;
- log book documenting inmate movement between the cell blocks: five years;
- open program availability sheets (prepared from KIPY): destroyed on a daily basis; and
- grievances filed against the defendants: three years from the date that they become inactive.

The Court, citing *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 107 (2d Cir. 2002), then reviewed the standard which must be met before sanctions may be imposed on a party which had not met its obligation to respond to discovery requests. A party seeking an adverse inference instruction based on the destruction of evidence must establish that:

1. The party having control over the evidence had an obligation to preserve it at the time it was destroyed;
2. The records were destroyed with a culpable state of mind; and
3. The destroyed evidence was “relevant” to the party’s claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.

The Court found that the requested documents reflecting inmate movements between the cell blocks and programming assignments were plainly relevant to the plaintiff’s claims.

The Court next addressed DOCCS’ obligation to preserve evidence. The obligation to preserve evidence arises when a party has notice that the evidence is relevant to litigation or when a party should

have known that the evidence may be relevant to future litigation. *See, Fujitsu Ltd. v. Federal Express Corporation*, 247 F.3d 423, 436 (2d Cir. 2001).

The Court found that, at the latest, the defendants were on notice of this litigation in 2011 when they were served with the complaint. At that point, records subject to DOCCS’ five-year retention policy had not yet been destroyed and it was possible that some of the grievances against the defendants still existed.²

With respect to the cell block movement sheets and inmate movement log books, the Court found that by failing to preserve the cell block move sheets and logbook, the defendants were grossly negligent. The defendants’ “total abrogation of their discovery obligations presents a circumstance in which relevance can be assumed.” (Had the judge not made the finding, the plaintiff would have had to prove the relevancy of the documents to his case.)

Based on the analysis above, the Court found that the requirements for imposing an adverse inference instruction due to the spoliation of evidence had been met. At a later date, the Court will determine the adverse inference instruction that will be given at trial.

² Ultimately, the Court found that the complaint did not put the defendants on notice that they had to retain all grievances filed against them and therefore

did not investigate when these documents were actually destroyed.

Pursuant to FRCP 36(e), sanctions can only be imposed for the defendants' destruction of electronically stored information (ESI) – in this case the relevant information stored in the KIPY program – if the destruction is prejudicial. The Court can only impose the most serious sanctions, including an adverse inference instruction, if the defendants intended to deprive the plaintiff of the information's use in his litigation. Here, the Court found that it was unclear what ESI could have been obtained from the KIPY program at the time that the lawsuit was filed. For that reason, the Court was not prepared, on the record before it, to determine whether the defendants' failures prejudiced the plaintiff.

John Willis Richard represented himself in this Section 1983 action.

NOTICES

Correction: Less is More

In the November 2021 issue of Pro Se, Vol. 31, No. 6, the frontpage article discusses the Less Is More law. We need to correct an error in the article: Individuals who on March 1, 2022 were incarcerated for parole violations **will** receive up to two years of retroactive Earned Time Credit when they are again released to parole supervision. The article in the November 2021 issue erroneously stated that these individuals would not receive retroactive Earned Time Credit.

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

News & Notes

Visits and Embraces

Due to a decline in the COVID-19 positivity rates, since March 19, DOCCS has allowed incarcerated individuals and their visitors a short embrace at the beginning and end of a contact visit. This policy will remain in effect until further notice.

State IG Creates New Post for Prison Investigations

In 2021, 57% of the complaints sent to the New York State Inspector General (IG) concerned DOCCS. Recognizing that this warrants an immediate and sustained response, IG Lucy Lang has decided to appoint a senior investigative counsel to serve as the attorney in charge of overseeing DOCCS matters. According to Ms. Lang, this will enable her office to proactively identify and address gaps and trends that affect what she identified as “some of the most vulnerable New Yorkers, those in the prison system.”

Governor Hochul and NYSPCRC Urge Expansion of Temporary Release

In 2007, then-Governor Spitzer issued an executive order barring incarcerated individuals who had been convicted of violent felony offenses from participation in DOCCS’ temporary release programs. Known as Executive Order #9, the order prohibits incarcerated individuals from participating in temporary release programs if they have been convicted of a violent felony offense that includes as an element:

- i. Being armed with, the use of, the threatened use of, or the possession with intent to use unlawfully against another of, a deadly weapon or a dangerous instrument; or

- ii. The infliction of serious physical injury.

Executive Order #9 significantly reduces the number of incarcerated individuals that can participate in temporary release.

Recently, Governor Hochul announced an initiative called “Jails to Jobs.” “Jails to Jobs” aims to improve re-entry into the workforce and reduce recidivism by connecting previously incarcerated individuals with education, resources and opportunities for job placement. Governor Hochul’s initiative focuses on expanding educational release as well as vocational, job readiness and re-entry programs. The Governor’s announcement of the “Jail to Jobs” initiative acknowledges that while State law currently allows for up to 14 hours per day of educational release for educational, vocational or related purposes, the majority of incarcerated individuals enrolled in college do not qualify for educational release due to the nature of their crimes. To remedy this, Governor Hochul proposes legislation to expand the number of individuals eligible for *Educational Release* to include those individuals who qualify for Limited Credit Time Allowance (LCTA) and to expedite the awarding of a six-month LCTA credit against the sentences of eligible individuals.

