Pro Se

Vol. 29 No. 4 August 2019 **Published by Prisoners' Legal Services of New York**

DOCCS Defendants Found in Contempt for Failing to Obey Court Order

In 2015, Anthony Medina, who is legally blind and suffers from headaches and other painful physical impairments, filed a lawsuit seeking, among other forms of relief, an order requiring that the defendants reinstate his pain medication; dim the overhead light in his cell; confine him in a cell that doesn't face a window or that the defendants tint the windows in front of his cell; and provide a closed circuit television (CCTV) and/or documents in 32 point font print before and during any disciplinary hearings.

Following a hearing on a motion for a preliminary injunction, in February 2017, the court found that beginning in 2006, DOCCS had provided Mr. Medina with Tramadol to relieve his severe headaches and eye pain caused by exposure to light and his visual disability. The court also found that DOCCS had in the past provided Gabapentin for his neuropathic pain in his arms. However, the court concluded, in spite of the success of these medications in providing pain relief, over time various DOCCS medical staff discontinued the Tramadol and Gabapentin. After reviewing the testimony and evidence submitted in support of and opposition to the motion for a preliminary injunction, the court granted the motion and ordered the defendants to:

- Reinstate Plaintiff's Tramadol prescription or prescribe an alternate, but equally effective pain medication immediately;

- Dim or turn off Plaintiff's overhead cell light in accordance with past accepted requests for the reasonable accommodation;

Continued on page 3 . . .

Also Inside . . .

Subscribe to Pro Se. See Page 6.

This project was supported by a grant administered by the New York State Division of Criminal Justice Services. Points of view in this document are those of the author and do not necessarily represent the official position or policies of the Division of Criminal Justice Services

2019 NYS Legislative Session Ends Without Passage of Solitary Confinement Reform Legislation

A Message from the Executive Director, Karen L. Murtagh, Esq.

On June 21, 2019, the New York State Legislature gaveled out without enacting any legislation on solitary confinement reform. There was a moment, near the end of the session, when it looked as if both houses of the Legislature were going to bring the Humane Alternatives to Isolated Confinement (HALT) bill to the floor for a vote, but that did not happen. HALT, prime sponsored by Assembly Speaker Pro Temp Jeffrion Aubry and Senator Luis Sepulveda, Chair of the Senate Crime, Crime Victims and Corrections Committee (A2500, S1623), proposed sweeping changes to solitary confinement throughout New York State's prisons and jails. These reforms included limiting solitary confinement to a maximum of 15 days, limiting the types of violations that could result in placement in solitary confinement, excluding vulnerable populations from any form of solitary confinement and creating residential rehabilitation units that would focus on treatment rather than punishment.

In lieu of legislation addressing solitary confinement, the Governor, Majority Leader Andrea Stewart-Cousins and Speaker Carl Heastie entered into a joint agreement to overhaul solitary confinement and issued the below press release:

> "While we are disappointed that HALT legislation could not be passed this year, we have reached an agreement to dramatically reduce the use of solitary confinement in correctional facilities. These new steps build on this year's landmark reforms and will further help to correct inequities and end inhumane practices in our criminal justice system. Together we will continue to work on this issue, fight to move this state forward and create a stronger, fairer and more just New York for all."

"The terms of this agreement, which will be implemented administratively, include:

- The strict prohibition of placement of vulnerable incarcerated individuals such as adolescents, pregnant women, and the disabled within a special housing unit for solitary confinement and provisions to ensure that only incarcerated individuals who commit serious misconduct can be sent to special housing units for solitary confinement.
- Ensuring that the duration of time incarcerated individuals will be permitted to be housed within a special housing unit for solitary confinement will ultimately be capped at 30 days.
- Expanding the use of specialized units by DOCCS where individuals released from solitary confinement will be housed before being returned to the general population area of the facility. While housed in these specialized units, incarcerated individuals will receive programming and treatment tailored to promote personal development and rehabilitation and staff assigned to these units will be required to undergo additional training.
- Ensuring that incarcerated individuals housed within one of the specialized units will be able to earn an early release back to the general population area of the facility by completing the programming assigned to them before the expiration of the imposed sanction. There will also be a presumption that any loss of good time will be restored to individuals who successfully complete their rehabilitation program.
- Ensuring that incarcerated individuals will not be denied essential services as a form of discipline and DOCCS will not impose restricted diets or any other changes in diet as punishment.
- Making clear that solitary confinement will be a reserved punishment for serious conduct that creates significant risk to the safety and security of correctional facilities and the individuals within.

- Increasing training of all staff that work within special housing units on de-escalation techniques, implicit bias, trauma-informed care, and dispute resolution."

