

# Pro Se

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## PLS SETTLES CHALLENGE TO JUVENILE SHU CONFINEMENT

Prisoners' Legal Services of New York (PLS) has reached a landmark settlement for juveniles in DOCCS custody. The settlement of Cookhorne v. Fischer provides comprehensive relief to 16 and 17 year olds who face solitary confinement following disciplinary hearings in NYS prisons.

The settlement includes several amendments to NYS regulations governing the discipline of juveniles in the state prisons and builds upon the settlement reached last year in Peoples v. Fischer. The Department has agreed to amend its regulations to require that a juvenile's age be considered a mitigating factor in disciplinary proceedings and that hearing officers make a written record of how a juvenile's age affected the disposition.

Sixteen and seventeen year olds are in what is called the adolescent stage of human development. During this stage, brain development is incomplete. As a result, 16 and 17 year olds react to stressful situations quite differently than do adults whose brains are fully developed. With the settlement in this case, the State of New York recognizes that to protect the rights of adolescents in its custody, their unique characteristics and needs must be recognized and that in assessing **culpability** (whether a person should be held responsible for his or her actions) and punishment, their immature brains must be taken into account.

The case stems from a Tier III hearing relating to charges that then 17 year old Paul Cookhorne had assaulted a corrections officer. Finding Mr.

Cookhorne guilty, the hearing officer imposed a four year SHU sanction. As part of the punishment, Mr. Cookhorne was also deprived of phone calls, packages, commissary and good time credits for four years.

On Mr. Cookhorne's behalf, Prisoners' Legal Services filed a lawsuit in the NYS Supreme Court, arguing that the hearing disposition was so harsh that it shocked the conscience. PLS also argued that by placing juveniles in solitary confinement for extended periods of time, DOCCS was deliberately indifferent to their medical and mental health needs.

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## **PLS PRESENTS ACCESS TO JUSTICE AWARDS**

### **A Message from the Executive Director - Karen L. Murtagh**

In my last message, I spoke of the upcoming 40<sup>th</sup> anniversary celebration that PLS was planning in partnership with the New York State Bar Association and Albany Law School. The celebration took place on October 24, 2014. It began with a full day of panel discussions by esteemed panelists from across the country, addressing a multitude of pressing prison-related human and civil rights issues including: the aging prison population; women and children prisoners; transgender prisoners; immigration; and solitary confinement.

More than 130 people attended the evening celebration. At the event, PLS honored four individuals who have demonstrated their commitment to civil and human rights and to the establishment and continuation of PLS. The four individuals were: John Dunne; the Appellate Division Third Department, in honor of Justice Clarence Herlihy; Professor Daniel Moriarty; and Assembly Speaker Pro Tempore Jeffrion Aubry.

As most of you know, the pivotal event in the late 20<sup>th</sup> century prisoners' rights movement was the 1971 Attica uprising. The Attica uprising was the bloodiest prison confrontation in U.S. history. The negotiations for returning control of the prison to the Department of Correctional Services focused on creating mechanisms for hearing and resolving prisoner grievances. Then-Senator John Dunne was a major figure during the negotiations to peacefully resolve the Attica uprising because, at the time, he was Chairman of the Senate Corrections Committee which oversees the prison system. During the uprising, Senator Dunne entered the prison with New York Times editor Tom Wicker and Assemblyman Arthur Eve to negotiate with the prisoners. Subsequently, Senator Dunne strongly argued that the prison standoff could have ended without bloodshed if state officials had acted differently.

In response to the problems identified during the Attica uprising, then-Appellate Division Third Department Presiding Justice J. Clarence Herlihy called for the implementation of a prison grievance process and access to legal representation for prisoners to allow them to present their claims in court. In turn, in 1974, under the sponsorship of Justice Herlihy, the mentorship of Professor Daniel Moriarty and the funding of the Law Enforcement Assistance Administration, Albany Law School created its first clinic: Prisoners' Legal Services.

Incorporated as a non-profit organization in 1976, PLS of New York has been providing civil legal services to indigent prisoners in New York State prisons for more than forty years. From 1995 to 2011, PLS was funded solely by the New York State Assembly due, in large part, to the efforts of then-Corrections Committee Chair, Assemblyman Jeffrion Aubry.

Without the insight, concern and passion of John Dunne, the foresight of Justice Clarence Herlihy, the supervision of Professor Daniel Moriarty and the commitment of now-Assembly Speaker Pro Temp Jeffrion Aubry, PLS would not exist.

In addition to the awards, all recipients were presented with a resolution passed by Senator Neil Breslin, honoring their commitment to justice. John Dunne was also presented with a special resolution, introduced by Senator John DeFrancisco and passed unanimously by the entire New York State Senate, declaring Mr. Dunne the first recipient of PLS' inaugural 'Champion of Justice' Award.

At the event, we also premiered the PLS short-documentary entitled "Anatomy of a Riot." The film examines the underlying causes of the 1971 Attica uprising and the resulting creation of PLS.

I would like to thank all those who worked tirelessly to make the event a huge success, all those who took time out of their busy schedules to attend the celebration, the PLS Board of Directors and the PLS staff, both current and past, who have dedicated their lives to fighting for civil and human rights.

*Continued from Page 1 . . .*

The lawsuit sought a judgment from the court declaring that (1) solitary confinement of 16 and 17 year olds violates the prohibitions contained in both the NYS State and Federal Constitutions against cruel and unusual punishment and (2) DOCCS' regulations allowing solitary confinement to be imposed on 16 and 17 year olds are unconstitutional because the regulations do not require that DOCCS consider a juvenile's age when imposing punishment at disciplinary hearings.