With respect to the expansion of the individuals who may participate in temporary release programs, the work of the New York State Prison Crisis Response Coalition (NYSPCRC) is relevant. NYSPCRC has launched a campaign to rescind Executive Order #9 in its entirety and to

allow all incarcerated individuals – regardless of their offenses – to participate in all temporary release programs, thereby enhancing their chances for adequate job preparation, training and successful reentry. NYSPCRC argues that allowing individuals to participate in temporary release programs will also enhance public safety by better enabling the Parole Board to assess how the individuals appearing before it will perform when/if granted parole.

To learn more about the Governor's Initiative, visit:

[Governor Hochul Announces 'Jails to Jobs' — A New Initiative to Improve Re-Entry into the Workforce and Reduce Recidivism \(ny.gov\)](#)

To learn more about NYSPCRC's campaign, visit:
[amended.whitepaper.10.21.21.pdf - Google Drive](#)

Child Support: Frequently Asked Questions

Did my child support obligation automatically stop when I became incarcerated?

No, your child support obligation did not automatically stop when you became incarcerated. In order for the support obligation to be modified or suspended, you must submit a child support modification petition to the family court.

Can I modify my child support order?

In order to modify a child support order, you must be able to show there has either been a substantial change in circumstances since the order was entered or last modified, three years have passed since the order was entered or last modified, or there has been a change in either party's income by more than 15% since the order was entered or last modified.

Is incarceration considered a change in circumstances?

In most cases, if you were incarcerated after your child support order was entered or last modified, your incarceration will constitute a change in circumstances. On October 13, 2010, amendments to the New York Family Court Act and the Domestic Relations Law went into effect allowing for modification of child support orders based on incarceration as a change in circumstances. Unfortunately, if your child support order was entered or last modified before October 13, 2010, incarceration may not be considered a change in circumstances because the amendments were not made to apply retroactively to orders entered or modified before October 13, 2010.

Is there anything I can do to modify my child support order if it was entered or last modified before October 13, 2010?

A modification petition may be successful even if your order was entered or last modified before October 13, 2010, if the child support is owed to New York City's Department of Social Services. Currently,

we do not know of any other county Departments of Social Services that may consent to modification of a child support order based on incarceration as a change in circumstances if the order was entered or modified prior to October 13, 2010.

Can the mother of my child(ren) consent to modifying the child support order?

If you owe your child support directly to the mother of your child(ren), she can consent to modifying the child support order whether or not the child support order was entered or last modified before October 13, 2010. The mother of your child(ren) cannot, however, consent to a modification if your child support is owed to DSS.

My child is over 21 and I am still receiving bills for child support arrears. What can I do?

In New York State, unless extenuating circumstances exist, child support obligations end once a child turns 21. Though the child support obligation typically ends at age 21, any arrears that have accrued do not automatically go away. It is our understanding that a family court will not order a reduction of the arrears owed. If you owe any arrears to New York City DSS, however, you may be eligible for a reduction of those arrears by participating in New York City's Arrears Cap Program. PLS can provide you with an application for the Arrears Cap Program upon request. Additionally, the party to whom you owe the child support arrears can consent to a reduction of arrears owed to them.

Can PLS assist me with modifying my child support order?

PLS' Family Matters Unit may be able to assist by drafting a child support modification petition for you to file on your own in family court. A determination of whether we can offer assistance will be made on a case-by-case basis, based on the facts of each case. Please note, PLS' Family Matters Unit is funded to assist individuals with family matters that originate out of one or more of the following counties: Albany, Bronx, Dutchess, Erie, Kings, Monroe, Nassau, New York, Onondaga, Orange, Queens, Richmond, or Suffolk. A matter originates out of a county if it is the county where you were convicted, or the county in which your child currently lives. If you would like assistance from the Family Matters Unit and believe your circumstances qualify you for assistance, please write to the Family Matters Unit at: 41 State Street, Suite M112, Albany, NY 12207.

PRO SE VICTORIES!

J.C. v. State of New York, Claim No. 133224 (Ct. Clms. March 3, 2022). In this case, the claimant successfully argued that having a female correction officer in the operating room during a colonoscopy violated his state constitutional right to privacy. To succeed in this claim, the claimant had to show that he had shown a subjective expectation of bodily privacy and that the officer did not have sufficient

justification to intrude on his Fourth Amendment rights. [Both the state and federal constitutional rights to bodily privacy – the Fourth Amendment to the U.S. Constitution and Article 1, §12 of the New York State Constitution – are rooted in the search and seizure provisions of the respective constitutions. The operative language of the state and federal provisions is identical].

Here, the Trial Court found, the defendant's testimony established that the claimant had shown an actual subjective expectation of privacy; a DOCCS employee testified that the claimant had irately asked the officer to leave the room. The Court found that the privacy intrusion experienced by the claimant was "clearly a serious one as it involved a female [officer] viewing, without consent, a 'naked individual, and in particular ... the private portions of that person's body.'" The Court balanced DOCCS' security concerns – the risk of escape and the danger to the public, correction officers and hospital staff should the claimant be left unattended – against the claimant's privacy interests.

To determine whether the claimant's constitutional rights were violated, the Court applied *Turner v. Safley*, 482 U.S. 78 (1987). The *Turner* standard requires that a Court considering whether a policy violates an incarcerated individual's constitutional rights must determine whether the policy is reasonably related to legitimate penological objectives.