As noted in the press release, New York State will be making the proposed changes "administratively" which most likely means that DOCCS will issue new regulations that will codify the agreement among the three leaders. It will take some time for DOCCS to adopt and implement the new regulations. Once DOCCS drafts the regulations, DOCCS is required to publish them to allow for public comment. When the comment period is over and DOCCS finalizes the regulations, the regulations will become official DOCCS policy. Even then, the proposed changes will not happen quickly. Most notably, with respect to the time limit on solitary confinement, the press release noted that it will "ultimately" be capped at 30 days which, most likely means that the 30-day cap will be eased in over the next few years.

Changes to the use of solitary confinement within DOCCS will have a profound impact on our readers and, because of that, we will be sure to keep you updated.

❁❁❁❁❁❁❁❁❁❁❁❁❁❁

. . .Continued from Page 1

- House Plaintiff in a cell which does not face a window or to tint the window; and

- Provide Plaintiff with a CCTV and/or documents in 32 point font before and during any disciplinary hearing and ensure that he can use them.

Two months after the order was made, Mr. Medina returned to court, seeking to hold the defendants in contempt for disobeying the court order with respect to window tinting. In June 2017, Mr. Medina amended his motion to add a claim that the defendants should be held in contempt for their failure to treat Mr. Medina's pain in accordance with the court's order.

The court conducted a hearing on the contempt motion on September 17, 2018. Following the hearing, the court found that the defendants were in contempt of the court's order with respect to pain treatment and were not in contempt with respect to the issue of tinted windows. *Medina v. Buther,* 2019 WL 581270 (SDNY Feb. 13, 2019).

Standard for Establishing Contempt

A party who fails to comply with a court order may be held in civil contempt where:

1. The order at issue is clear and **unambiguous** (does not have more than one meaning);
2. The proof of noncompliance is clear and convincing; and
3. The **contemnor** (person alleged to be in contempt) has not diligently attempted to comply in a reasonable manner.

When a defendant acts based on what appears to be a good faith and reasonable interpretation of the court's order, he should not be held in contempt. However, a defendant is not reasonably diligent when he or she ignores the order or takes only superficial actions that strain both the language and intent of the order. It is even more troubling when a defendant takes actions that contravene the provisions of the order. *See, Powell v. Ward*, 487 F.Supp. 917, 930-34 (2d Cir. 1981) and *Vertex Distrib., Inc. v. Falcon Foam Plastics, Inc.*, 689 F.2d 885, 889 (9th Cir. 1982). In applying this standard to the facts before it, the court first reviewed the testimony and other evidence submitted in support of and opposition to the motion.

The Contempt Hearing

The court found that the plaintiff's witnesses – Mr. Medina and his expert witness – were credible.

According to the court, Mr. Medina had an extraordinary recollection for detail and did not exaggerate his claims or downplay his own misconduct. The court found that plaintiff's expert witness was familiar with Mr. Medina's medical history.

The court was not favorably impressed by the defendants' witnesses. It characterized the testimony of one facility doctor as somewhat defensive and evasive; it characterized the testimony of a regional medical director that he was interested in providing the plaintiff with effective pain medication as belied by the witness's actual conduct; and characterized the testimony of the now former Chief Medical Officer as uninformed with respect to the treatment that Mr. Medina received. The court found that the testimony of the defendants' expert witness was neither credible nor persuasive.

The court found that following the issuance of the preliminary injunction, the defendants had willfully interfered with the effective treatment of Mr. Medina's pain. The court's decision describes in great detail the pain management treatment that the defendants provided after the issuance of the preliminary injunction in February 2017.

Court Finds Defendants in Contempt

The court found that the 2017 Order regarding pain medication was clear and unambiguous. It held that evidence of non-compliance was clear and convincing. Finally, the court found that the defendants did not diligently attempt to comply with the order. Based on these findings, the court held that the defendants had willfully failed to obey the portion of the court's 2017 order pertaining to pain management.

Amy Jane Agnew, Esq., represents Anthony Medina in this Section 1983 action.

News and Notes

PLS' FAMILY MATTERS UNIT

In January 2017, PLS opened the Family Matters Unit (FMU). A grant from Judiciary Civil Legal Services enabled PLS to open this unit. The FMU is staffed by PLS staff attorneys. The attorneys working in the FMU assist incarcerated parents who were convicted in the counties of *Albany, Bronx, Erie, Kings, Nassau, New York, Queens or Richmond* (or have children living in those counties):

- To challenge prison disciplinary proceedings that result in interference with visitation or communication with their minor children;
- To prepare child visitation petitions;
- To prepare child support modification petitions; and
- To help incarcerated parents access family court records.

In the last year, we have helped a number of incarcerated parents with legal matters involving their children.

The FMU is a resource for incarcerated parents. The unit helps parents, who were convicted in or have children in the eight identified counties, to use the court system to help maintain family ties during their incarceration. For parents who are subject to child support orders, the FMU also helps to remove one of the major barriers to successful reintegration – the accumulation of insurmountable debt as a result of child support arrears.