The case was first heard by the State's Appellate Division, Fourth Department, which agreed with PLS and ruled that in light of Mr. Cookhorne's age, the four year SHU sanction was so disproportionate to the alleged offense that it was shocking to the court's sense of fairness. The Appellate Division then sent the declaratory judgment part of the case to State Supreme Court for adjudication. After lengthy negotiations, PLS and the State of New York entered into an agreement settling Mr. Cookhorne's case.

In addition to the regulatory changes mentioned above, the State agreed to take the following actions:

- end the use of solitary confinement for juveniles by limiting in cell confinement for juveniles serving SHU sanctions to no more than 18 hours a day during the week and 22 hours a day on the weekend;
- schedule four hours of programming and two hours of recreation during the six hours of out-of-cell time during the week;
- hire three social workers who have master's degrees and who specialize in the treatment of juveniles;
- review juveniles and former juveniles (juveniles who were 16 or 17 years of age when they entered solitary confinement and have been in SHU continuously since then) who are currently in solitary confinement to determine if SHU sanctions should be

modified and assess them for special education and programming needs;

- establish a Juvenile Separation Unit where juveniles in SHU status will be provided with positive, adolescent-appropriate programming;
- create plans to transition juveniles in solitary confinement back to general population and implement an incentive-based system which rewards positive behavior;
- create training materials for hearing officers that explain the basis for mitigating punishment based upon a juvenile's age and mandate training for all DOCCS' staff who work with juveniles; and
- mandate review by supervisory staff of all sanctions resulting in any disciplinary confinement of juveniles in DOCCS custody.

Sixteen and seventeen year old inmates who receive SHU sanctions as a result of disciplinary hearings or individuals who are now in SHU as a result of disciplinary sanctions imposed when they were 16 or 17 years old who would like additional information about the Cookhorne settlement can contact Maria Pagano in the Buffalo Office of PLS.

## News and Notes

### **PREA and Exhaustion of Administrative Remedies**

The Prison Litigation Reform Act (PLRA) requires that a prisoner exhaust all available administrative remedies before he or she files a federal lawsuit against an employee of a department of corrections. 42 USC § 1997e(a). In New York State, this usually means that prior to filing a Section 1983 lawsuit (or other lawsuit based on a

violation of a federal law), prisoners must follow the steps for filing and appealing grievances that are set forth in Directive 4040.

In recognition of the sensitive nature of reporting sexual abuse, the Prison Rape Elimination Act (PREA) prohibits departments of corrections from imposing deadlines for submitting grievances relating to allegations of sexual abuse. 28 C.F.R. §115.52. PREA does not, however, prohibit departments of corrections from requiring prisoners to follow other steps of the grievance process. Recently, the Western District of New York dismissed a lawsuit relating to a sexual assault because the prisoner-plaintiff had failed to follow the DOCCS grievance process. Omaro v. Annucci, 2014 WL 6068573 (W.D.N.Y. Nov. 13, 2014). The Court found that PREA did not **abrogate** (do away with) an inmate's obligation under the PLRA to follow the steps set forth in the DOCCS grievance process in order to exhaust his administrative remedies. Id.

In May 2014, roughly a year after the date upon which the incident which was the subject matter of the Omaro lawsuit occurred, DOCCS revised Directive 4040, Inmate Grievance Program, to state that inmates are **not** required to file a grievance or to use the formal grievance process in order to exhaust their administrative remedies with respect to claims of sexual abuse and sexual harassment. The Directive now states that an allegation of sexual abuse or sexual harassment is considered exhausted for purposes of the PLRA where there is **official documentation confirming either that:**

- 1) An inmate who alleges being the victim of sexual abuse or sexual harassment reported the incident to facility staff; in writing to Central Office staff; to any outside agency that the Department has identified as having agreed to receive and immediately forward inmate reports of sexual abuse and sexual harassment to agency officials under the PREA Standards; or to the Department's Office of the Inspector General; or
- 2) A third party reported that an inmate was the victim of sexual abuse and the alleged victim confirmed the allegation upon investigation.

The DOCCS policy with respect to claims of sexual abuse and sexual harassment goes above and beyond what the PREA Standards require. The DOCCS policy eliminates deadlines for reporting both sexual abuse and sexual harassment. The PREA Standards require that departments of corrections eliminate deadlines only for filing sexual abuse grievances; the Standards do not require the elimination of deadlines for filing sexual harassment grievances.

In addition, DOCCS has adopted a greatly simplified procedure for exhausting administrative remedies with respect to claims of sexual abuse and sexual harassment. The Directive adopts a one-step process for the exhaustion of sexual abuse and sexual harassment claims. The exhaustion process with respect to sexual abuse and sexual harassment claims is complete when there is official documentation that 1) a prisoner reported the abuse or harassment or 2) a third party reported the abuse or harassment and the inmate-victim confirmed that he or she was the victim of sexual abuse or sexual harassment.

If a prisoner chooses to use the formal grievance procedure to report sexual abuse or sexual harassment, the grievance will be forwarded to the IGP Supervisor and Watch Commander, and the claim will be considered to be exhausted upon filing. Any portion of the grievance that does not relate to sexual abuse or sexual harassment will be handled through the normal grievance procedure.

Neither the PREA Standards nor DOCCS Directive 4040 affects any applicable statutes of limitations relating to the filing of lawsuits alleging claims involving sexual assault or sexual harassment. Prisoners who plan to file federal or state claims relating to sexual assault or sexual harassment must exhaust their administrative remedies with respect to such claims and file their claims before the expiration of the relevant statutes of limitation.

