

Pro Se

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COURT NIXES CHALLENGE TO HALT ACT REFORMS!

On March 31, 2022, the Humane Alternatives to Long Term Solitary Confinement Act (HALT) went into effect. HALT limits the conduct for which an incarcerated individual may be placed in segregated confinement, also known as solitary confinement, for more than three days. HALT also caps the number of days an incarcerated individual may be held in segregated confinement to 15 **consecutive days** (days in a row) and 20 days in a 60-day period. Segregated confinement is defined as any housing that requires an incarcerated individual to spend over 17 hours a day in a cell.

HALT also bans the segregated confinement of people 1) who are under 21 and over 55; 2) with a physical, mental or medical disability; or 3) who are pregnant or in the first eight weeks of post-partum recovery or caring for a child in a correctional facility.

HALT requires that people who are serving disciplinary sanctions and either have exceeded the permissible length of time in segregated confinement or cannot be placed in segregated confinement be assigned to Residential Rehabilitation

Units (RRUs). Individuals in RRUs have at least 10 hours of out of cell time per day.

Prior to HALT, the use of solitary confinement in New York State prisons was limited by the settlement agreement in *Peoples v. Annucci*, 180 F.Supp.3d 294 (S.D.N.Y. 2016) (*Peoples*).

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DIGNITY BEYOND DETENTION

A Message from the Executive Director, Karen L. Murtagh

No one wants to be defined by the worst thing they've ever done. That's an ambitious goal for anyone, but it is particularly challenging for people who are currently or formerly incarcerated. The stigma associated with a criminal record, especially when a conviction is coupled with detention in a local or state correctional facility, makes reentry into society an extremely difficult path to navigate.

I am happy to report on four seemingly unrelated events that have the potential to help improve this process.

First, on August 8, Governor Hochul signed into law a measure that would prohibit the future labeling of incarcerated individuals as "inmates", a term long viewed as dehumanizing and antithetical to the goals of rehabilitation and reentry. Another measure signed by the Governor would allow incarcerated individuals the opportunity to complete their rehabilitation programs and work at the same time, thus furthering the opportunities for successful reintegration.

Said the Governor:

"In New York, we're doing everything in our power to show that justice and safety can go hand-in-hand . . . By treating all New Yorkers with dignity and respect, we can improve public safety while ensuring New Yorkers have a fair shot at a second chance."

New York State has long prided itself as a bastion of second chances, and we commend the Governor for her leadership on this issue.

Second, in both anticipation (and furtherance) of such efforts, we at PLS anchored this year's request for written client submissions for our Annual Pro Bono Event to the topic of "Convictions Beyond A Conviction."

Inspired by Brian Stevenson's quote "Each of us is more than the worst thing we've ever done," we asked incarcerated individuals to send us poetry and prose that focus on who they are apart from their conviction and incarceration – submissions that would help people on the outside understand who they really are in terms of the following:

- *Their beliefs;*
- *Their ambitions, hopes, and dreams;*
- *What their children, parents, family and friends mean to them;*

- *How their past experiences shaped them as individuals; and*
- *What they want others to know about them, beyond their criminal convictions.*

In this, our 11th year of participating in the nation's Annual Pro Bono Month activities, we received more submissions than ever before. The writing gave voice to the great importance of acknowledging human frailty and seeking redemption and highlighted the need for dignity as a pathway to self-improvement and societal acceptance.

Third – in another development that speaks to human dignity, mutual respect and the need for truth, education and honest conversation – is the recent decision by New York State corrections officials to allow the book “Blood in the Water” by Heather Thompson into DOCCS’ facilities. The book provides an in-depth description of the conditions leading to the 1971 Attica uprising and expresses the view – shared by public officials and private citizens alike – that to avoid the errors of the past, we must acknowledge and learn from them.

Fourth, PLS’ PREP program – which seeks to assist long-term incarcerated individuals with their reentry efforts – was recently awarded a renewed grant by the New York Community Trust Foundation and, in the process, has garnered the interest of our elected state representatives for its continuation and expansion.

To me, there is a common thread that connects these four developments: the recognition that the preservation of human dignity through the worst of times is a necessary means to a better end.

These are not new thoughts, and voices from the past are worth noting here:

Thomas Jefferson – often quoted and paraphrased by Winston Churchill – Mahatma Ghandi and others: “The measure of society is how it treats the weakest members.”

The brilliant novelist, Fyodor Dostoyevsky, who wrote eloquently of the human condition, famously noted that “you can judge a society by how well it treats its prisoners.”

This is all to say that, despite the negative headlines that besiege us every day, these four developments, all of which occurred in the last month, provide glimmers of hope that our common interest in preserving human dignity, lifting others up and providing second chances is nonetheless alive and well.

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The *Peoples* reforms included:

- A reduction in the frequency and duration of SHU sanctions;
- Improvements to the SHU conditions; and
- Mechanisms for the implementing and enforcing the settlement agreement.

After the *Peoples* reforms went into effect in 2016, the average length of a SHU sanction was reduced by roughly 30 percent and the number of people serving SHU sanctions was reduced by roughly 58 percent.

New York Correctional Officers and Police Benevolent Association, Inc. v. Kathy Hochul, 2022 WL 2180050 (N.D.N.Y. June 16, 2022) (*NYSCOBA v. Hochul* or *NYCOBA*), is a class action challenge to the HALT law and the *Peoples* reforms. It was brought by the Correction Officers' Union and six individual corrections officers. The plaintiffs alleged that the changes in the policies and practices brought about by the *Peoples* and HALT reforms violate their due process right to be free from state-created danger.