The Court concluded that DOCCS' security concern provided no legitimate justification for the female officer's presence in the

operating room during the time that the claimant was anesthetized and, as a result, unconscious. The Court found that "the scope of the intrusion was magnified given that the particular procedures being performed exposed the most private portions of the claimant's body by projecting them onto a monitor for all those present to see." And, "considering that the claimant was under anesthesia and unconscious for the entire duration of the procedures," the Court wrote, "defendant's security rationale fails to provide a legitimate penological justification for the visual intrusion into his bodily privacy."

Based on this application of the law to the facts, the Court found that the defendant was 100% liable for the violation of the claimant's constitutional right to privacy in the operating room.

Matter of Andre Scott v. Anthony Annucci, Index No. 7944-20 (Sup. Ct. Oct. 26, 2021). The Court rejected the respondent's argument that DOCCS' policies required the petitioner to be tested for tuberculosis (TB) using the Quantiferon blood test rather than the Mantoux PPD test that the petitioner had requested, and ordered the respondent to provide PPD testing to the petitioner, unless and until the Health Services Manual (HSM) is revised. In this case, the petitioner claimed that when he requested the PPD test, a nurse told him that the HSM policy governing TB testing had been revised and that the test generally offered is the Quantiferon test. The petitioner filed a grievance with respect to the health staff's refusal to allow the PPD test. The

Superintendent denied the grievance, writing that the petitioner had been advised by the nurse that that testing had been changed to Quantiferon testing instead of PPD testing. The Central Office Review Committee sustained the denial, stating that the only TB testing currently available is Quantiferon. Petitioner then filed an Article 78 challenge, attaching HSM 1.18, "Tuberculosis." HSM 1.18 provides that the Mantoux PPD test is given in most situations while the Quantiferon blood test is used in specific situations. The Court found that there is nothing in the record to support a policy change, nor was petitioner provided with any documentation concerning the claimed revision. Accordingly, the Court found, respondent's refusal to allow the petitioner PPD testing in accordance with its written policy was arbitrary and capricious.

***Matter of Sterling Stephens v. Donald Venettozzi*, Index No. 114-20 (Sup. Ct. Albany Co. Nov. 10, 2021). In response to Mr. Stephens Article 78 challenge to a Tier III hearing, the respondent agreed to reverse the hearing.** Mr. Stephens then filed a motion pursuant to Civil Practice Law and Rules §8601 seeking fees and expenses – \$362.70 – connected to the filing of the petition. In support of the motion, Mr. Stephens submitted "a specific breakdown of the fees along with certified mail receipts, a receipt of payment for court filing fees and disbursement forms for mailing and copying which total[ed] \$362.70." The respondent opposed the motion, arguing that Mr. Stephens had referenced the wrong statute; CPLR 8601, cited by the petitioner in support of his motion, allows a court to

authorize payment of counsel and expert fees and thus was not applicable to Mr. Stephen's motion for costs and expenses. Citing *Matter of Meseck v. Noworyta*, 170 A.D.3d 1371 (3d Dep't 2019), the Court found that Mr. Stephens was nonetheless entitled to reimbursement of actual fees and costs and awarded disbursements and fees in the amount of \$362.70.

***Matter of Salvatore Cuppuccino v. Donald Venettozzi*, Index No. 5361-21 (Sup. Ct. Albany Co. Jan 18, 2022). Respondent's failure to include the tape recordings on which the Misbehavior Report was based resulted in reversal of the challenged Tier III determination of guilt and expungement of the charges from Mr. Cuppuccino's prison records.** On the basis of recorded phone calls, the hearing officer found Mr. Cuppuccino guilty of soliciting, threats and gangs. In his Article 78 challenge, Mr. Cuppuccino argued that the determination of guilt was not supported by substantial evidence and that he had been denied the opportunity to confront his witness. Normally, such an argument would result in a transfer to the Appellate Division, as trial courts do not have the authority to decide whether a determination is supported by substantial evidence. However, the trial court, noting that the respondent had four times adjourned the return date of the proceedings and when he finally did submit an answer, failed to submit either the transcript of the phone recordings or the recordings themselves, found "equity dictates that, in the absence of the complete record of the hearing, the violation of the petitioner's right to confront his witness,

combined with the fact that the petitioner ha[d] already served the sentence given to him, the petition must be granted” In reaching this result, the Court cited *Matter of Vidal v. Annucci*, 149 A.D.3d 1366 (3d Dep’t 2017).