## Pro Se Victories!

**Matter of Daniel Karlin v. NYS Board of Parole, Index No. 543-14 (Sup. Ct. Albany Co. Sept. 26, 2014). Daniel Karlin successfully challenged a denial of parole based on the inclusion of erroneous information in the COMPAS evaluation, upon which information the Board of Parole relied, in spite of the petitioner's efforts to correct the information before his parole hearing.**

In his petition, Mr. Karlin pointed out that the COMPAS evaluation erroneously stated that 1) his prison release status was "Reparole, same term/status" when in fact he had never been incarcerated before, 2) listed his age at the time of the crimes as 21 rather than 20, and 3) stated that he had no employment plans when in fact he had received employment assurance letters. The subsequent correction of these errors improved his risk/needs assessment. For this reason, the court found that the Board's reliance on the COMPAS assessment that was based on erroneous information failed to comply with Executive Law § 269-c(4) and remanded the matter for a new hearing.

**Matter of Damon Green v. Anthony Annucci, Index No. 2631-13 (Sup. Ct. Albany Co. Oct. 31, 2014). In this case, a prior reversal of a Tier III hearing resulted in an order to remove petitioner from a close supervision unit (CSU).**

In Volume 23, No. 6, we reported that Damon Green had successfully challenged a Tier III hearing for possession of contraband. The challenge was based on the Department's failure to follow its own procedures for cell searches. The remedy ordered was reversal of the hearing and expungement of all references to the determination and underlying disciplinary matter from petitioner's institutional record.

After the court issued this order, the petitioner brought a contempt action, asserting that the respondent had failed to expunge the hearing and as a result, his security classification had been changed from Max B to Max A and he had been placed in a CSU. The respondents argued that although the disciplinary hearing had been expunged, the incident report properly remained a part of

petitioner's institutional record and that placement in the CSU was not a result of the hearing. The court rejected this argument, holding that its prior order prohibited the respondents from considering the contraband allegedly found during the improper cell search. Because the petitioner was being held in the CSU as a result of contraband that formed the basis of the prior hearing, the court stated, the respondents must release him from CSU.

The court rejected petitioner's claim that he had been reclassified as a result of the Tier III and concluded the respondents' conduct did not rise to the level of contempt.

**Barnes v. State, Claim No. 120755, Motion No. M 85161 (Ct. of Clms. Oct. 22, 2014). In his claim, Jessie Barnes alleged that DOCCS employees had negligently broken his glasses. He sought the value of the glasses.** While the claim was pending, Mr. Barnes sought sanctions against the defendant for failing to disclose a videotape on which was depicted the incident during which the glasses were broken. In his motion, Mr. Barnes established that 1) he had timely asked that the tape be preserved; 2) the tape was introduced at a Tier III hearing; 3) agents of the state submitted the tape to the court in the context of an Article 78 challenge to the hearing; and 4) four months later, when Mr. Barnes made a discovery request for production in the Court of Claims action, the defendant responded that the tape did not exist.

In the face of proof that multiple copies of the tape had existed 4 months prior to Mr. Barnes's request, the court ordered that the defendant locate and produce the tape. If the respondent could not or did not do so, the only appropriate remedy, the court stated, was to strike the defendant's answer and grant judgment to Mr. Barnes.

*Pro Se Victories!* features descriptions of successful unreported pro se litigation. In this way, we recognize the contribution of pro se 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

#### Refusal to Attend Hearing Leads Court to Conclude that Prisoner Waived His Rights

In Matter of Kalwasinski v. Prack, 994 N.Y.S.2d 481 (3 Dep't 2014), the record showed that after the escort officer informed the hearing officer that Mr. Kalwasinski had refused to leave his cell to attend the hearing, the hearing officer went to the cell and advised Mr. Kalwasinski that if he did not attend the hearing, it would be held **in his absence** (the hearing would take place without him). In response, the hearing officer reported, Mr. Kalwasinski said that he did not wish to attend and would not sign the refusal to attend form. This conversation was documented by the hearing officer on a refusal to attend form that was signed by the hearing officer and a correction officer who had witnessed the conversation. The court found that the petitioner had refused to attend the hearing. By refusing, the Court wrote, the petitioner “**forfeited** [gave up] his right to be present and failed to preserve any procedural objections or defenses.”

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Mitchell Kalwasinski represented himself in this Article 78 proceeding.

#### Court Finds that Circumstantial Evidence of Guilt is Not Sufficient

In Matter of Santiago v. Cunningham, 121 A.D.3d 1495 (3d Dep't 2014), during a search of a refrigerator shared by multiple prisoners, a correction officer found items stolen from the mess hall in a net bag labeled with the petitioner's name. At his hearing, the petitioner testified that he had given another prisoner permission to use his bag and had no idea what the other individual had put in the bag. The other prisoner confirmed that the petitioner had given him authority to use the bag and that he had not told the petitioner what he had

put in it. Under these circumstances, the Court held, there was no evidence establishing that the petitioner intended to possess stolen property or that the property was stolen. Accordingly, the Court ordered the determination annulled and the charges expunged.

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Miguel Santiago represented himself in this Article 78 proceeding.

#### Court Rules Expungement and Not Rehearing is the Appropriate Remedy

In Matter of Alicea v. Annucci, Index No. 21499-14 (Sup. Ct. Wyoming Co. Oct. 20, 2014), the respondent **conceded** (admitted) that because he could not produce a complete record of the Tier III hearing, the hearing determination should be annulled. The respondent, however, argued that the proper remedy was a new hearing. The petitioner argued that because he had already served the full penalty imposed at the hearing, the determination should be annulled and expunged.

Citing Matter of Polite v. Goord, 666 N.Y.S.2d 94 (4<sup>th</sup> Dep't 1997), the court acknowledged that because the **obligation** (duty) to produce a record is regulatory and not constitutional, normally a rehearing would be the appropriate remedy. However, the court wrote, “equitable considerations may favor expungement in a given case.” Here, the petitioner had already served the **confinement sanction** (SHU or keeplock) and for this reason the court found that equitable considerations favored expungement.

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Ralph Alicea was represented by The Wyoming County – Attica Legal Aid Bureau in this Article 78 proceeding.