You are eligible for services from PLS' Family Matters Unit if:

1. You are a prisoner whose county of conviction was *Albany, Bronx, Erie, Kings, Nassau, New York, Queens or Richmond;* **OR**

2. You have a visitation or support issue involving children who reside in *Albany, Bronx, Erie, Kings, Nassau, New York, Queens or Richmond;* **AND**

3. You have been subjected to a recent prison disciplinary proceeding that resulted in suspension or termination of visitation or communication with your minor children; **OR**

4. You are interested in seeking an order of visitation; **OR**

5. You are interested in seeking modification of an existing child support order; **OR**

6. You are having difficulty accessing family court records.

If you would like the assistance of the FMU and you meet the above eligibility requirements, please write to the FMU at this address:

Prisoners' Legal Services of New York
Family Matters Unit
41 State Street, Suite M112
Albany, NY 12207

LETTERS TO THE EDITOR

Dear Editors,

I am writing to thank you for your help. Because of ***Pro Se***, I was able to have a Tier III hearing reversed. I was charged with threats. At my hearing, the hearing officer did not adequately investigate the reason one of my witnesses refused to testify. While I was told the reason – fear of retaliation – the hearing officer did not request information about the basis for the witness's fear. Thanks to what I learned from ***Pro Se***, I was able to get the hearing overturned.

Respectfully,

Raymond Sprinkler

Letters to the editor should be addressed to:

Pro Se, 114 Prospect Street, Ithaca, NY 14850, ATTN: Letters to the Editor.

Please indicate whether, if your letter is chosen for publication, you want your name published. Letters may be edited due to space or other concerns.

PRO SE VICTORIES!

***Matter of Susan M. Cobaugh v. Anthony Annucci*, Index No. 18-5661 (Sup. Ct. Albany Co. May 15, 2019). After the respondents in this Article 78 challenge agreed to reverse and expunge the challenged Tier III hearing, the petitioner, Susan Cobaugh, argued that she should be reimbursed for the $45.00 filing fee that she paid.** The respondent disagreed, citing Civil Practice Law and Rules (CPLR) 1101(f)(4). This rule prohibits the reimbursements of costs to prisoner-litigants except where the monetary judgment exceeds the filing fee paid. The court rejected this argument, noting that the Appellate Division, Third Department, in *Matter of Zaire v. West*, 27 A.D.3d 810, 811 (3d Dep't 2006) and *Matter of Jova v. Goord*, 27 A.D.3d 805, 806 (3d Dep't 2006), had considered the argument and ordered the reimbursement of the filing fees. The court wrote that failing to reimburse the filing fees paid by prisoner-petitioners with respect to claims that a state agency admits, by its actions, have merit, would have a chilling effect on legitimate claims. That is, petitioners would have to pay $15.00 to recover $5.00 (the surcharge for a Tier III), or in Ms. Cobaugh's case, $45.00 to recover $5.00. Thus, the court wrote, rather than discouraging frivolous suits – the intended purpose of CPLR 1101(f), the respondents' reading of the CPLR 1101(f) would have a chilling effect on legitimate claims as a petitioner would have to pay more than he or she can recover. For this reason, the

court ordered that the petitioner be reimbursed in the amount of $45.00 for the cost of the filing fees.

Correction

In ***Pro Se***, Volume 29, Number 2, April 2019, we reported on ***Jessie Barnes v. Paul Chappius,***. The correct citation for the decision is: 2018 WL 4660380 (N.D.N.Y. Sept. 28, 2019). For your convenience, the article is re-printed here:

Responding to cross motions for summary judgment, Judge Sharpe accepted in its entirety the Magistrate Judge's report and recommendation denying the plaintiff's motion for summary judgment and recommending that the defendants' cross-motion for summary judgment be granted in part and denied in part. To that end, the court adopted the magistrate's recommendation that eight of the plaintiff's claims be dismissed in their entirety; that the failure to protect claim be dismissed as to two defendants, but proceed to trial as to Defendants Rock and Uhler; that the plaintiff's Eighth Amendment use of force claims as to three incidents be dismissed, but that the use of force claims relating to 4 other incidents proceed to trial; that the plaintiff's First Amendment retaliation claims against two defendants be dismissed but that the remaining First Amendment claims against 10 other defendants proceed to trial; that the plaintiff's Due Process claims with respect to one disciplinary hearing proceed to trial but that the remaining due process claims be dismissed.

Pro Se Victories! *features summaries of successful unreported pro se litigation. In this way, we recognize the contribution of pro se litigants. We hope that this column 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.*

Subscribe to *Pro Se*!

Pro Se is published six times a year**.** ***Pro Se*** accepts individual subscription requests. With a subscription, a copy of ***Pro Se*** will be delivered, free of charge, directly to you via the facility correspondence program. To subscribe send a subscription request with your name, DIN number, and facility to ***Pro Se***, 114 Prospect Street, Ithaca, NY 14850.

Pro Se Wants to Hear From You!

Send your comments, questions or suggestions about the contents of ***Pro Se*** to: ***Pro Se,*** 114 Prospect Street**,** Ithaca, NY 14850.