In 2021, DOCCS Agreed to Reverse 18 Hearings Challenged by Pro Se Petitioners

Matter of Jamel Upson v. John Rich, 190 A.D.3d 1182 (3d Dep’t 2021)

Matter of Wade Briggs v. Donald Venettozzi, 190 A.D.3d 1186 (3d Dep’t 2021)

Matter of Jose Santana v. Anthony J. Annucci, 190 A.D.3d 1182 (3d Dep’t 2021)

Matter of Anthony Jefferies v. NYS DOCCS, 190 A.D.3d 1250 (3d Dep’t 2021)

Matter of Eon Shepherd v. Anthony J. Annucci, 193 A.D.3d 1134 (3d Dep’t 2021)

Matter of Jahmel Clark v. James Leconey, 193 A.D.3d 1159 (3d Dep’t 2021)

Matter of Lance Carter v. H.O. Fischer, 193 A.D.3d 1362 (4th Dep’t 2021)

Matter of Charles Blanchard v. Donald Venettozzi, 194 A.D.3d 1295 (3d Dep’t 2021)

Matter of Andre Harris v. Jaifa Collado, 194 A.D.3d 1240 (3d Dep’t 2021)

Matter of Shawn Cyrus v. Anthony J. Annucci, Index No. 3443-20 (Sup. Ct. Albany Co. 2020)

Matter of Anthony Adams v. Anthony J. Annucci, 195 A.D.3d 1298 (3d Dep’t 2021)

Matter of Kiaza Loccenitt v. Anthony J. Annucci, 196 A.D.3d 993 (3d Dep’t 2021)

Matter of Neftaly Dominguez v. Rosemarie Wendland, 196 A.D.3d 991 (3d Dep’t 2021)

Matter of Leroy Johnson v. Stewart T. Eckert, 197 A.D.3d 1011 (4th Dep’t 2021)

Matter of Reginald Fraser v. Donald Venettozzi, 197 A.D.3d 1475 (3d Dep’t 2021)

Matter of Clarence Jeffreys v. NYS DOCCS, 199 A.D.3d 1155 (3d Dep’t 2021)

Matter of Cordarise Houston v. Anthony Annucci, 200 A.D.3d 1387 (3d Dep’t 2021)

Matter of Sterling Stephens v. Venettozzi, Index No. 114-20 (Sup. Ct. Albany Co. Nov. 10, 2021).

STATE COURT DECISIONS

Disciplinary and Administrative Segregation

DOCCS’ Dismissal of Drug Possession Charge Results in Judicial Reversal of Related Charge

In *Matter of Razor v. Venettozzi*, 200 A.D.3d 1180 (3d Dep’t 2021), the Third Department was faced with an unusual set of facts. The case that came before the Court began after an officer allegedly observed Mr. Razor smoking a cigarette with an “unusual odor.” The officer had the contents tested and based on the test results, charged Mr. Razor with possession of marijuana and possession of contraband. The hearing officer found Mr. Razor guilty of the charges and that determination was affirmed on administrative appeal. The determination of guilt was

subsequently reversed due to the drug tester's failure to follow the manufacturer's instructions.

This was the posture in which the case came before the Court. The question presented was whether, in light of the reversal of the drug possession charge, there was substantial evidence to support the determination that the cigarette was contraband. The Court held that there was not. "The prohibition of contraband," the Court wrote, "hinges on whether or not the item is authorized." Due to the unreliable drug test, and the absence of any hearing testimony identifying the substance at issue or attesting to the petitioner's alleged admission, the Court found that substantial evidence did not support the determination that the material in the cigarette was unauthorized and therefore contraband.

Based on this analysis, the Court granted the petition, annulled the determination of guilt, and directed the DOCCS Commissioner to expunge all references to this matter from the petitioner's institutional (prison) record.

Derek Razor represented himself in this Article 78 proceeding.

Substantial Evidence of Intoxication

In keeping with the trend of holding that a nurse's testimony, combined with the allegations in the misbehavior report, constitute substantial evidence of intoxication, in *Matter of Barranco v. Annucci*, 202 A.D.3d 667

(2d Dep't 2022), the Third Department held that a determination that Mr. Barranco was intoxicated, which was supported by a misbehavior report and the testimony of a nurse who had examined Mr. Barranco, was supported by substantial evidence. In reaching this result, the Court, citing *Matter of Bryant v. Coughlin*, 77 N.Y.2d 642 (1991), noted the long-standing standard: "in order to sustain the determination, the Court 'must find that the disciplinary authorities have offered such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact.' " Here, the Court found, the hearing officer's written disposition stated that in reaching the determination of guilt, the hearing officer relied on the misbehavior report and the nurse's testimony. In combination, the Court found, this constituted substantial evidence.

Earle Barranco represented himself in this Article 78 proceeding.

Engaging in Lawful Conduct is Not a Defense to RDO

In *Matter of Watson v. Werlau*, 201 A.D.3d 1288 (3d Dep't 2022), the petitioner challenged the hearing officer's determination that the petitioner was guilty of refusing a direct order, creating a disturbance and being out of place. In the misbehavior report, the reporting officer alleged that when the petitioner was given an order to lock in his cell because rec time was over, the petitioner argued with the officer that his rec period was not over, and

became louder in his objections when the officer again ordered him to return to his cell.

The Court found that the determination of guilt was supported by substantial evidence. The Court rejected the petitioner's argument that his conduct was justified because he was entitled to more recreation time, writing that "petitioner is not free to disregard a direct order, even if he believes the order was wrong or unauthorized."

Earl Watson represented himself in this Article 78 proceeding.

Sentence and Jail Time

Legality of Sentence Cannot Be Challenged Using an Article 78

In *Matter of Hunt v. Annucci*, 201 A.D.3d 1112 (3d Dep't 2022), the petitioner, who had been convicted of two counts of murder in the second degree, two counts of burglary in the first degree and criminal possession of a weapon, filed a grievance asserting that his sentence was illegal and his Sentence and Commitment Order was incorrect. In the grievance, the petitioner asked that DOCCS comply with Corrections Law §601-a and report the errors to the sentencing court so that his sentence could be corrected and his parole eligibility date recalculated. The Inmate Grievance Resolution Committee

(IGRC) denied the grievance. The Central Office Review Committee (CORC) upheld the denial.