## Sentencing

### Court of Appeals Expands Coverage of the 2009 DLRA

The Drug Law Reform Act of 2009 (2009 DLRA) is intended to **ameliorate** (make less harsh) the excessive punishments imposed on low-level, non-violent drug offenders under the Rockefeller Drug Laws. One of the provisions of the 2009 DLRA establishes procedures whereby individuals convicted of Class B non-violent felony drug offenses who are serving indeterminate sentences can apply to be re-sentenced to determinate sentences. See, Criminal Procedure Law §440.46.

An individual who is serving a sentence for an offense for which a merit time allowance is not available is not eligible for resentencing under 2009 DLRA. Correction Law §803 (1)(d)(ii) makes a merit time allowance unavailable to an offender who is serving a sentence imposed for any of the violent or sexual crimes listed in that statute, without regard to the offender's **predicate sentencing status** (whether the offender was sentenced as a second or persistent felony offender). Correction Law §803 also prevents any offender serving a sentence authorized for an A-I felony offense from receiving a merit time allowance.

In People v. Coleman, 2014 WL 5285477 (2014), the Court considered the issue of whether an individual who was convicted of a Class B drug felony and sentenced as a persistent felony offender to an indeterminate sentence with a maximum term of life, is eligible for resentencing pursuant to 2009 DLRA. The issue came before the Court because the Third Department of the Appellate Division, in People v. Coleman, 970 N.Y.S.2d 329 (3d Dep't 2013), concluded that such individuals are eligible for resentencing, while the Second Department, in People v. Gregory, 914 N.Y.S.2d 655 (2d Dep't 2011), reached the opposite result.

The Court of Appeals framed the issue before it as follows:

Does the DLRA resentencing **exclusion**:

1. Apply to all offenders who are ineligible to receive a merit time allowance,

including those who cannot receive those allowances solely by virtue of their recidivist sentencing adjudications; or,

2. Apply only to offenders who have been convicted of certain serious crimes that are specifically listed in Correction Law §803(1)(d)(ii).

Defendant Coleman argued that he was not serving a sentence upon a conviction for, nor did he have a predicate felony conviction for, any statutory exclusion offense that would make him ineligible for resentencing. Therefore, although he could not receive a merit time allowance as a result of his adjudication as a persistent felony offender, his current conviction was not for an offense for which a merit time allowance was unavailable pursuant to Correction Law §803. In the defendant's view, he merely had a sentencing adjudication, as opposed to an offense, which prevented him from receiving a merit time allowance. In addition, the defendant argued that because substantial justice did not dictate the denial of his resentencing application, he should be resentenced.

The People argued that because Defendant Coleman had been sentenced as a persistent felony offender on his instant drug crimes and could not obtain a merit time allowance, his current drug offense qualified as an exclusion offense under the merit time related resentencing exclusion.

The Court agreed with Defendant Coleman, finding that Defendant Coleman had no conviction for an "exclusion offense" because he had never been convicted of a crime that by its nature makes it impossible for the offender to receive a merit time allowance under the Correction Law, notwithstanding that Defendant Coleman happens to be unable to receive such an allowance due to his persistent felony offender adjudication.

Interestingly, when the Court analyzed each party's reading of Correction Law §803, it found that each had a plausible argument as to the meaning of the language. The Court found, however, that the defendant's reading of the statute was more consistent with the statute's remedial purpose than the People's reading. That is, as interpreted by the defendant, the statute would grant the benefits of resentencing to a broad array of non-violent felony offenders, including those who could have received a merit time allowance had they not been sentenced

as persistent felony offenders. The People's reading of the statute would deny resentencing to all persistent felony offenders and permit resentencing for just a limited group of offenders who are eligible for merit time allowance, thereby depriving a substantial number of non-violent drug offenders of the relief which the Legislature had envisioned.

## **Prisoner is Not Entitled to an Order Requiring DOCCS to Act with Respect to an Illegal Sentence**

Melvin Johnson believed that the court illegally sentenced him as a persistent felony offender. He requested that pursuant to Correction Law §601-a, DOCCS notify the sentencing court of this error. DOCCS denied the request, based upon its determination that Mr. Johnson had not shown that he had been sentenced in error. Mr. Johnson filed an Article 78 proceeding in the nature of mandamus, seeking an order compelling DOCCS to make the requested notification. The lower court dismissed the petition.

On appeal, in Matter of Johnson v. Fischer, 960 N.Y.S.2d 559 (3d Dep't 2013), the Court held the relief that the petitioner was seeking could not be obtained by means of a writ of mandamus. Writs of mandamus, the Court wrote, lie only to compel the performance of acts which are mandatory, not discretionary, and only when there is a clear right to the relief sought. Pursuant to Correction Law §601-a, the respondent in this case has a duty to inform the sentencing court *when it appears to the respondent* that a prisoner has been erroneously sentenced. Because the initial determination of whether notification pursuant to the C.L. §601-a is entrusted to the respondent's discretion and judgment, mandamus does not lie. The Court further noted that claims that a sentence is illegal can be raised pursuant to Criminal Procedure Law §440.20

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Melvin Johnson represented himself in this Article 78 Proceeding.

## **Parole**

### **Parole Denial Annulled: Determination So Irrational as to Border on Impropriety**

In December 2012, the Parole Board concluded that releasing Philip Rabenbauer to parole supervision would 1) be incompatible with the welfare and safety of the community and 2) **deprecate** (lessen) the severity of the offense as to undermine respect for the law. Eleven months later, the Supreme Court in Sullivan County found that because the Board's decision failed to specify the basis for these conclusions, the denial was legally insufficient and arbitrary and capricious. The court commented that it is unacceptable for the Board to simply restate the usual and predictable language used in so many parole denials with no specificity or other explanation to justify the parole denial. Based on these findings, the court ordered the Parole Board to hold a new hearing within 30 days with none of the Parole Board commissioners who had been involved in the hearing that was reversed and to render a decision within 15 days after the hearing.