Filed in 2021, the *NYSCOBA* plaintiffs alleged that since 2012, there has been an almost 100 percent increase in violence by incarcerated individuals against staff and a roughly 85 percent increase in violence by incarcerated individuals against each

other. During this time period, the incarcerated population fell by 36 percent. The complaint further alleges that the *Peoples* and HALT reforms:

- Create a dangerous living and working environment by permitting incarcerated individuals with a propensity for violently attacking peaceful members of the incarcerated population and corrections staff to be placed in congregate settings where they can easily engage in violence;
- Have increased workplace danger beyond what is customary in the prison setting and have resulted in serious permanent injuries to the plaintiffs, their fellow employees and other incarcerated individuals.

These factors, the plaintiffs allege, violate their Fourteenth Amendment rights to be free from state created danger.

The defendants – Governor Hochul, the State of New York, DOCCS and DOCCS Commissioner Anthony Annucci – moved to dismiss the complaint, arguing that it fails to state a claim upon which relief can be granted. District Court Judge Mae D'Agostino agreed with the defendants and on June 16, 2022, dismissed the complaint.

The Court's Analysis

Subject Matter Jurisdiction and Standing

The Court began its analysis by reviewing the phrase “subject matter jurisdiction,”

noting that “[a] case is properly dismissed for lack of subject matter jurisdiction under [Federal] Rule 12(b)(1) when the district court lacks the statutory or constitutional power to **adjudicate** [decide] it. When the defendants moved to dismiss for lack of subject matter jurisdiction, the NYSCOPA Court wrote, in deciding the motion “the court ‘must accept as true all material factual allegations in the complaint but [is] not to draw inferences from the complaint favorable to the plaintiffs.’”

To survive a motion to dismiss, the plaintiffs’ allegations “must have sufficient factual heft” to show that the plaintiff is entitled to relief. The factual allegations must be strong enough to raise a right of relief above the speculative level. The claims must be plausible but do not have to be probable. “Ultimately,” the Court wrote, “when the allegations in the complaint, however true, could not raise a claim of entitlement to relief, or where the plaintiff has not nudged its claims across the line from conceivable to plausible, the complaint must be dismissed.” (brackets, internal quotation marks and citations omitted).

The Constitution limits the **jurisdiction** (authority) of the federal courts to actual cases and controversies. This is known as “standing.” To have standing to bring a claim, the Court wrote, a plaintiff must have suffered “an injury in fact” that is:

- fairly traceable to the challenged conduct of the defendants; and

- likely to be redressed by a favorable judicial decision.

Injury in Fact

An injury in fact is shown by “the invasion of a legally protected interest which is concrete and particularized, actual or imminent, and not conjectural or hypothetical.” Here, the Court wrote, the plaintiffs are alleging that they suffered harm as a result of the implementation of the *Peoples* settlement and that there is likelihood of future harm from HALT. The plaintiffs also argue that HALT will ensure that the increase in violence resulting from the *Peoples* settlement will continue when HALT is implemented. The statistical evidence of increasing risk of harm establishes, they argue, an “injury in fact.”

Citing *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) (*Lyons*), the Court rejected the plaintiffs’ argument with respect to the HALT claims. The *Lyons* Court held that the risk that a third party will break the law to cause an injury at some future unspecified date, in an unspecified manner, is too speculative to create an injury in fact. Applying the *Lyons* standard to *NYSCOPA v. Hochul*, the Court found that the allegations that HALT would lead to an overall higher level of violence in New York prisons were too speculative and thus the plaintiffs did not have standing to challenge the act. Based on this conclusion, the Court dismissed the claims relating to the HALT reforms.

State Created Danger

According to *Matican v. City of New York*, 524 F.3d 151, 155 (2d Cir. 2008), the Due Process Clause of the Fourteenth Amendment requires protection against private violence where the state either:

- assisted in creating or increasing the danger to the victim; or
- had a special relationship with the victim.

The plaintiffs allege that the *Peoples* settlement and the HALT Act unconstitutionally expose them to state created danger. To state a claim under the state created danger doctrine, the complaint must allege that:

- a government official took an affirmative act that created the danger; and
- the official's conduct was so **egregious** (extremely bad and in an obvious way) that it shocks the contemporary conscience.

In its analysis of this issue, the NYSCOBA Court applied the rule of law set by the Second Circuit decision in *Lombardi v. Whitman*, 485 F.3d 73, 84 (2d Cir. 2007). The *Lombardi* decision requires that a court reviewing a claim for state created danger presume that the administration of government programs is based on a rational decision-making process that takes account of competing social, political and economic forces. The *Lombardi* decision also notes that “the

presence of significant countervailing obligations precludes official actions from shocking the conscience.” *Id.* at 83.

In *NYSCOBA*, the Court found that the New York State Legislature and DOCCS had balanced the competing interests of prisoners, who enjoy a special relationship with the defendants, entitling them to protection pursuant to the Due Process Clause. “Whether Defendants actions here ‘shock the conscience,’ ” the Court wrote, “therefore must be analyzed with due consideration of competing interests.” The Court found that the plaintiffs had failed to allege any conduct so egregious, or so outrageous, that it might fairly be said to shock the contemporary conscience. “Balancing the use of solitary confinement on prisoners with workplace safety for correction officer[s],” the Court wrote, “is exactly the type of competing obligations where courts have refused to find state-created dangers.”

Based on the above analysis, the Court dismissed NYSCOBA’s complaint.

NEW & NOTES

DOCCS Rescinds Mask Mandate But Maintains Social Distancing

Effective July 1, 2022, DOCCS has **rescinded** (lifted) its mask mandate for DOCCS staff and volunteers. The decision to lift the mandate was based on the decrease in COVID-19 infections in correctional

facilities and the community. Masks must still be worn in certain situations, including during visits, see below. DOCCS continues to require that when an individual is not masked, they maintain a 6-foot separation between themselves and other individuals.

The mask mandate remains in effect:

- In the visiting room (because 6 feet of distance between individuals cannot be maintained);
- for individuals working in isolation/quarantine areas;
- when a DOCCS employee has been directed to wear a mask because they are in quarantine status;
- when an incarcerated person is in quarantine status; and
- during all medical encounters, including planned health care interactions such as infirmary visits, clinic appointments, and sick call sessions.