The petitioner filed the Article 78 proceeding asking the Court to order DOCCS to perform its obligations under Correction Law 601-a. This is known as a request for mandamus relief. "The writ of mandamus," the Court wrote, "is an extraordinary remedy that lies only to compel the performance of acts which are mandatory, not discretionary, and only when there is a clear legal right to the relief sought." Here, the Court found, whether DOCCS is required to notify the sentencing court depends upon DOCCS' discretionary determination as to whether the facts show that the court imposed an erroneous sentence. Thus, an action asking for an order to compel DOCCS to communicate specific information to the court must be dismissed.

The proper vehicle for challenging an illegal sentence, the Court wrote, is on direct appeal or in a Criminal Procedure Law Article 440 motion.

Brian Hunt represented himself in this Article 78 proceeding.

Court of Claims

Claimant Failed to Establish Use of Force Was Unreasonable

In *McFadden v. State of New York*, 200 A.D.3d 1357 (3d Dep't 2021), the claimant alleged that officers used excessive force and assaulted him three times in one day and then, after he returned from a trip to the emergency room, interfered with the medical care for his injuries, by placing him in SHU rather than in the infirmary. After trial, the Court dismissed the claim and the claimant appealed.

In response to the argument that the trial court had failed to consider all of Mr. McFadden's claims, the Appellate Court ruled that at the start of trial, the trial court stated the issues – excessive force, assault and interference with medical care – and the claimant agreed those were the issues to be tried. Thus, the Appellate Court held, any other issues were not properly before the trial court and, in any event, if they were, the claimant failed to meet his burden of proof with respect to the other causes of actions.

Before reviewing the evidence on which the trial court relied, the Appellate Court reviewed the law. Correction officers are permitted to use force upon an incarcerated individual to prevent injury to person or property, enforce compliance with a lawful direction or to prevent an escape. 7 NYCRR

251-1.2(d); Corrections Law §137(5). Where the use of force is necessary, only the degree of force reasonably required shall be used. 7 NYCRR 251-1.2(b). When reviewing a non-jury verdict, an appellate court has broad authority to review the **probative weight** (the value of the evidence in proving the fact it is offered to prove) of the evidence, but, the Court went on, “we generally defer to the trial court’s credibility determinations and factual findings, as that court had the opportunity to observe the witnesses.”

The Appellate Court then summarized the facts on which the trial court had relied in dismissing the claim. Two officers testified that after the body orifice scanner indicated the presence of metal in the claimant’s groin area, they escorted him to the infirmary for a strip frisk. There, the officers testified, they neither assaulted the claimant nor witnessed anyone else do so. However, one officer testified, after the claimant had stripped down to his underwear, he tried to run from the room whereupon the officer grabbed him. The second officer then helped him bring the claimant to the floor and “applied a ‘figure four leg lock,’” a body hold that DOCCS has authorized officers to use to gain compliance. The officers testified that the use of force ended when the claimant complied with their orders. A sharpened metal object, they testified, was found on the floor where the claimant had been lying.

With respect to the claim that DOCCS unreasonably interfered with the claimant’s medical care, the evidence upon which the trial court relied was the testimony of a

doctor employed by DOCCS. The doctor testified that DOCCS' policies do not require that an incarcerated individual be admitted to the infirmary after a visit to an outside hospital unless the individual had been *admitted* to the hospital. On the day of the incident, the claimant had not been admitted to the hospital; rather, he had been taken to the emergency room. Thus, the doctor testified, where a nurse examined the claimant after his return from the emergency room and consulted with a doctor before placing him in SHU, the prison medical staff followed DOCCS' procedures.

After reviewing the evidence, and accepting the Trial Court's credibility determinations that favored the officers, the Appellate Court concluded that the claimant had failed to establish that the officers' use of force was unreasonable or excessive. The Court also found that considering the doctor's testimony, the claimant had failed to prove any employee interfered with this medical care.

Reginald McFadden represented himself in this Court of Claims action.

Miscellaneous

Father's Failure to Support Or Maintain Contact Leads to Termination of Rights

The decision in *Matter of Prinzivalli v. Kaelin*, 200 A.D.3d 781 (2d Dep't 2021), deals with the issue of what the biological father of

children who were born when their biological parents were not married must do if he wants to have a legal right to oppose their adoption. In this case, the Second Department affirmed the Family Court's finding that because the biological father had abandoned his two children, his consent to the adoption of the children was not required.

In 2016, when Mr. Prinzivalli's children were two and three years old, he had temporary custody of them for roughly four months. However, when Mr. Prinzivalli was arrested on burglary charges, the children's maternal grandmother was granted custody. Mr. Prinzivalli was incarcerated between May 2017 and July 2019. In August 2019, he petitioned for parental access to the children. Three months later the grandmother and her husband petitioned for their adoption.

After a fact-finding hearing, the Family Court determined that the father's consent to the adoption of the children was not required and that in any event, he had abandoned them.