Following this decision, the Board of Parole conducted a new hearing and again denied Mr. Rabenbauer parole release. In Matter of the Application of Philip Rabenbauer v. NYS DOCCS, Index No. 1401-14 (Supreme Court, Sullivan County, New York Nov. 17, 2014), the court found that the Parole Board had done no better at the second hearing than it had at the first and again ordered the hearing reversed.

Mr. Rabenbauer was serving 15 years to life for killing his wife. This was the minimum sentence for murder in the second degree. By the time of the most recent hearing, Mr. Rabenbauer had served 28 years in prison, 13 years beyond his minimum sentence. He had a close to perfect disciplinary record, had outside clearance and, while in prison, had earned three college degrees and completed every program offered by DOCCS. He also had numerous letters of recommendation for release from corrections officers, officials and members of the community, as well as a substantial support system on the outside, release plans and housing.

Mr. Rabenbauer had repeatedly expressed remorse, shame and guilt for murdering his wife.

The court noted that a court may reverse a Parole Board decision under four circumstances:

1. Where the Board bases its decision to deny parole solely on the serious nature of the underlying crime. See, Matter of King v. NYS Division of Parole, 598 N.Y.S.2d 245 (1<sup>st</sup> Dep't 1993), affirmed, 610 N.Y.S.2d 954;
2. Where the Board fails to consider the importance of the factors set forth in the guidelines (Executive Law §259-i(2)(a)). See Matter of Rios v. NYS Division of Parole, 836 N.Y.S.2d 503 (Sup.Ct. Kings Co. 2007) (while the Board need not consider each guideline separately and has broad discretion to consider the importance of each factor, the Board must still consider the guidelines);
3. Where the Board sets forth its decision in conclusory terms. See Matter of Wallman v. Travis, 794 N.Y.S.2d 381 (1<sup>st</sup> Dep't 2005).
4. Where the Board retries, harasses, badgers or argues with an inmate, second guesses the findings of competent experts involved in the inmate's trial, or infuses the Commissioners' personal beliefs into the proceeding. See, Matter of King v. NYS Division of Parole, (holding that the role of the Board is not to resentence petitioner, according to the personal opinions of its members as to the appropriate penalty for murder, but to determine whether, as of this moment, given all of the relevant statutory factors, he should be released).

In Mr. Rabenbauer's case, the court found that the decision to deny parole release was so irrational as to border on gross impropriety and illegal action. It reached this decision based on a review of the record which revealed, the court wrote, that the commissioners had 1) based their decision to deny parole release solely on their personal opinions of the nature of the instant offense; 2) had improperly

characterized the petitioner's actions immediately following the murder; 3) had failed to consider all of the guidelines or factors; 4) had issued a determination that was written in conclusory terms and was unsupported by the record; and 5) at least one Commissioner had been argumentative and appeared to have made the decision prior to the parole interview.

In support of these conclusions, the court noted that 2/3 of the interview was devoted to discussing the petitioner's offense; one commissioner spent half the interview reiterating the specifics of the crime, including editorializing about petitioner's defense and speculating about whether he had been attempting to frame a third person for the crime (a suggestion, the court wrote, that may have figured into the decision of the other two commissioners to deny parole); and one commissioner disputed the expert testimony from the trial concerning the petitioner's state of mind following the murder and interrogated the petitioner repeatedly about his claim that he was in shock after he murdered his wife. The court could find no law that authorizes Parole Board commissioners to **infuse** (put) their personal opinions or speculations into the parole interview or process.

The court found that other than the Board's opinion of the heinous nature of the crime and their personal beliefs and speculation, there was no rationale for the Board's decision to deny parole release. "Because the decision lacks any foundation in reality," the court wrote, "this court is left with no ability to evaluate why two of the three commissioners on the Board denied parole."

Not only did the record fail to clarify on what grounds the Board denied parole, but the record strongly supported parole release: the petitioner has served almost double his minimum term, and neither the commissioners nor the respondent's attorney could say why the Board concluded that release would be incompatible with the safety and welfare of society or why it would deprecate the seriousness of the crime so as to undermine respect for the law.

Based on the record, the court further found, it appeared that the Board began the interview and proceeded through much of it with such antagonism toward the petitioner that the court had to conclude that the Board had no intention of considering parole release.

The court granted the petition and ordered the respondent to conduct a new hearing within 30 days and to issue a decision within 15 days. The court also warned that if the matter is again returned upon an Article 78 proceeding involving the same circumstances, a “different remedy may be warranted.”

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Philip Rabenbauer was represented by David Lenefsky, Esq.

## Application of SARA to Defendant Violates Ex Post Facto Clause

In 2002, Michael Devine, then 22 years old, was convicted of sexual abuse of a then 17 year old female. In 2008, he was released to parole supervision. In 2014, DOCCS informed Mr. Devine that because the residence that he shares with his fiancé in Brooklyn was within 1000 feet of a school, it was not compliant with Executive Law §259-c(14) (the Sexual Assault Reform Act or SARA). He moved out of the home that he shared with his fiancé and moved into his mother’s house.

In 2005, the Sexual Assault Reform Act, enacted in 2001, was amended to define school grounds as including the area accessible to the public which is located within one thousand feet of a real property line of a school. “Area accessible to the public” includes sidewalks, streets, parking lots, parks, playgrounds, stores and restaurants. Individuals to whom the law applies are prohibited from knowingly entering an area that is accessible to the public and that is within 1000 feet of any school and from entering other institutions which depend on the presence of persons under the age of 18.