Please **DO NOT** send requests for legal representation to ***Pro Se***. Send requests for legal representation to the PLS office noted on the list of PLS offices and facilities served which is printed in each issue of ***Pro Se***.

Pro Se On-Line

Inmates who have been released, and/or families of inmates, can read ***Pro Se*** on the PLS website at www.plsny.org.

STATE COURT DECISIONS

Disciplinary and Administrative Segregation Hearings

List Showing that Petitioner was not in Area of Assault Discredited by Officer's Observations

Officers charged Thomas Jackson with fighting, assaulting staff, assaulting another inmate, possessing a weapon, violent conduct, damaging state property, and refusing a direct order. At his hearing, Mr. Jackson testified that the report was filed in retaliation for a prior incident and that he was in his cell at the time of the incident. He produced a "go-around-list" which showed that he was in his cell at the time of the incident. Nonetheless, the hearing officer found him guilty of the charges. After Mr. Jackson's administrative appeal was denied, he filed an Article 78 challenge to the determination of guilt.

In *Matter of Jackson v. Annucci*, 2019 WL 2619457 (3d Dep't June 27, 2019), the court held that the issue of whether the misbehavior reports were filed in retaliation presented a credibility issue for the hearing officer. Similarly, the court ruled that the hearing officer was entitled to credit the testimony of the officer who testified that they saw Mr. Jackson and were assaulted by him over the go-around-list. Moreover, the court noted, the officer who made the go-around-list testified that the list was completed before the incident and that petitioner could have asked anther officer to let him out of his cell after the completion of the go-around-list.

Having rejected Mr. Jackson's arguments, the court affirmed the lower court decision dismissing the petition.

Thomas Jackson represented himself in this Article 78 proceeding.

Removal for Strip Frisk Trumps Right to Observe Cell Search

Andrew Benitez was in his cell when officers arrived to conduct a cell search. According to the Misbehavior Report, during the search, written material was found indicating that Mr. Benitez was involved in gang activity. At a Tier III hearing relating to the materials found during the search, the hearing officer found Mr. Benitez guilty of the charges. Following an unsuccessful administrative appeal, Mr. Benitiez filed an Article 78 petition challenging the hearing. The hearing was transferred to the Appellate Division because it raised an issue of substantial evidence.

In *Matter of Benitez v. Annucci*, 172 A.D.3d 1855 (3d Dep't 2019), the Third Department rejected the petitioner's argument that the hearing should be reversed because the petitioner was denied the right to observe the cell search. DOCCS Directive 4910(V)(D)(1) provides that when an individual is removed from his or her cell prior a search, he or she must be allowed to observe the search. There is an exception, however, when the presence of the person assigned to the cell endangers the safety or security of the facility. In this case, petitioner was not permitted to observe the search because when officers pat frisked Mr. Benitez, they discovered a lump in his waistband area, whereupon he was taken to the strip frisk area. While he was being strip frisked, the cell search was completed. Citing *Matter of Santiago v. Venettozzi*, 149 A.D.3d 1429, 1430 (3d Dep't 2017) and *Matter of Llull v. Coombe*, 238 A.D.2d 761 (3d Dep't 1997), the court held that under these circumstances, there was a proper basis for denying petitioner the right to observe the search.

Andrew Benitez represented himself in this Article 78 proceeding.

Court Rejects Arguments that the HO Violated Petitioner's Rights to Assistance and to Call Witnesses

In *Matter of Clark v. Annucci*, 170 A.D.3d 1499 (4th Dep't 2019), the court considered three arguments made in support of the petitioner's request that the court order the reversal of a Tier III hearing. First, the petitioner wrote, because the assistant failed to question witnesses and collect the requested documentary and videotape evidence, he was denied his right to employee assistance. The court agreed that the petitioner's right to pre-hearing assistance had been violated. However, the court held, "the Hearing Officer remedied any alleged defect in the pre-hearing assistance by obtaining that evidence and reviewing it with the petitioner and by having relevant inmate witnesses interviewed and obtaining statements from them reflecting that they refused to testify." [internal quotation marks and citation omitted].

With respect to whether the hearing officer had violated the petitioner's right to call witnesses, the court found that because no witness had agreed to testify before the hearing officer arranged to have them interviewed, and the witnesses stated the reasons that they were refusing to testify – some because they had no knowledge of the incident and others because they did not want to get involved – the hearing officer had complied with the requirements of *Matter of Hill v. Selsky*, 19 A.D.3d 64 (3d Dep't 2005). In *Hill*, the court held that "when the refusing witness gives no reason for the refusal but that witness did not previously agree to testify, an inquiry by the hearing officer through a correction officer adequately protects the inmate's right to call witnesses."

Based on the analysis above, the court affirmed the dismissal by the lower court.

Leah Nowotarski of the Wyoming County Legal Aid Bureau, represented Jahmel Clark in this Article 78 proceeding.