A review of the law shows what the biological father of a child who is born to unmarried parents must do in order **retain** (keep) his parental rights. Domestic Relations Law §111(1)(d) provides that a biological father's consent to the proposed adoption of children whose parents were not married at the time of their birth and who are placed for adoption more than 6 months after their birth is only required if the father "maintained substantial and continuous or repeated contact with the children as shown by making reasonable

child support payments and either monthly visitation or regular communication with the children or their custodian.”

Pursuant to this law, the Court wrote, a biological father’s unexcused failure to satisfy either of these requirements – child support payments **and** contact/communication – warrants a finding that his consent to the proposed adoption is not required.

Mr. Prinzivalli, the Court found, had not maintained substantial and continuous contact with the children through payment of support or through regular visitation/communication. Nor did Mr. Prinzivalli’s incarceration release him from the statutory contact requirement. Accordingly, the Court held, the Family Court properly determined that Mr. Prinzivalli’s consent to his children’s adoption was not required.

Joseph Petito, Esq., Poughkeepsie, N.Y., represented Benjamin Prinzivalli in this Family Court proceeding.

Court Rejects Challenge to Termination of Parental Rights

In *Matter of Luciano Q., Sr.*, 198 A.D.3d 967 (2d Dep’t 2021), the appellant – the father whose parental rights had been terminated – sought to vacate an order holding that his consent to his child’s adoption was not required. This decision is instructive with respect to how important it is for

incarcerated parents to maintain contact with their children and, to the extent possible, pay child support while they are incarcerated.

In an appeal from an order terminating his parental rights, Luciano Q, Sr. argued that the Family Court should have vacated its determination that by failing to appear at a fact-finding hearing at which the Court determined that the father’s consent to the adoption of his child was not required, he had “defaulted.” When a party defaults by not appearing, the court will nonetheless decide the issue that is before it without the benefit of the absent party’s testimony or evidence.

The Appellate Court began its consideration of the father’s appeal by noting that “the determination of whether to relieve a party of a default is within the sound discretion of the Family Court.” As the Court in *Matter of Johanna B. [Grace B.]*, 157 A.D.3d 668, 669 (2018), wrote, “A [party] seeking to vacate an order entered upon his or her default in a termination of parental rights proceeding must establish a reasonable excuse for the default as well as a potentially meritorious defense to the relief sought in the petition.”

Here, the Appellate Court agreed with the Family Court that Luciano Q, Sr. had not provided a reasonable excuse for failing to appear. Mr. Q., Sr. asserted that the day before the hearing, he was transferred to a different prison. He failed however to provide an affidavit swearing to the reason for his absence or any documentation substantiating the reason he did not appear.

Instead, Mr. Q., Sr. relied on an affirmation from his attorney who had no personal knowledge about the purported transfer.

However, the Court went on, regardless of the reason that Mr. Q., Sr. had failed to appear, he admitted that he had not provided any support for the child while the child was in foster care. Mr. Q., Sr. had also failed, the Court noted, to put forth a **potentially meritorious defense** (a defense that if proven could lead to a ruling in his favor) to the determination that his consent to the child's adoption was not required. Accordingly, the Court concluded, the Family Court properly exercised its discretion in denying the father's motion to vacate the default.

Louisa Floyd, Esq., Rochester, N.Y., represented Luciano Q., Sr. in this Family Court proceeding.

Court Upholds Penalty Imposed for ASAT Refusal

After DOCCS told Theodore Simpson that he was required to participate in an Alcohol and Substance Abuse Treatment (ASAT) program, Mr. Simpson filed a grievance asserting that the requirement was unwarranted. When the grievance was denied by the Central Office Review Committee, he filed an Article 78 proceeding. The Supreme Court, Albany County, dismissed the petition.

In *Matter of Simpson v. State of New York*, 202 A.D.3d 1245 (3d Dep't 2022), the Appellate Court began its analysis by restating the standard it was required to apply: "Judicial review of the denial of an incarcerated

individual's grievance is limited to whether such determination was arbitrary and capricious or affected by an error of law." The Court then noted that the ASAT Operations Manual does not limit the program to incarcerated individuals with a diagnosed or previously established pattern of alcohol or drug abuse. Rather, participation includes incarcerated individuals who have prison disciplinary histories of alcohol and/or drug infractions. And, the Court went on, it is well established DOCCS has a great discretion in determining the program needs of those in its custody.

Here, the petitioner's grievance was denied because his disciplinary history includes drug use and possession. For this reason, the Court concluded that there was no basis for disturbing the denial of the grievance.

Theodore Simpson represented himself in this Article 78 proceeding.

Immigration Matters

This month's column focuses on *Ojo v. Garland*, 25 F.4th 152 (2d Cir. 2022), a February 2022 decision from the Second Circuit Court of Appeals which will likely have positive consequences for non-citizens who are in deportation proceedings because of criminal convictions. The case is also noteworthy for a fascinating dialogue between the majority and dissenting opinions, a dialogue which raises important and complex questions about the proper

rule of the judiciary when reviewing agency decisions that erroneously apply the law.