Mr. Devine filed an Article 78 challenge to the application of the SARA amendments to him. He argued that the law is an ex post facto punishment as it was enacted after the commission of his crime and increases the penalty imposed by exiling him from his home and community with the possibility of increased incarceration if he does not comply. In support he cited Article I, §10 of the U.S. Constitution (the Ex Post Facto Clause) which makes it unconstitutional to increase the punishment for a crime after it was committed.

In Matter of Devine v. Annucci, 994 N.Y.S.2d 819 (Sup. Ct. Kings Co. Sept. 29, 2014), ruled in Mr. Devine’s favor, finding that as applied to Mr.

Devine, the 2005 amendment of the SARA law was an ex post facto punishment and ordered that he be allowed to return to his Brooklyn home.

To reach this result, the court did not simply agree that increasing the area within which Mr. Devine could not reside was an additional punishment that was not imposed at the time that he was sentenced; not all changes in the law which have an adverse effect on a defendant violate his rights under the ex post facto clause. To determine whether the 2005 amendment to SARA was an ex post facto punishment, the court looked to the Supreme Court’s reasoning in Smith v. Doe, 538 U.S. 84 (2003), a decision which analyzed whether a statute requiring sex offenders to register was an ex post facto punishment as those individuals had committed crimes prior to the date upon which the registration laws were enacted. In Smith, the Court advised that in looking at this issue, the lower courts should consider whether the goal of the legislators who enacted the law was to impose punishment. If so, the law violates the ex post facto clause. But, if the goal was to enact a regulatory scheme which is civil and non-punitive, the courts must examine whether the scheme is so punitive either in purpose or in effect as to negate (cancel) the state’s intent to deem it civil.

In this case, to counter the state’s argument that the amendment was civil and not intended as punishment, the petitioner (Mr. Devine) produced a map of New York City showing that the law created an **enormous** (very very large) **exclusion zone** (an area where sex offenders cannot reside) that includes the majority of New York City. Petitioner argued that the legislature could have foreseen that the law would lead to the **banishment** (exile) of sex offenders from New York City. Banishment, the petitioner argued citing Black’s Law Dictionary, is a form of punishment. The petitioner also cited the “strong and fear inducing” language used by an assemblyman in support of the amendment, which he said, showed an intent to punish sex offenders. Finally, the petitioner argued, the stated goal of protecting young and vulnerable members of society from the risk posed by sex offenders was not supported by any evidence, research or crime statistics.

The court noted that a lack of research to support the stated purpose of the statute does not automatically convert its purpose from a civil prohibition to a criminal punishment, and said that

it could only reject the legislature's stated intention where the party challenging the statute provides the clearest proof that the statutory scheme is so punitive either in purpose or effect as to negate the State's intention to deem it civil. Here the petitioner argued, despite the uncertainty as to legislative intent, the law is so punitive in effect that it negates any **benign** (harmless) intent: the law bans the petitioner from large areas of New York City and imposes a near total banishment from Brooklyn. Mindful that the state may impose certain restrictions on people released from prison, the court found that the law in question puts limitations on a par with banishment.

While the court found that Executive Law §259-c(14) was unconstitutional as to Mr. Devine, it was careful to write that the law would not necessarily be unconstitutional as to others. For instance, if an individual had no particular ties to an area from which he was banned or presents a particular danger to children, the law may not be unconstitutional.

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Michael Devine was represented by Brooklyn Defender Services and the Appellate Advocates.

## Misreading of Record Leads to New Parole Hearing

In Matter of Esquilan v. NYS Division of Parole, 991 N.Y.S.2d 747 (Sup. Ct. Orange Co. 2014), the petitioner challenged the determination denying him parole release. The court found that the findings in the COMPAS assessment tool were **devoid of support** (had no support) in the record and remanded the matter for a new hearing.

The facts which led to this result were the following: The petitioner had committed the crime of conviction while under the influence of cocaine. He has been in prison since 1987. The screener who prepared the COMPAS assessment stated that she was unsure whether petitioner had had prior treatments for substance abuse and was unsure whether petitioner had any history of failed drug/urinalysis tests. On the assessment, the response to the question "Is this person at risk for substance abuse problems?" was redacted. Other records in the proceeding show that the petitioner had completed a substance abuse treatment program in 2010 and had had no Tier III disciplinary

violations for drug abuse during his entire incarceration. Petitioner's assertion at the hearing that he had not used drugs for 27 years was unchallenged by any evidence in the record. Nonetheless, the assessor concluded that it was "highly probable" that if released, petitioner would reenter a lifestyle of substance abuse.

The court noted that it was unclear 1) why a COMPAS screener with presumed access to the petitioner's institutional record would be unsure of whether he had failed any drug tests and 2) why the ultimate finding on this issue would be redacted. However, due to the Board's reliance on this instrument, which contained a misreading of the record, the court vacated the determination and remanded the matter for a new hearing.

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Adolfo Esquilan represented himself in this Article 78 action.

## Court Considers Impact of the Unavailability of Sentencing Minutes

In Matter of Delrosario v. Evans, 993 N.Y.S.2d 591 (3d Dep't 2014), the Court considered the significance of the Parole Board's failure to consider the petitioner's sentencing minutes when it reviewed the petitioner's parole application. Executive Law §259-i(2)(a)(ii)(c)(A) provides that in making parole decisions, among other factors, the Parole Board must consider recommendations of the sentencing court, the district attorney and the attorney for the inmate. This has been interpreted to mean that the Board must consider the sentencing minutes. In this case, the Court agreed with the lower court decision dismissing the Article 78 challenge to the parole denial. The Court acknowledged that the Board had failed to consider the sentencing minutes, but concluded that the record showed that the minutes were unavailable despite a diligent effort to locate them and, consequently, found that the failure to consider the minutes was not a basis for annulling the Board's decision. In reaching this result, the Court relied on Matter of Smith v. NYS Division of Parole, 916 N.Y.S.2d 285 (3d Dep't 2011) and Matter of Williams v. NYS Div. of Parole, 894 N.Y.S.2d 224, *lv. denied*, 14 N.Y.3d 709 (2010).