Sentencing and Jail Time Court Affirms Decision Denying DLRA Resentencing

In 1994, Armando Valdez-Rodriguez was convicted of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree. He was sentenced as a second felony offender to 12½ to 25 years. While in prison, Mr. Valdez-Rodriguez was convicted of aggravated harassment of an employee in 1997 and in 2004 of attempted promoting of prison contraband in the first degree. In addition, Mr. Valdez-Rodriguez was found guilty of 14 prison disciplinary violations.

In 2010, Mr. Valdez-Rodriguez moved for resentencing under the 2009 Rockefeller Drug Law Reform Act (DLRA). The DLRA was adopted to correct what legislators agreed were the overly harsh Rockefeller drug laws. The DLRA permits people convicted of certain classes of drug felonies to ask the courts to replace their harsh indeterminate terms with less severe determinate terms.

In *People v. Valdez-Rodriguez*, 172 A.D.3d 1762 (3d Dep't 2019), the court reviewed a lower court decision denying the defendant's motion. The appellate court first noted that there is a statutory presumption in favor of ordering the resentencing. It also noted that resentencing is not automatic and "may be denied upon a showing that substantial justice dictates denial."

Here the appellate court did not find the lower court abused its discretion in denying the defendant's motion. Not only was the defendant a predicate felon when he was convicted of the crime with respect to which he was seeking to be resentenced, while in prison he had committed two additional crimes and had been found guilty of 14 rule violations. The court concluded that the considerations cited by the lower court in support of its decision were significant and found that there

was no abuse of discretion in the Supreme Court's denial of Mr. Valdez-Rodriguez's resentencing motion.

_____

Erika A. James of Davis Polk Wardwell LLP, represented Mr. Valdez-Rodriguez in this Article

Court of Claims

SOL for Excessive SHU Confinement Claim Runs from Date of Release from SHU

As a result of a series of SHU and keeplock sanctions, Reginald Trammel was continuously in disciplinary confinement between 12/16/12 and 12/27/13. On 1/15/14, Mr. Trammel filed a claim seeking damages resulting from the miscalculation of his release-from-SHU date. The parties filed cross motions for summary judgement – that is, both the claimant and the defendant argued that based on the undisputed facts, he (the claimant) and it (the State of New York) was entitled to a judgment in his/its favor. The court denied the motions for summary judgment and after trial, ruled in favor of Mr. Trammel.

The defendant appealed, arguing that because the claim related only to Mr. Trammel's period of SHU confinement, and because he was released from SHU confinement on 9/27/13, the claim was untimely.

In *Trammel v. State of New York*, 172 A.D.3d 1847 (3d Dep't 2019), the court rejected the State's argument. The court first noted that a claim for wrongful confinement accrues upon a claimant's release from confinement, at which point a claimant must file and serve a claim or notice of intention to file a claim, within 90 days. While the defendant argued that "the claim does not sufficiently set forth a claim for wrongful confinement with respect to the period of time that the claimant spent in keeplock, the court noted that the claim "refers to his continuous confinement period of December 16, 2012 through December, 27, 2013." Further, the court wrote, "the claim sets forth the separate yet overlapping disciplinary determinations at issue and the corresponding penalties, both SHU and keeplock, used in calculating his continuous confinement period." Finally, while the claimant did not challenge the four months of keeplock penalties imposed, the claim asserts that a miscalculation of the SHU penalties resulted in a miscalculation of his keeplock release date and an excessive period of confinement.

The court found that "given the continued nature of the claimant's confinement," it agreed that "under these circumstances, there is no basis to split the claim into two causes of action consisting of claimant's confinement in SHU and claimant's confinement in keeplock." The court held that where the continuous confinement ended on December 27, 2013, the claim which was filed and served on January 15, 2014, was timely.

_____

Reginald Trammel represented himself in this Court of Claims action.

Miscellaneous

If You Make A FOIL Request, Don't Drop the Ball!

Not infrequently, people make requests for records under the New York State Freedom of Information Law (FOIL) but when the agency to which the request is sent denies the records in whole or in part, they decide to let it go. Sometimes the person making the request thinks that rather than contest the denial, he or she will drop the matter for the time being and ask again when they have more time or resources to respond to the agency's arguments about why the records are exempt from production. Unfortunately, this approach does not work.

In *Matter of Stankevich v. New York City Police Department*, 2019 WL 2454815 (1st Dep't June 13, 2019), the First Department affirmed the dismissal of a petition requesting the production of records that the petitioner had previously requested and been denied. In this case, in 2015, the petitioner requested records from the NYPD. The request was denied in January 2016. Sometime after he received the denial, the petitioner filed a second records request with the NYPD for the same and some additional records. When that request was also denied, in July 2016 the petitioner filed an Article 78 challenge to the denial in the Supreme Court of New York County. The court dismissed the petition, ruling that the four month statute of limitations for challenging a final agency action had expired before the petitioner filed his Article 78.