While DOCCS has lifted the mandate, individuals who want to wear masks may continue to wear them. Older and medically vulnerable incarcerated people, even those who are vaccinated and boosted, should seriously consider continuing to wear masks. The effects of COVID infection on these two populations can be more severe and the risk of

hospitalization, serious complications, death and long-term impacts are higher.

PRO SE VICTORIES!

Matter of Jessie Barnes, 09-B-2707 v. Shelley M. Mallozzi, et al., Index No. 9163-21 (Sup. Ct. Albany Co. May 25, 2022). After the court ordered the reversal and expungement of certain disciplinary charges, the petitioner brought an Article 78 proceeding to compel the respondents to expunge from all facility and departmental records all references to the related use of force reports. The Court ruled that due to the respondents' failure 1) to address this claim and 2) to attach a full administrative record of the proceedings under review, their response was insufficient for the purpose of **discerning** (detecting) whether the respondents had made a determination with respect to petitioner's request for expungement and if so, whether the determination was rational. The court therefore ordered the respondents to provide the records related to the disciplinary proceeding conducted with respect to an incident that occurred on December 4, 2020.

People v. Barry M. Renert, Indictment No. 2014-001 (County Court, Oswego County Feb. 7, 2022). In 2015, after entering a plea of guilty, Barry Renert was convicted of burglary in the second degree

and sentenced to 15 years. Recently, Mr. Renert filed a Criminal Procedure Law §440.10 motion, seeking to have his conviction reversed because 1) the indictment was jurisdictionally defective; and 2) his lawyer was ineffective. On February 7, 2022, the County Court, finding that Mr. Renert's papers suggested a possible basis for relief on the merits, granted his application for assigned counsel.

Pro Se Victories! features descriptions of successful pro se administrative advocacy and unreported pro se litigation. In this way, we recognize the contribution of pro se jail house litigants. We hope that this feature will encourage our readers to look to the courts for assistance in resolving their conflicts with DOCCS. The editors choose which unreported decisions to feature from the decisions that our readers send us. Where the number of decisions submitted exceeds the amount of available space, the editors make the difficult decisions as to which decisions to mention. Please submit copies of your decisions as Pro Se does not have the staff to return your submissions.

STATE COURT DECISIONS

Disciplinary and Administrative Segregation

Hearing Officer Violated Petitioner's Right to Reply to the Evidence Against Him

In *Matter of Proctor v. Annucci*, 205 A.D.3d 1253 (3d Dep't 2022), the petitioner was charged with participating in a demonstration, creating a disturbance and committing an unhygienic act. According to the misbehavior report, the petitioner and others who were locked in their cells were yelling and making noise. The report alleged that 1) the video monitoring system showed the petitioner yelling and banging on his cell bars, and 2) when an officer entered the unit to deescalate the situation, he observed the petitioner throw an unknown liquid out of his cell.

The petitioner was found guilty at the hearing and the determination of guilt was affirmed on administrative appeal. The petitioner then filed an Article 78 proceeding asserting, among other claims, that the hearing officer had violated his right to reply to the evidence against him when he denied the petitioner the opportunity to view the videotape.

At the hearing, the hearing officer told the petitioner that due to the format of the video, it could only be played on equipment

located in a secure area of the facility that petitioner was not permitted to enter. The hearing officer further stated that he had viewed the videotape and then described what it depicted. The petitioner objected, arguing that he was being prevented from providing exculpatory testimony as to what the video depicted. The hearing officer overruled the objection, stating, “the video speaks for itself.” The hearing officer relied on the video in making his determination of guilt.

The Third Department found that the hearing officer had failed to make any attempt either to move the equipment to an area where the petitioner could watch the video or to find other equipment capable of playing the video in an area that petitioner could access. In the absence of evidence relating to the option of moving equipment to an area where the petitioner was permitted or the unavailability of other equipment that could play the video, the Court found, the respondent had failed to “articulate institutional safety or correctional goals sufficient to justify denying petitioner’s right to reply to the evidence against him.” See, 7 NYCRR 254.6(a)(3); *Matter of Cahill v. Goord*, 36 A.D.3d 997 (3d Dep’t 2007).

The respondent also argued that the violation of the petitioner’s right should be excused because the petitioner had viewed the videotape at a prior hearing that had been administratively reversed. The Court rejected this argument, holding that the hearing officer interfered with the

petitioner’s ability to offer, *at the hearing under review by the court*, exculpatory testimony about the events depicted on the videotape.

Robert Proctor represented himself in this Article 78 proceeding.

Incarcerated Individuals Must Obey Even Unauthorized Orders

Having volunteered for double celling in 2015 and having remained there for nine months, Labriel Wilson believed that 7 NYCRR 1701.7 – the regulation controlling double bunking – protected him from being required to double bunk. When he was told that he had been assigned to a double bunked cell, he initially refused, explaining that he was not required to double bunk as he had voluntarily done so for nine months. Ultimately, he complied with the order to go to a double occupancy cell. Nonetheless, the escort officer wrote a misbehavior report charging Mr. Wilson with refusing a direct order and a movement violation. He was found guilty at the hearing. The determination of guilt was affirmed on administrative appeal. Mr. Wilson then filed an Article 78 challenge to the hearing.

In his petition, Mr. Wilson acknowledged that he had disobeyed the order to go to the double occupancy cell. Rather than file an answer, the respondent moved to dismiss the petition on the grounds that 1) the petitioner had failed to exhaust his administrative remedies and 2) the petition did not state a claim upon which

relief may be granted. The Supreme Court, Albany County granted the respondent's motion to dismiss. Mr. Wilson appealed that order to the Third Department.