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Carlos Delrosario represented himself in this Article 78 action.

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### Miscellaneous

## For the Purposes of Penal Law §205.25, Court Concludes Heroin is Dangerous Contraband

A prisoner is guilty of violating Penal Law §205.25(2), promoting prison contraband in the first degree, when he or she possesses any dangerous contraband. Dangerous contraband is defined as “contraband which is capable of such use as may endanger the safety or security of a detention facility.” See, Penal Law § 205.00(4). In People v. Verley, 121 A.D.3d 1300 (3d Dep’t 2014), Defendant Verley was convicted of promoting prison contraband in the first degree where, after he was found unconscious in his cell from an apparent

drug overdose, a cell search resulted in the recovery of two small balloons of heroin.

Defendant Verley appealed the conviction, arguing that it was based on legally insufficient evidence and was against the weight of the evidence in that the heroin found in his cell did not constitute dangerous contraband.

The test for determining whether contraband is dangerous, the Court wrote, is whether its particular characteristics are such that there is a substantial probability that the item will be used in a manner that is likely to cause death or other serious injury, to facilitate escape, or to bring about other major threats to a detention facility’s institutional safety or security. Contraband will be considered dangerous where it endangers the life of any person. In this case, the defendant was found unresponsive due to heroin use and testified that he took the drug to kill himself. The Court found that the heroin possessed by the defendant had endangered his own life and this constituted legally sufficient evidence from which the jury could reasonably conclude that it constituted dangerous contraband. For this reason, the Court found that the verdict was not against the weight of the evidence.

## Disciplinary Hearings in Prison Effect SORA Classification

In People v. Graves, 993 N.Y.S.2d 778 (2d Dep’t 2014), the defendant appealed from an order classifying him as a level 3 sexually violent offender under the Sex Offender Registration Act (SORA). The SORA classification system assigns points for factors which are indicative of the risk of committing another sex offense. The system authorizes points for unsatisfactory conduct in prison. In this case, the defendant was given 10 points because while incarcerated, he had been found guilty at 7 Tier II hearings. The lower court found this to be evidence of unsatisfactory conduct while confined. On appeal, the Second Department held that the defendant’s unsatisfactory conduct while confined was supported by clear and convincing evidence in the form of his prison disciplinary history and upheld the assignment of 10 points.

## Jail Time Credited to an Undischarged Sentence Cannot Also be Credited to a New Sentence

In 2006, while on parole from a 2004 sentence, Steven Santiago was arrested on new charges and a parole violation warrant was lodged. He remained in jail on the new charges until June 2007 when he was sentenced on the new charges. The Board of Parole never acted on the violation warrant, and the 2004 sentence expired in March 2007. The period between the 2006 arrest and the expiration of the 2004 sentence was credited to the 2004 sentence. The period after the 2004 sentence expired was credited as jail time toward the 2007 sentence. Mr. Santiago brought an Article 78 proceeding seeking a court order that the time between his 2006 arrest and the expiration of the 2004 sentence be credited as jail time toward his 2007 sentence. In Matter of Santiago v. Germain, 121 A.D.3d 1479 (3d Dep't 2014), the Court ruled that pursuant to P.L. §70.30(3), "inasmuch as the jail time prior to March 14, 2007 was credited to the 2004 sentence, the 2007 sentence was appropriately credited only with the jail time served thereafter."

Mr. Santiago returned to prison in 2007 and was released to post release supervision in July 2008. He was arrested on new charges and a parole violation in August 2008. In November 2008, while still confined on the new charges, Mr. Santiago was restored to post release supervision. He remained in jail until February 19, 2010, when he was sentenced on the 2008 charges. Because petitioner's period of post release supervision had not concluded, the court rejected Mr. Santiago's argument that the period between November 2008 and February 19, 2010 should be credited as jail time.

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Steven Santiago represented himself in this Article 78 proceeding.

## FEDERAL COURT DECISIONS

### Court Clarifies When an Excessive Force Claim Cannot be Dismissed as "De Minimis"

For many years, the courts have said that where a use of force is "de minimis," provided that the force is not of a sort repugnant to the conscience of mankind, there is no Eighth Amendment violation. The Eighth Amendment prohibits cruel and unusual punishment. De minimis force is force that is not serious enough to reach constitutional dimensions. Courts have **interpreted** (read) this to mean that some force – including unnecessary but minor force – is too **insignificant** (minor) to violate the 8<sup>th</sup> Amendment. See, e.g., Tafari v. McCarthy, 714 F.Supp.2d 317, 341 (N.D.N.Y. 2010) (holding that where a corrections officer threw urine and feces on a prisoner while he was sleeping, the use of force was de minimis). When a court concludes that the use of force alleged is de minimis, it dismisses the claim that the conduct violated the prisoner's Eighth Amendment rights.

Recently, in Hogan v. Fischer, 738 F.3d 509 (2d Cir. 2013), the Second Circuit clarified that under certain circumstances, claims involving the use of minor force may violate the constitutional prohibition on cruel and unusual punishment. In Hogan, the plaintiff alleged that the defendants, wearing paper bag masks to conceal their identities, sprayed a mix of vinegar, feces and machine oil into his cell, hitting his mouth, eyes, nose and body. The solution, the plaintiff alleged, burned his eyes and skin and caused significant psychological harm. The district court, finding that Hogan had not shown that the defendants had applied more than de minimis force and that while the use of force described was "certainly repulsive," it was not sufficiently severe to be considered repugnant to the conscience of mankind, dismissed the Eighth Amendment claim. The plaintiff appealed to the Second Circuit. The Second Circuit disagreed with the district court's conclusions and found that the plaintiff had stated a plausible Eighth Amendment claim.