The First Department agreed, holding that by the time that the petitioner filed the Article 78 in July 2016, more than four months had passed since the January 2016 denial of his request. While petitioner argued that it was the date of the denial of his second request that should be the date from which the statute of limitations ran, the court did not agree. Rather, the court wrote, "Petitioner's second FOIL request, while broader than his first request, was essentially duplicative of his prior request and therefore did not extend or toll the time to commence the Article 78. In support of its conclusion, the court cited *Matter of Walker v. Roque*, 137 A.D.3d 643 (1st Dep't 2016), in which the court held that an Article 78 challenge to a 2012 record request was time barred because the petitioner had submitted the same request in 1992 and had failed to file an Article 78 petition within four months of the final agency decision relating to the 1992 request.

Andrew Stankevich represented himself in this Article 78 proceeding.

Requests for Legal Assistance

If you need assistance with a legal issue, please do not address your letter to ***Pro Se***. At the end of this issue, there is a list of PLS offices and the prisons each office serves. Write to the office that serves your prison. Mail sent to ***Pro Se*** should be about ***Pro Se*** issues only (add to the mailing list, change of address, Letters to the Editor, etc.). Sending your request for legal assistance to ***Pro Se*** will delay a response to your letter.

Let us know where you are!

If you are on the ***Pro Se*** mailing list and you are transferred, please make sure you let us know your new address. DOCCS is not always able to let us know when a prisoner has been transferred. We update our mailing list before each issue is sent out but we only know you have moved if you tell us or if DOCCS sends back your undelivered issue of Pro Se. If you don't keep us updated on your current location, you might miss issues of ***Pro Se***.

PRO SE PRACTICE

Domestic Violence Survivors Justice Act: Resentencing Options

In 2019, New York State **amended** (changed) the laws **governing** (controlling) the sentences imposed on some victims of domestic violence who commit crimes related to their domestic abuse. The law now provides for alternate sentences (DV Alternative Sentences) for people who meet the law's eligibility requirements. Known as the Domestic Violence Survivors Justice Act, the changes in the law were necessary because laws with a similar intent, enacted in 1999, had not resulted in reduced sentences for victims of domestic violence who committed crimes related to their abuse. The DV Alternate Sentences are less harsh than the sentences for people who commit the same crimes but 1) who are not victims of domestic violence; and 2) whose crimes either were not coerced by their abusers or whose abusers were not the victims of the crimes.

This article refers to information found in the appendix to the memo version of this article. Due to space considerations, the article does not include the appendix. If you are interested in obtaining a copy of the memo with the appendix, please request a copy of the memo entitled Domestic Violence Survivors Act from the PLS Office that handles legal issues arising at the prison where you are incarcerated.

A. What Laws Have Been Amended?

1. Penal Law §60.12: Authorized Disposition, Alternative Sentence, Domestic Violence Cases;
2. Penal Law §70.45: Determinate Sentence, Post-Release Supervision;
3. Criminal Procedure Law §440.47: Motion for resentence; Domestic Violence Cases; and
4. Criminal Procedure Law §450.90: Appeal to Court of Appeals from order of intermediate appellate court; in what cases authorized.

B. Who is Eligible for a DV Alternative Sentence?

A domestic violence survivor (defined below) may be eligible for DV Alternative Sentence with respect to:

1. Crimes committed due to coercion by an abuser;
2. Crimes committed against the defendant's abuser; or
3. Crimes committed **at the behest** (at the request or order) of the defendant's abuser.

C. What other eligibility criteria are there for a DV Alternative Sentence?

1. A defendant who has been convicted of committing any of the following crimes, or who was convicted of an attempt or conspiracy to commit any of the following crimes, **is not eligible** for an DV Alternative Sentence:
   a. Aggravated murder (Penal Law §125.26);
   b. Murder in the first degree (Penal Law§125.27);
   c. Murder in the second degree (when the offender, being over the age of 18, intentionally kills the victim while in the course of one or more of specific sex offenses and the victim is under the age of 14) (Penal Law §125.25(5));
   d. Any offense included in Penal Law Article 490: Offenses constituting Terrorism;
   e. Any offense that would require registration as a sex offender.

For a list of the offenses that require registration as a sex offender, see Correction Law §168-a(2) and (3), included in the Appendix to the memo version of this article.

2. To be eligible for a DV Alternative Sentence, a court must find, after a hearing:

    a. That at the time of the offense, the defendant was a victim of domestic violence who had been subjected to substantial physical, sexual or psychological abuse inflicted by a member of the same family or household as the defendant, including persons who are not related by **consanguinity** (blood) or **affinity** (marriage) who have been in an intimate relationship whether such persons have lived together at any time. For a more complete definition of "members of the same family or household," see Criminal Procedure Law §530.11(1)(a-e), included in the appendix to the memo version of this article;

    b. The abuse was a significant contributing factor to the defendant's criminal behavior; and

    c. Due to the nature and circumstances of the crime and the history, character and condition of the defendant, a sentence of imprisonment pursuant to Penal Law §§70.00 (first felony offender), 70.02 (first violent felony offender), 70.06 (second felony offender) or 70.71(2) or (3) (Class A felony drug offender, first and second felony offender) of this title would be unduly harsh. See the appendix to the memo version of this article for a description of the offenders to whom these sections of the Penal Law would otherwise apply.