In *Matter of Wilson v. Annucci*, 205 A.D.3d 1163 (3d Dep't 2022), the Third Department found that the lower court had properly dismissed the petition. The Court rejected the petitioner's argument that the regulation governing double celling did not permit the respondent to move him to a double cell, finding that regardless of what that regulation provides, incarcerated individuals are required to obey orders promptly and without argument. See 7 NYCRR 270.2(B)(7)(i).

The proper means for challenging the legality of an order or the application and interpretation of a regulation, the Court wrote, is through the prison grievance procedure. This is because Mr. Wilson's challenge to the order to move to a double cell was in fact a challenge to the application of a written regulation.

Because Mr. Wilson had not filed a grievance with respect to DOCCS' authority to place him in a double cell, the Court found that he had failed to exhaust his administrative remedies with respect to the legality of the order to double cell.

Labriel Wilson represented himself in this Article 78 proceeding.

Circumstantial Proof of Weapon May Constitute Substantial Evidence

In *Matter of Devin Lee Jones v. Anthony J. Annucci*, 206 A.D.3d 1397 (3d Dep't 2022), the Third Department affirmed a lower court decision finding that the charge of possessing a weapon was supported by circumstantial evidence. The circumstantial evidence was that the petitioner and another incarcerated individual were fighting and when the fight ended, the other individual had a stab wound.

In this case, the petitioner was charged with violent conduct, creating a disturbance, fighting, possessing a weapon and refusing a direct order. The author of the misbehavior report wrote that he observed the petitioner and the other individual exchanging closed fist punches to the head and body areas. They failed to respond to the officer's de-escalation attempts and refused to comply with his orders to stop fighting. When the two were separated, the other individual had injuries consistent with a stabbing type weapon. Petitioner admitted to fighting, but denied having a weapon or engaging in violent conduct. He was found guilty of the charges. On administrative appeal, the charge of creating a disturbance was dismissed. The determination of guilt as to the other charges was affirmed. Petitioner then filed an Article 78 petition challenging the determination of guilt as to the remaining charges.

In its decision, the Court ruled that the Misbehavior Report, the use of force report and the testimony of the correction officer who examined the victim's injuries provided substantial evidence to support the determination of guilt even though no weapon had been recovered.

Julio Lewis represented himself in this Article 78 proceeding.

Sentence and Jail Time

The Aggregation of Consecutive Sentences

In *Matter of Jones v. Annucci*, 205 A.D.3d 1241 (3d Dep't 2022), the Third Department explained how the law requires several sentences, imposed at different times, to be calculated. The sentences at issue were as follows:

1999: 6 to 12 years (Indeterminate)

2001: 7 years and 5 years post release supervision (Determinate)

2003: 23 years to life (Indeterminate)

Following the imposition of the 2003 sentence, the petitioner's parole eligibility date was March 3, 2036.

In 2016, the 2001 sentence was reversed. After a retrial and appeal, the conviction was again reversed and the indictment dismissed. DOCCS recalculated Mr.

Jones's sentence, resulting in a parole eligibility date of March 30, 2030. Believing that the time he spent in prison on the 2001 sentence – 12 years – should have been used to reduce the amount of time he had to spend in prison before he was parole eligible, Mr. Jones brought an Article 78 proceeding seeking an order requiring DOCCS to recompute his sentence. The lower court dismissed the petition and Mr. Jones appealed.

Citing Penal Law §70.30(1)(b), the Third Department affirmed the lower court's decision. Penal Law §70.30(1)(b) provides that where multiple consecutive indeterminate sentences are imposed, the minimum terms of each of sentence are added together to arrive at an aggregate minimum term. In this case, the aggregate minimum term was 29 years (6 + 23 = 29). Twenty-nine years from the date that Mr. Jones went into DOCCS custody – August 7, 2001 – is August 7, 2030. However, because Mr. Jones had 153 days – 5 months and 4 days – of jail time credit, his actual parole eligibility day is March 3, 2030.

In this case, the expiration date of the 1999 sentence had not been reached when Mr. Jones began serving the 2003 sentence. Thus, the time that Mr. Jones spent in prison was fully credited to the sentences he is now serving; he did not spend any time in prison as a result of the 2001 sentence that was not credited to the sentences that he is now serving.

Andrew Jones represented himself in this Article 78 proceeding.

Court of Claims

Claimant Awarded Damages After Trial on Property Claim

According to Claimant Donovan Cunningham, when he was transferred from general confinement to the Auburn SHU, the correction officer failed to complete an I-64 property form and failed to make an itemized list of the his property. When Mr. Donovan was transferred back to his cell from SHU, roughly two thirds of this property was missing.

Mr. Donovan filed an Inmate Claim Form listing among the missing property 24 books, a pair nautical shoes, a pair of sneakers, 8 personal shirts, a lamp and light bulb, a fan, a pair of headphones, \$50.00 in commissary, family pictures and 2 tan bedspreads and pillowcases.

Prior to trial, the defendant offered to reimburse Mr. Donovan in the amount of \$86.02. Mr. Donovan rejected the offer because he thought the property that he lost was worth more than that.

At trial, Mr. Donovan was the only witness. His I-64 and his list of the lost property were considered by the Court. Claimant testified that his legal bag had contained the receipts for some of the listed lost property but the contents of the bag had been destroyed or misplaced and he could not, therefore, provide receipts to

the Court. He was able to produce receipts for the books, headphones, lamp and fan.

The Court's Statement of the Law

The Court began its decision by noting that when the State takes possession of an incarcerated individual's property, the State becomes a bailee. *Cunningham v. State of New York*, 2022 WL 2166174 (Ct. Clms. May 20, 2022). A bailee is a person or entity –in this case DOCCS – which temporarily has possession and a duty to safeguard property. DOCCS, as a bailee of an incarcerated individual's property owes a common law duty to that individual to secure the property in its possession. DOCCS Directive 4913 provides that each item of an incarcerated individual's property which is going to be temporarily transferred to DOCCS' possession must be recorded on Form 2064. DOCCS Directive 4934 sets forth the guidelines for temporarily securing and storing personal property when an incarcerated individual is moved to a SHU.