Ojo concerns the deportation proceedings of Olukayode David Ojo, a Nigerian national who entered the United States in 2010 on a tourist visa and was subsequently convicted in federal court of conspiracy to commit wire fraud and conspiracy to unlawfully possess identification documents. After completing his federal sentence, the Department of Homeland Security took Ojo into custody and initiated deportation proceedings against him. In immigration court, Ojo submitted a Form I-589 application which sought three kinds of relief from deportation— asylum, withholding of removal, and protection under the Convention Against Torture (“CAT”)—based on his fear that he would face serious danger if returned to Nigeria. After a hearing in immigration court, an Immigration Judge denied his application, and Ojo appealed to the Board of Immigration Appeals, which affirmed the denial of relief. Ojo subsequently petitioned for review before the Second Circuit Court of Appeals.

In a majority opinion authored by Judge Bianco and joined by Judge Chin, the Second Circuit vacated the immigration agency’s decision and remanded for additional proceedings. First, with respect to Ojo’s asylum application, the Court found that the agency had misapplied 8 U.S.C. §1158, the federal statute governing asylum applications. Under that statute, an asylum applicant must file his or her application “within 1 year after the date of the alien’s arrival in the United States.” 8 U.S.C.

§1158(a)(2)(B). But an untimely application may still be considered by the agency if the applicant can demonstrate either “the existence of changed circumstances which materially affect the applicant’s eligibility for asylum or extraordinary circumstances relating to the delay” in filing the application. 8 U.S.C. §1158(a)(2)(D).

In this case, Ojo filed his application more than one year after his arrival in the United States, but he argued that changed circumstances justified the late filing because of his status as a criminal deportee, which placed him at risk of harm in Nigeria. The agency concluded that changed circumstances did not apply because Ojo himself had created those changed circumstances by engaging in criminal activity, thus rendering the exception inapplicable under 8 C.F.R. §1208.4(a)(5). However, the Second Circuit concluded this was error because 8 C.F.R. §1208.4(a)(5) applies only to “extraordinary circumstances,” *not* to “changed circumstances.” And while the agency had denied Ojo’s application in the alternative as a matter of discretion based on his criminal history, the Court found that this alternative holding was also erroneous because the agency considered only Ojo’s criminal history without balancing the equities for and against the applicant, as required by Second Circuit law.

Next, the Court concluded that the agency was incorrect in finding that Ojo was barred from withholding of removal because of his conviction for a “particularly serious crime” or “PSC.” To make a PSC determination, the agency is required to first consider whether

the elements of the applicant's statute of conviction "potentially bring the crime into a category of particularly serious crimes." *Matter of N-A-M-*, 24 I. & N. Dec. 336, 342 (BIA 2007). If they do, the agency must then examine the facts and circumstances of the applicant's conviction to determine whether the applicant is a danger to the community of the United States. In Ojo's case, the agency found that the elements of his conviction brought his crime into the PSC category because fraud is a "crime against persons." The Court disagreed, concluding that "crimes against persons" are offenses "in which the perpetrator uses or threatens to use force," whereas "Ojo's crimes of conspiracy to commit wire fraud and conspiracy to possess false identification documents do not have as an element use or threatened use of force." 25 F.4th at 166. The Court therefore ordered the agency to reconsider its PSC determination.

Finally, with respect to Ojo's application for protection under the CAT, the Court concluded that the agency erred by failing to consider evidence submitted by Ojo, including an expert declaration by a Nigerian human rights lawyer which the agency entirely failed to address.

In a blistering dissent, Judge Menashi took issue with each of the majority opinion's conclusions. In Judge Menashi's view, Ojo's case was "straightforward" because Ojo was "a Nigerian citizen illegally present in the United States" who "scammed unsuspecting Americans by selling non-existent vehicles on the internet and then using false identity documents to collect payments wired to Western Union." *Id.* at

176. Judge Menashi deemed the agency's decision to deport Ojo "entirely reasonable" and accused the majority of "nitpick[ing] its way to vacating every aspect of the agency's decision." *Id.* Specifically, Judge Menashi took issue with the fact that, "[t]hough [the majority] does not disagree with the agency's substantive judgment, the court decides the agency's opinion could have been written more clearly—and it remands for the agency to revise it." *Id.*

At the heart of the dispute between the majority and dissent in *Ojo* lies two very different conceptions of judicial review of agency decisions, and in particular, of a legal principle called the "futility doctrine." Under that doctrine, when a federal court reviews an agency's decision, the court should not vacate that decision and remand for additional proceedings when doing so would be futile—that is, when the agency would undoubtedly reach the same result on remand. The goal of the futility doctrine is to conserve administrative and judicial resources when the agency commits a legal error but would reach the same result even when the error is corrected.

In the majority's view, remand in Ojo's case would *not* be futile because the sole grounds relied upon by the agency to deny Ojo's application were based on legal error. As the majority stated, "when a court speculates as to how the agency would have decided the claim if it had operated under the correct legal standard or assumes that it considered and rejected key evidence on some unknown ground, it improperly usurps the adjudicatory role entrusted to the agency in the first instance by Congress and also

subjects one of the most important decisions in our legal system—namely, whether an individual has the right to remain in the United States— to judicial guesswork.” *Id.* at 157. In contrast, Judge Menashi found no problem determining what the agency would do on remand, concluding that “the substance of the Board’s command is not seriously contestable and there is not the slightest uncertainty as to the outcome of a proceeding before the Board.” *Id.* at 180 (internal quotation marks and citation omitted). *Ojo* thus offers a thought-provoking dialogue on the proper role of the judiciary when reviewing administrative decisions, a dialogue that will likely continue to animate the Second Circuit in future administrative cases.