The Second Circuit began its analysis by noting that the district court had granted the defendants' motion to dismiss for failure to state a claim. That is, the defendants argued, and the court agreed, that even if the plaintiff could prove the facts he alleged, he would not have shown that the defendants had violated his Eighth Amendment rights. For the purposes of such a motion, the court must assume the truth of the allegations. The Second Circuit, reviewing the district court's decision, held that it was unwilling to accept that as a matter of law, the proposition that spraying an inmate with a mixture of feces, vinegar and machine oil constitutes a de minimis use of force. Such conduct, the Court wrote, "is unequivocally contrary to 'contemporary standards of decency.'"

Further, the Court wrote, even if it was to assume for the purpose of argument that the physical force was de minimis (though it was not), spraying an inmate with vinegar, excrement and machine oil in the circumstances alleged by the plaintiff, is "undoubtedly 'repugnant to the conscience of mankind' and therefore violates the Eighth Amendment."

Noting the significance of pleadings relating to the defendants' state of mind to the determination of whether the complaint states a cause of action for an Eighth Amendment violation, the Court cited to Hudson v. McMillan, 503 U.S. 1 (1992) (stating that the core judicial inquiry used to assess a claim of excessive force is whether force was used in a good faith effort to maintain or restore discipline or maliciously and sadistically to cause harm) and to Boddie v. Schneider, 105 F.3d 857, 861 (1997) (stating that where no legitimate law enforcement or penological purpose can be inferred from the defendant's alleged conduct, the abuse itself may be sufficient evidence of a culpable state of mind). Applying these standards, the Court found that Plaintiff Hogan's allegations about the defendants' conduct – wearing masks and approaching his cell for the sole purpose of spraying him with a noxious substance – had plausibly alleged that prison officials had sufficiently culpable states of mind. Given this context, the Court found, the assault obviously was not a "good faith effort to maintain or restore discipline," but rather was an attempt "to maliciously and sadistically cause harm."

Based on this analysis, the Court held that the district court erred in concluding that the defendants' alleged use of force was de minimis and

not of the sort repugnant to the conscience of mankind. The conduct alleged in the complaint, the Court found, was undoubtedly a form of cruel and unusual punishment **proscribed** (barred) by the Eighth Amendment. The Court vacated the order of dismissal and remanded the case for further proceedings before the district court.

Following the Second Circuit's remand of this case to the district court, the defendants agreed to settle the claims against them.

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John Hogan represented himself in this Section 1983 action.

## **Court Denies Defense Request That Plaintiff Pay for Discovery Production**

In Barnes v. Alves, 10 F.Supp.3d 391 (W.D.N.Y. 2014), a case seeking damages for the defendants' use of excessive force, the court not only denied the defendants' request that the court require the plaintiff to pay for the cost of producing a record to which the plaintiff was entitled, but also questioned, given the \$25.00 cost of the copying, the defendants' belief that the motion was an efficient use of judicial resources.

The issue about whether the plaintiff or the defendants should pay for the production of a 100 page record arose after discovery had closed, when the plaintiff, realizing that he had received only a portion of a requested record, made a motion to compel. The court granted the motion, as it appeared that the defendants had not produced the complete record. The defendants then filed a motion for reconsideration.

Addressing the motion, the court first found that the Federal Rules of Civil Procedure do not recognize a motion for reconsideration. Previous courts have construed such motions as motions to alter or amend the judgment pursuant to FRCP 59(e) or 60(b). For this reason, the court treated the defendants' motion as a motion made pursuant to Rule 60(b). Such motions for reconsideration [under Rule 60(b)], the Second Circuit has noted, will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked – matters in other words that might reasonably be expected to alter the conclusion reached by the court." See, Shrader v. CSX Transp.,

Inc., 70 F.3d 255 (2d Cir. 1995). The court further noted that the burden of proof is on the defendants to show that the court made a clear error in directing the defendants to provide the plaintiff with a copy of the record at the defendants' expense.

The court found that the defendants did not present any evidence to rebut the plaintiffs' argument that they had not provided a complete copy of the record – the Inspector General report on the incident which is the subject of the lawsuit – even though the report was plainly relevant to the allegations. Further, their papers responding to the motion to compel acknowledged that they had not sent the full report. And, although the local rules require that in pro se cases, the parties file all discovery materials with the court, the defendants did not file a copy of the I.G. report.

The defendants argued that the Federal Rules of Civil Procedure require only that they produce the requested record for inspection. They did not, the court found, describe how the production for inspection would occur. Citing Murray v. Palmer, No. 9:03-CV-1010, 2006 WL 2516485 (N.D.N.Y. Aug. 29, 2006), the court stated that in order to have effective production, the defendants would have to produce the report to plaintiff at his place of incarceration and they would have to ensure that he had a sufficient amount of time to review the production under the appropriate circumstances.

The court acknowledged that the defendants were correct that the FRCP 34 allows a party to inspect and copy relevant documents and does not require a responding party to pay the costs of copying. See, Obiajulu v. City of Rochester, 166 F.R.D 293 (W.D.N.Y. 1996). However, the court went on, the court retains the discretion to fairly alter the cost burden and order production under appropriate circumstances. Here, the court found, where trial was scheduled to begin roughly 4 months from the date the order was issued and the plaintiff was required to file his witness list two months before trial, and the defendants failed to produce the IG report as a part of discovery, there is good cause to order the defendants to pay for the copy they must produce for the plaintiff.

Based on this analysis, the court denied the defendants' motion for reconsideration and ordered the defendants to provide the plaintiff with a copy of the relevant IG report.

Jessie Barnes represented himself in this Section 1983 action.

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