When an incarcerated individual shows that property delivered to a DOCCS employee was not returned, the Court continued, "a presumption arises that [the employee] lost the property as a result of its own negligence." DOCCS Directive 2733 acknowledges this. When this occurs, the defendant must come forward with proof explaining the loss.

At this point in the decision, the Court switched gears to discuss DOCCS's loss or destruction of evidence. In the legal world destruction of evidence is known as "spoliation." In determining the sanction for spoliation, the nature of the sanction should relate to the degree to which the moving party had been prejudiced by the loss of evidence as opposed to whether the loss was intentional or negligent. Severe sanctions for spoliation, such as striking a pleading or precluding evidence, are limited to situations where a party to a lawsuit deliberately makes evidence unavailable or where a claim is fatally compromised because the unavailability of the evidence leaves a party unable to prove its claim.

The Court then found that the loss of the property bag containing the claimant's legal work and his receipts **constituted** (added up to) spoliation and that the claimant should not be prejudiced or barred from receiving compensation for the items that he would have used to show ownership had the bag not been lost. Rather, the Court ruled, as a sanction for losing the property bag with receipts, the Court would draw a negative inference against the defendant with respect to the lost receipts; that is, the Court would, based on the claimant's testimony, find that the claimant had proven ownership of the personal books, headphones, lamp and fan that he testified he had turned over to DOCCS. Thus, the Court found that the claimant, by credible testimony, had established that he gave these items to a

correction officer and the items were not returned.

The Court then turned to the defendant's arguments that the claimant had failed to demonstrate the fair market value of the lost property. With respect to this argument, the Court noted that it is the claimant's responsibility to produce such evidence. However, the Court continued, while receipts are the best evidence of fair market value, uncontradicted testimony about replacement value may also be acceptable.

Based on the documentary evidence submitted by the claimant that was attached to his claim and his trial testimony, as well as the negative inference taken against the defendant, the Court found that the claimant had established by a preponderance of the evidence that items in his property under the care and control of the defendant, including the receipts for the lost property, were not delivered to him when he left SHU to return to general confinement. The defendant, the Court found, had not submitted any competent evidence to rebut the presumption of negligent bailment or to demonstrate that the loss was due to circumstances beyond its control.

For these reasons, the Court found in favor of the claimant, accepted his valuation of the replacement value of his lost property and awarded him more than two and a

half times what DOCCS had offered him, with statutory interest from May 19, 2017.

Donovan Cunningham represented himself in this Court of Claims action.

Continuous Treatment Doctrine Rescues Otherwise Untimely Claim

The claimant, J. Gavarette, filed both a notice of intention to file a claim (NOI) and a claim on January 24, 2020, alleging that he had been deprived of adequate and timely medical care for the treatment of his right knee, and that as a result, he experienced pain and suffering and his condition worsened. The State moved to dismiss the claim as untimely, arguing that the claim was time-barred because it was not filed within 90 days of April 10, 2018, the date on which the Mr. Gavarette was last seen by a specialist.

Mr. Gavarette disagreed, arguing that the claim was timely filed because it was filed within 90 days of December 2019, his most recent date of treatment for the condition. He also argued that the allegations in the claim dating back more than 90 days prior to the commencement of the claim are timely pursuant to the continuous treatment doctrine. The continuous treatment doctrine tolls the accrual date of a medical claim to the date of the last medical treatment, which in this case occurred in December 2019.

The Court began its analysis by noting that the service and pleading requirements in Court of Claims Act §§10 and 11 are jurisdictional in nature and require strict

compliance; a failure to comply with the requirements of §§10 and 11 is a jurisdictional defect which compels dismissal of the claim. In a medical malpractice case, a notice of intention must be served, or a claim filed, within 90 days of accrual of the claim. Under the continuous treatment doctrine, the Court wrote, “‘where there is continuous treatment for the same illness, injury or condition which gave rise to the said act, omission or failure,’ the accrual of a medical malpractice claim is tolled until the last date of treatment.” See, Civil Practice Law and Rules 214-a.

Here, the claim asserts that Mr. Gavarette last received treatment for his medical condition in December 2019. During the appointment, the claim alleges, the claimant complained of pain and suffering and requested proper treatment. He explained to the doctor that the condition has been ongoing for years, since he arrived at Eastern C.F. To date, none of the treatment that he received has resolved the pain.

In *J. Gavarette v. State of New York*, 75 Misc.3d 1207(A) (Ct. Clms. Mar. 28, 2022), the Court accepted the claimant’s argument that he had been continuously treated between April 13, 2017 and December of 2019 and held that the state’s arguments that the claim was time-barred based on an accrual date of April 10, 2018 were without merit.

The Court rejected the defendant’s argument that the claimant’s grievances about the treatment that he was receiving interrupted the continuity of the

treatment. While the initiation of a *lawsuit* interrupts continuous course of treatment, the Court noted, the submission of a *grievance* does not.

Pursuant to the continuous treatment doctrine, the Court concluded, the claim was timely commenced by the service and filing of a claim within 90 days of the claimant's doctor appointment in December 2019.

J. Gavarette represented himself in this Court of Claims action.

Miscellaneous

Incarcerated Plaintiff's Malpractice Claim Survives Summary Judgment

On September 14, 2013, in the late afternoon, Michael Fischella, who was incarcerated at Shawangunk C.F., began experiencing pain in his left testicle. A telemed consultation with a urologist resulted in the conclusion that Mr. Fischella was suffering from testicular torsion. Testicular torsion occurs when a testicle turns around its axis, forcing its blood supply to twist, thereby causing vascular compromise of the testicle.

At around 9:30 p.m., Mr. Fischella was taken to the Saint Luke's Cornwall Hospital. There, an emergency room doctor ordered a testicular ultrasound. Two hours later, the ultrasound was performed. It

revealed an absence of blood flow to the testicle, consistent with testicular torsion. At 1:45 a.m., Mr. Fischella underwent exploratory surgery to **detorse** [reverse the torsion] his testicle. During the surgery, it was determined that the testicle had lost its viability and it was removed.