WHAT DID YOU LEARN?

1. To retain his parental rights and maintain the authority to reject a proposed adoption, the biological father of a child born to unmarried parents must present proof concerning:
 - a. Child support payments and communications with the child.
 - b. Child support payments, communications with the child and his criminal record.
 - c. His fitness to be a parent as certified by a licensed social worker and proof of child support payments.
 - d. His prison disciplinary history and the child’s appearance at the prison on visiting days.
2. A State Supreme Court may grant an Article 78 petition when:
 - a. The respondent fails to litigate the case in a timely and efficient manner.
 - b. The Appellate Division issues an order giving jurisdiction to Supreme Court.
 - c. It has a complete record of the Tier III hearing.
 - d. The parties consent to giving jurisdiction to Supreme Court.
3. In the *Matter of Andre Scott v. Anthony Annucci*, the Court found that DOCCS engaged in arbitrary and capricious behavior by:
 - a. Denying treatment to incarcerated individuals suffering from tuberculosis (TB) unless the Mantoux PPD test was used as the diagnostic measure.
 - b. Claiming that its policy for Tuberculosis Testing had been revised but not submitting evidence to show that DOCCS had

revised the Tuberculosis Testing policy in the Health Services Manual.

- c. Prohibiting use of the Mantoux PPD except where a nurse authorized a PPD TB test.
 - d. Requiring the medical staff to use TB tests developed by the Mantoux pharmaceutical company.
4. When an incarcerated individual wins an Article 78 challenge to a Tier III hearing, the individual is entitled to reimbursement of fees and costs:
 - a. If represented by counsel.
 - b. If the expenditure is related to the hiring of an expert witness.
 - c. If the individual submits proof that he made the expenditures.
 - d. If reimbursement is needed to file a Section 1983 civil rights action to be brought in federal court.
 5. An incarcerated individual's right to bodily privacy is rooted in:
 - a. The First Amendment right of freedom of expression.
 - b. The Fourteenth Amendment right of due process.
 - c. The Eighth Amendment right to be free from cruel and unusual punishment.
 - d. The Fourth Amendment right to be free from unreasonable searches and seizure.
6. In *Matter of Razor v. Venettozzi*, the Court found that where a cigarette possessed by an incarcerated individual could not be shown to contain marijuana because of a failure in the drug testing procedure, that finding also led to the conclusion that:
 - a. There was substantial evidence of possession of contraband.
 - b. Substantial evidence did not support the conclusion that the petitioner possessed contraband.
 - c. There was substantial evidence of possession of contraband because the officer testified that based on his training and experience, the contents of the cigarette was not tobacco.
 - d. There was substantial evidence of conspiracy to distribute drugs.
 7. According to *Matter of Barranco v. Annucci*, intoxication is established by substantial evidence if the allegations of odd behavior in the misbehavior report are supported by:
 - a. A breath test.
 - b. A blood test.

- c. Medical testimony.
 - d. A field sobriety test used in DWI cases.
8. Which argument presented by an incarcerated person is *least* likely to be accepted by a court?
- a. An incarcerated person may disregard orders by staff if the order is unreasonable or against DOCCS policy.
 - b. A finding of guilt in a prison disciplinary hearing must be supported by substantial evidence.
 - c. A correction officer may direct an incarcerated individual to enter his or her cell even if recreation time has not ended.
 - d. Orders given by correction officers require obedience regardless of the merits of the argument presented by an incarcerated individual.
9. The *most* effective way of challenging an illegal sentence is by:
- a. Bringing the issue to the attention of the District Attorney who prosecuted the case.
 - b. Writing to the office of the NYS Attorney General.
 - c. Filing an Article 78 petition asking the Court to direct DOCCS to notify the sentencing court about the illegal sentence.
 - d. Raising the issue on direct appeal or filing an Article 440 motion challenging the sentence.
10. When an appellate court reviews a Court of Claims verdict rejecting an incarcerated individual's claim of excessive force, the appellate court:
- a. Must accept the factual findings made by the trial court.
 - b. Must conduct its own inquiry into the facts of the case.
 - c. Usually defers to the factual findings made by the trial court.
 - d. Usually rejects the trial court's findings and appoints a special monitor to prepare a report summarizing the facts of the case.

Answer Key

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

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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.

PLS ALBANY OFFICE: 41 State Street, Suite M112, Albany, NY 12207

Adirondack • Altona • Bare Hill • Clinton • CNYPC • Coxsackie • Eastern • Edgecombe
Franklin • Gouverneur • Great Meadow • Greene • Hale Creek • Hudson • Marcy • Mid-State
Mohawk • Otisville • Queensboro • Riverview • Shawangunk Sullivan • Ulster • Upstate •
Wallkill • Walsh • Washington • Woodbourne

PLS BUFFALO OFFICE: 14 Lafayette Square, Suite 510, Buffalo, NY 14203

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

PLS ITHACA OFFICE: 114 Prospect Street, Ithaca, NY 14850

Auburn • Cape Vincent • Cayuga • Elmira • Five Points

PLS NEWBURGH OFFICE: 10 Little Britain Road, Suite 204, Newburgh, NY 12550

Bedford Hills • Fishkill • Green Haven • Sing • Taconic

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