D. Does the Law Permit Incarcerated Domestic Violence Survivors and Domestic Violence Survivors Who Are Under Parole Supervision to Apply for Resentencing Under the DV Alternative Sentencing Guidelines?

Criminal Procedure Law §440.47 permits an incarcerated Survivor of Domestic Violence to apply for resentencing under the DV Alternative Sentencing Guidelines where:

1. He or she is serving a sentence with a minimum or determinate term of at least 8 years; and

2. The sentence that he or she is serving is for an offense committed prior to the August 12, 2019.

The law does not permit a Survivor of Domestic Violence who is under parole supervision to apply for resentencing.

E. How Does an Incarcerated Survivor of Domestic Violence Request Resentencing?

The process for requesting a DV Alternative Sentence is set forth in Criminal Procedure Law §440.47 as follows:

1. Submit a "Request to Apply for Resentencing Pursuant to Penal Law §60.12: Alternative Sentence of Imprisonment – Domestic Violence" to the judge or justice who imposed the original sentence;

2. The request must **include records** showing that:

    a. The applicant is confined in a DOCCS facility;

    b. The applicant is serving a sentence with a determinate term of at least 8 years or an indeterminate sentence with a minimum term of at least 8 years;

    c. The sentence is for an offense committed prior to August 12, 2019;

d. The applicant is serving a sentence for an offense eligible for an Alternative DV Sentence (see Question C., above, for a list of crimes that would render an applicant ineligible for a DV Alternative Sentence);

e. If, based on the submitted records, the court finds that the person requesting the DV Alternative Sentence meets the requirements for re-sentencing, the court will notify the person that he or she may submit an application for resentencing;

f. After receiving notice from the court that he or she may submit an application, the person may request that the court assign an attorney for the preparation of and proceedings on the application for resentencing;

g. The application (as opposed to the ***request*** to submit an application for resentencing) must include at least two pieces of evidence supporting the applicant's claim that he or she was, at the time of the offense, a victim of domestic violence subjected to substantial physical, sexual or psychological abuse inflicted by a member of the same family or household as the applicant;

h. After the application is submitted, the court will conduct a hearing.

i. If the applicant wins the hearing, the court will issue an order setting forth its findings of fact and notifying the applicant that the court will enter an order vacating the sentence originally imposed and imposing a new sentence.

F. Is There an Appeal from a Decision Denying a Resentencing Application?

Yes, there is a right to appeal a lower court's denial of an application for re-sentencing to the Appellate Division.

G. What if the Judge Grants the Application but the New Sentence is Too Harsh?

There is a right to appeal from the imposition of a DV Alternative Sentence on the basis that the new sentence is too harsh.

H. If the Appellate Division Affirms the Lower Court Decision, Is there an Appeal to the Court of Appeals?

Where the Appellate Division affirms the lower court decision, the applicant can move for leave to appeal to the Court of Appeals. The procedure for moving for leave to appeal is set forth in Criminal Procedure Law §450.90.

I. What are the Sentencing Ranges for Survivors of Domestic Violence With Respect to Whom the Judge Determines that the Sentencing Ranges Set Forth in Penal Law §§70.00, 70.02,70.06 and 70.71 are Unduly Harsh?

To show the significance of reductions in the sentencing ranges for people who are granted an Alternative DV Sentence, both the alternative sentencing range and the non-alternative sentencing range is shown in subsection 2, below.

1. For a **non-violent felony offender (first conviction) who was not convicted of a drug offense** and who would normally be sentenced pursuant to P.L. §70.00, the sentencing range is as follows:

   a. A sentence of probation;

   b. A definite sentence of 1 year or less; or

   c. A determinate term, followed by a term of post-release supervision, as follows:

      i. For a Class A felony, a determinate term of at least 5 years and no more than 15 years (not eligible for a sentence of probation or a definite sentence);

ii. For a Class B felony, a determinate term of at least 1 year and no more than 9 years;

iii. For a Class C felony, a determinate term of at least 1 year and no more than 5½ years;

iv. For a Class D felony, a determinate term of at least 1 year and no more than 2½ years;

v. For a Class E felony, a determinate term of at least 1 year and no more than 1½ years.

vi. The terms of post-release supervision that a court may impose are:

a) For Class C and B felony convictions, the range of the period of post-release supervision is at least 1 year and at most 2 years; and

b) For Class D and E felony convictions, the period of post-release supervision is 1 year.