Mr. Fischella filed a medical malpractice action against the hospital. After the hospital had filed an answer and the parties had engaged in discovery, the hospital moved for summary judgment. A court will grant a motion for summary judgment when the moving party shows that there are no material facts in dispute and the undisputed facts show that the moving party is entitled to judgment in its favor. In Mr. Fischella's case, the trial court found that the defendant had not shown that it was entitled to judgment in its favor and denied the motion. The defendant appealed.

On appeal, the Third Department disagreed with the defendant and in *Fischella v. Saint Luke's Cornwall Hospital*, 204 A.D.3d 1343 (3d Dep't 2022), affirmed the trial court's decision.

In support of its motion, the defendant hospital submitted the affidavit of a board-certified urologist. After reviewing the plaintiff's medical records, the defendant's expert concluded, that the treatment the hospital provided to the plaintiff following his arrival in the emergency room was within the accepted

standards of care. The defendant's expert urologist gave the following opinions:

- The testicular ultrasound was timely ordered and performed;
- Waiting for the results of the ultrasound before consulting with a urologist was not a departure from acceptable standards of medical care for an emergency room doctor to; and
- Even if the plaintiff's testicular torsion had been diagnosed and treated immediately after he arrived at the emergency room, the outcome would not have been different.

In response, the plaintiff submitted an affidavit from a different board-certified urologist. The plaintiff's expert gave the following opinions:

- Testicular torsion is a true medical emergency; the rapid restoration of blood flow to the testicle is critical to **salvaging** (saving) it;
- The salvage rate is almost 100% if **detorsion** (untwisting) occurs less than 6 hours from the onset and roughly 50% if it is done within 6 to 12 hours;
- When the plaintiff arrived at the hospital, he had a diagnosis of testicular torsion with documented symptoms;

- Given the information he had, the emergency room doctor should have made a presumptive diagnosis and consulted with a urologist immediately;
- To a reasonable degree of medical certainty, the decision to order a testicular ultrasound rather than arrange for expedited surgery constituted a departure from acceptable standard of medical practice; and
- The unnecessary delay in performing surgery decreased the chance of salvaging the plaintiff's testicle and was the proximate cause of his injuries.

The defendant argued that the plaintiff's expert's affidavit was conclusory and speculative. Neither the trial court nor the Third Department accepted the defendant's argument.

Contrary to the defendant's argument, the Third Department wrote, "any scrutiny with respect to the source of or basis for [the plaintiff's expert's] opinion, or the credibility of [the expert] himself, is properly left to cross-examination at trial." Viewing the evidence in the light most favorable to the non-moving part – as a court deciding a motion for summary judgement must – the Third Department held that triable issues of fact existed as to 1) whether the defendant deviated from

the standard of care and 2) whether that deviation diminished the plaintiff's chance of a better outcome.

Metzger Injury Law, David L. Steinberg of McCabe Coleman Ventosa & Patterson, PLLC, Poughkeepsie, of Counsel, represented Michael Fischella in this medical malpractice action.

***Pro Se* Petitioner Entitled to Award of Litigation Costs**

Julio Lewis made a FOIL request for the wiretap applications, warrants and other documents connected to his criminal indictment. When he did not receive a response, he filed an Article 78 petition challenging the constructive denial of his request. Rather than filing an answer to the petition, the respondent, the State Attorney General, moved to dismiss the case, because as Attorney General, she was not the proper party. The court agreed, and dismissed the petition. Mr. Lewis appealed.

The respondent moved to dismiss the appeal as **moot** (issues are dismissed as moot when there is no longer an actual controversy) and asked the Appellate Division to remit the matter to the lower court so that the petitioner could submit an application for fees. The respondent argued that the challenge to the FOIL denial was moot because she had discovered that she was in possession of 465 pages of responsive records which she had given to the petitioner. The Court

denied the motion and ruled that the respondent could raise the argument in her appellate brief.

In *Matter of Julio Lewis v. Letitia James*, 206 A.D.3d 13935 (3d Dep't 2022), the Court agreed with the respondent that having given the petitioner the records he had requested, that portion of the petition was moot.

With respect to the issue of fees and costs, the Court noted that Public Officers' Law permits an award of reasonable counsel fees and other litigation costs where the petitioner has substantially prevailed in a FOIL proceeding and when the agency failed to respond to a request within the statutory time frame. Under the circumstances, as petitioner included in his petition a request for fees associated with the FOIL application, the matter must be remitted to the lower court for an award of fees.

Julio Lewis represented himself in this Article 78 proceeding.

Court Affirms Dismissal of Petition Challenging Denial of Grievance

Johnathan Johnson filed a grievance protesting DOCCS' purposeful and malicious service of cold, hard leftover rice. The IGRC denied the grievance. The Superintendent reached the same result, as did the Central Office Review Committee. Mr. Johnson then filed an

Article 78 petition alleging the grievance was wrongfully denied and that DOCCS' conduct in serving the rice presented an immediate danger to his health and wellbeing, thereby violating his Eighth Amendment rights to be free from cruel and unusual punishment. The lower court dismissed the petition and Mr. Johnson appealed.

In reviewing the dismissal, the Third Department, in *Matter of Johnson v. Uhler*, 205 A.D.3d 1277 (3d Dep't 2022), noted that the judicial review of the denial of a prison grievance is limited to considering the question of whether such the determination was arbitrary and capricious, irrational or affected by error of law. Further, the Court continued, "[w]here an appropriate investigation of the matter reveals nothing to substantiate the petitioner's claims ... there is no basis for this Court to disturb the determination denying the grievance."

The Court found that the submission of the grievance resulting in an investigation. The investigation did not reveal **malfeasance** (wrong doing by a public official) or the use of substandard-quality food in the preparation of petitioner's meal tray, even though leftover rice had been reheated and served. As such, the Court wrote, there was no evidence supporting the petitioner's claims that the rice was inedible or harmful. For this reason, the Court found that the denial of his grievance was neither irrational nor arbitrary and capricious.

With respect to the petitioner's Eighth Amendment claim – that he was being deprived of basic food and his health and wellbeing were in immediate danger – the petitioner had to allege, the Court wrote, that:

1. Objectively, the deprivation he suffered was sufficiently serious that he was denied the minimal civilized measure of life's necessities; and
2. Subjectively, the facility acted with a sufficiently culpable state of mind, such as deliberate indifference to an incarcerated individual's health and safety.

With respect to these two issues, the Court found that even if the facility was serving cold hard rice, petitioner had not demonstrated that such conduct "constitute[d] a sufficiently serious deprivation to satisfy the objective element of an Eighth Amendment violation or that, subjectively, it demonstrate[d] a deliberate indifference to petitioner's health so as to substantiate an Eighth Amendment violation." (citations omitted).

Petitioner Johnson had also asked the court to allow him to amend his petition to add a claim relating to watery cold grits. The lower court denied the motion. The Third Department affirmed that decision, noting that the grievance under review did not mention grits.

Johnathan Johnson represented himself in this Article 78 proceeding.

IMMIGRATION MATTERS

Nicholas Phillips

This month's column will focus on several interesting unpublished decisions issued recently by the Second Circuit Court of Appeals, all of which concern a type of relief from deportation called deferral of removal under the Convention Against Torture ("CAT"). Unpublished decisions—also known as "summary orders"—are decisions designated by the Court as lacking precedential value; that is, they may not be cited as binding authority by future litigants, but instead apply only to the facts of the particular case in question. While unpublished decisions are obviously less important than published opinions, which are binding upon all future litigants, they often offer a fascinating peek into the way a Court is looking at specific legal issues, particularly those which are often not discussed in published cases.

Deferral of removal under the CAT is one of several types of relief available in deportation proceedings to noncitizens who fear that they would be harmed if returned to their country of origin. The most widely known of these "fear-based" forms of relief is asylum. Under the Immigration and Nationality Act ("INA"), a noncitizen qualifies for asylum if he or she can establish a well-founded fear of persecution on account of race, religion, nationality, political opinion, or membership in a particular social group ("PSG"). A

noncitizen has a "well-founded fear" when "a reasonable person in her circumstances would fear persecution if she were returned to her native country." *Carcamo-Flores v. INS*, 805 F.2d 60, 68 (2d Cir. 1986). To qualify as "persecution," the harm a noncitizen fears must be sufficiently severe, rising above "mere harassment." *Ivanishvili v. U.S. Dep't of Justice*, 433 F.3d 332, 341 (2d Cir. 2006).

Asylum confers many benefits to noncitizens who qualify for such relief. (People who qualify for asylum are known as asylees). For example, an asylee may apply for lawful permanent resident status (or "green card") status one year after receiving a grant of asylum. An asylee's spouse and children may also apply for green cards as part of the asylee's application.

However, asylum also has several requirements which make it a difficult form of relief to obtain. For example, subject to certain very limited exceptions, a noncitizen must apply for asylum within one year of arriving in the United States. A noncitizen will also be barred from applying for asylum if it is determined that he or she poses a danger to the security of the United States, for example, because of a criminal conviction either in the United States or abroad. Finally, asylum is a discretionary form of relief, which means that even if a noncitizen meets the legal requirements, the application can still be denied if the adjudicator determines that he or she is undeserving of such relief.

Noncitizens who do *not* qualify for asylum can apply for a second kind of relief known as withholding of removal. Like asylum, withholding of removal protects noncitizens who will be persecuted in their home country because of race, religion, nationality, political opinion, or membership in a PSG. Unlike asylum, withholding of removal has no time limit for applying, and it is a mandatory form of relief: if a noncitizen demonstrates eligibility, the adjudicator is required to grant relief. There are significant drawbacks to withholding of removal, however. It has a higher standard of proof than asylum: a noncitizen must establish that it is “more likely than not” that he or she will be persecuted, which means proving a greater than 50% chance of persecution. Furthermore, withholding of removal does *not* offer a path to green card status, but instead only allows the noncitizen to apply for federal employment authorization documents, which only authorize the noncitizen to work legally in the United States, and which must be renewed on a yearly basis.

Of relevance here, the INA prohibits a noncitizen from obtaining asylum or withholding of removal if he or she has “been convicted by a final judgment of a particularly serious crime [and is] a danger to the community of the United States.” 8 U.S.C. §1158(b)(2)(A)(ii). For noncitizens who fall under this statutory bar, the only available fear-based form of relief is deferral of removal under the CAT. To qualify for CAT deferral, a noncitizen must prove that it is more likely than not that he or she will be tortured in their home

country. “Torture” is defined as “severe pain and suffering,” 8 C.F.R. §208.16(c)(2), which is “specifically intended,” 8 C.F.R. §208.16(a)(5), and which is inflicted “by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity,” 8 C.F.R. §208.16(c)(2). Like withholding, CAT deferral offers no path to green card status. Unlike both asylum and withholding, CAT deferral does not require the applicant to prove that he or she will be tortured on account of race, religion, nationality, political opinion, or PSG membership.

Given these limitations, deferral of removal under the CAT is often an overlooked form of relief given short shrift by immigration adjudicators. In several recent unpublished decisions, however, the Second Circuit has emphasized that immigration officials must give serious consideration to applications for CAT deferral of removal. For example, in *Leiva-Argueta v. Garland*, No. 19-3423, 2022 WL 881048, at *2 (2d Cir. Mar. 25, 2022), the Second Circuit vacated the immigration agency’s denial of CAT relief because the agency “did not make any factual findings to support that determination or identify where the claim was deficient.” The Court thus concluded that the agency’s CAT decision was “insufficient for judicial review.” *Id.* In *Ramirez-Hernandez v. Garland*, No. 19-2488-AG, 2022 WL 2314493, at *2 (2d Cir. June 28, 2022), meanwhile, the agency denied CAT relief for the same reasons it denied asylum and withholding of removal, but the Second Circuit reversed and remanded, finding

that the agency committed legal error because they are distinct forms of relief with differing legal requirements.