2. For a **first time felony offender convicted of a violent felony offense** who would normally be sentenced pursuant to P.L. §70.02, the sentencing range is as follows:

a. A sentence of probation;

b. A definite sentence of imprisonment of 1 year or less; or

c. A determinate term, followed by a term of post-release supervision, as follows:

i. For a Class B felony, at least 1 year and no more than 5 years (This is reduced from: at least 6 years and no more than 25 years);

ii. For a Class C felony, at least 1 year and no more than 3½ years (This is reduced from: at least 4½ years and no more than 15 years);

iii. For a Class D felony, at least 1 year and no more than 2 years (This is reduced from: at least 3 years and no more than 7 years);

iv. For a Class E felony, at least 1 year and no more than 1½ years (This is reduced from: at least 3 years and no more than 4 years);

v. For Class B and C felony convictions, the period of post-release supervision is at least 2½ years and not more than 5 years;

vi. For Class D and E felony convictions, the period of post-release supervision is at least 1½ years and not more than 3 years.

3. For a **second felony offender whose prior and current convictions are non-violent** and who would normally be sentenced pursuant to P.L. §70.06(3), the sentencing range is as follows:

a. A sentence of probation;

b. With respect to Class C, D and E felonies, a definite sentence of imprisonment of one year or less; or

c. A sentence of parole supervision (e.g., 90 day drug treatment program) for individuals who meet the eligibility criteria for such a sentence, see the summary of Criminal Procedure Law §410.91 – the section of the law governing eligibility for a sentence of parole supervision – included in the Appendix to the memo version of this article, and who have not been convicted of a violent felony offense or a Class A or B felony; or

d. A determinate term followed by a term of post- release supervision, as follows:

i. For a Class B felony, at least 2 years and no more than 12 years;

ii. For a Class C felony, at least 1½ years and no more than 8 years;

iii. For a Class D felony, at least 1½ years and no more than 4 years;

iv. For a Class E felony, at least 1½ years and no more than 2 years;

v. The term of post-release supervision is at least 1 year and no more than 2 years.

4. For a **second felony offender whose first felony offense was violent and whose second felony offense is non-violent** and who would normally be sentenced pursuant to PL §70.06(3), the sentencing range – a determinate sentence followed by a term of post-release supervision – is as follows:

   a. For a Class B felony, at least 6 years and no more than 15 years;

   b. For a Class C felony, at least 3½ years and no more than 9 years;

   c. For a Class D felony, at least 2½ years and no more than 4½ years;

   d. For a Class E Felony, at least 2 years and no more than 2½ years;

   e. The term of post-release supervision must be at least 1½ years and no more than 3 years.

5. For a **second felony offender whose first felony offense was non-violent and whose second felony offense is violent**, and who would normally be sentenced pursuant to P.L. §70.06(6), the sentencing range – a determinate sentence followed by a term of post-release supervision – is as follows:

   a. For a Class B felony, at least 3 years and no more than 8 years;

   b. For a Class C felony, at least 2½ years and no more than 5 years;

   c. For a Class D felony, at least 2 years and no more than 3 years;

   d. For a Class E felony, at least 1½ years and no more than 2 years;

   e. The term of post-release supervision for Class B and C felony convictions must be at least 2½ years and no more than 5 years;

   f. The term of post-release supervision for Class D and E felony convictions must be at least 1½ years and no more than 3 years.

6. For a Class A felony drug offender who would normally be sentenced pursuant to P.L. §70.71, the sentencing range is as follows:

   a. For a Class A-I first felony, at least 5 years and no more than 8 years;

   b. For a Class A-I second felony offender, at least 5 years and no more than 12 years;

   c. For a Class A-II felony, at least 1 year and no more than 3 years;

   d. For a Class A-II second felony offender, at least 3 years and no more than 6 years;

   e. The term of post-release supervision which must be imposed in addition to the above determinate terms is at least 1½ years and no more than 3 years.

Pro Se
114 Prospect Street
Ithaca, NY 14851

PLS Offices and the Facilities Served

Requests for legal representation and all other problems should be sent to the local office that covers the prison in which you are incarcerated. Below is a list identifying the prisons each PLS office serves:

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

Prisons served: Bedford Hills, CNYPC, Coxsackie, Downstate, Eastern, Edgecombe, Fishkill, Great Meadow, Greene, Green Haven, Hale Creek, Hudson, Lincoln, Marcy, Mid-State, Mohawk, Otisville, Queensboro, Shawangunk, Sing Sing, Sullivan, Taconic, Ulster, Wallkill, Walsh, Washington, Woodbourne.

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

Prisons served: Albion, Attica, Collins, Gowanda, Groveland, Lakeview, Livingston, Orleans, Rochester, Wende, Wyoming.

ITHACA, 114 Prospect Street, Ithaca, NY 14850

Prisons served: Auburn, Cape Vincent, Cayuga, Elmira, Five Points, Southport, Watertown, Willard.

PLATTSBURGH, 24 Margaret Street, Suite 9, Plattsburgh, NY 12901

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

Pro Se Staff

EDITORS: BETSY HUTCHINGS, ESQ., KAREN L. MURTAGH, ESQ.
COPY EDITING AND PRODUCTION: ALETA ALBERT