Two other unpublished decisions have emphasized that the agency must carefully evaluate the evidence submitted by a noncitizen in support of his or her application for CAT deferral. In *Argueta Anariba v. Garland*, No. 19-2862, 2022 WL 500459, at *1 (2d Cir. Feb. 18, 2022), the Second Circuit vacated the agency's denial of CAT because the agency "mischaracterized Argueta's claim and failed to consider material evidence." In particular, the Court found that the agency ignored material evidence showing that the noncitizen would be harmed in Honduras, and failed to adequately consider an expert witness affidavit which stated that the noncitizen was at great risk of torture. Similarly, in *Oliva-Oliva v. Garland*, No. 20-1319, 2022 WL 3038776, at *2 (2d Cir. Aug. 2, 2022), the Second Circuit vacated the agency's denial of CAT because "[t]he agency failed to evaluate any of the country conditions evidence relevant to [the noncitizen's] CAT claim." Specifically, the Court noted that the agency entirely failed to consider evidence submitted by the noncitizen showing that "a majority of the police force in Guatemala is unreliable, that widespread corruption and impunity make prosecuting criminals difficult, that police are unable to enter certain neighborhoods controlled by the gangs, and that the Guatemalan government is unable to respond to or prevent crime due to a lack of police training and funding." *Id.*

Collectively these unpublished decisions affirm that, despite its limitations, CAT deferral of removal is an important form of relief from deportation which must be given reasoned and thoughtful consideration by the immigration agency.

WHAT DID YOU LEARN?

Brad Rudin

1. **Who was the plaintiff in the challenge to the solitary confinement reforms instituted by the State of New York?**
 - a. Prisoners' Legal Services of New York and five community activists.
 - b. Department of Correctional Services and Community Supervision and 7 members of the DOCCS executive staff.
 - c. a class of *pro se* incarcerated individuals and their supporters.
 - d. the labor union representing correction officers and 6 individual officers.
2. **Under the HALT Act that went into effect on March 31, 2022, the Legislature of the State of New York:**
 - a. abolished segregated confinement in New York prisons.
 - b. Limited segregated confinement to six months.

- c. banned segregated confinement for incarcerated individuals who are under 21 and over 55 years of age.
 - d. allowed segregated confinement for incarcerated individuals under the age of 21 if those individuals have a history of violent offenses in prison.
- 3. In the lawsuit challenging the HALT Act, the Court ruled that the plaintiff's claim about future harm that correction officers will suffer from limits on solitary confinement:**
- a. had been proven beyond a reasonable doubt after trial.
 - b. was merely the product of speculation and therefore insufficient to justify relief from the Court.
 - c. could be proven at trial if the State of New York made a full disclosure of facts concerning segregated confinement.
 - d. lacked any merit at all and therefore the lawyers for the plaintiffs would be subject to disciplinary action.
- 4. What relief did the Court grant in the May 2022 case of *Matter of Jesse Barnes*?**
- a. reversed the disciplinary finding.
 - b. awarded damages to petitioner who had been wrongfully determined to be guilty in the disciplinary proceedings.

- c. ordered full disclosure of the records associated with a prior disciplinary matter.
 - d. imposed a fine on the hearing officer presiding over the prior proceeding.
- 5. The CPL 440 motion filed by Barry M. Renert shows that New York courts may collaterally review a conviction based on a claim of:**
- a. ineffective assistance of counsel.
 - b. Unconstitutional conditions in state confinement.
 - c. incorrect rulings by the trial judge about the introduction of hearsay evidence.
 - d. prejudice resulting from the prosecutor's disrespectful manner during the trial.
- 6. Which principle is *not* supported by the decision of the Third Department in *Matter of Proctor v. Annucci*?**
- a. The State must make reasonable efforts to enable an incarcerated person to present a defense.
 - b. Limitations on the right of an incarcerated to present a defense may be based on the need to maintain prison safety.
 - c. If the hearing officer reviews videotape evidence, the accused incarcerated person has a due process right to view that evidence.
 - d. An accused incarcerated individual is entitled to free legal representation in an Article 78 proceeding.

7. *Matter of Wilson v. Annucci*, stands for the proposition that when an incarcerated individual is given an order they believe is unauthorized, the individual should:

- a. engage in passive non-violent resistance.
- b. Obey the order and file a grievance.
- c. start a petition protesting the order.
- d. violate the order so that it can be reviewed by the courts.

8. When an incarcerated person is charged with possession of a weapon, the courts will *not* uphold a disciplinary finding on that charge unless:

- a. the evidence shows actual physical possession of that weapon beyond a reasonable doubt.
- b. the weight of the evidence shows an undisputed intent to possess a weapon
- c. the circumstances amount to substantial evidence of possession.
- d. the weapon is recovered.

9. When multiple consecutive indeterminate sentences are imposed, DOCCS computes the legal date computation for the minimum term of confinement based on:

- a. The lowest minimum term.
- b. The highest minimum term.

- c. The highest maximum term in the discretion of the court.
- d. The total of all of the minimum terms combined.

10. When DOCCS takes possession of the property belonging to an incarcerated individual and that property has been delivered but not returned, there exists the presumption that:

- a. DOCCS lost the property because of staff negligence.
- b. the value of the lost property must be assessed at its highest estimated value.
- c. the value of the lost property must be assessed at its lowest estimated.
- d. the lost property has no value unless documentation is provided.

ANSWERS

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

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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 Sing • Taconic

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