Pro Se

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Sex Offenders Must Be Released On or Before Their Maximum Expiration Dates

In People ex rel. Green v. Superintendent, 25 N.Y.S.3d 375 (3d Dep't 2016), the Appellate Division was confronted with the question of whether DOCCS is authorized to keep an individual in custody beyond the maximum expiration date of his determinate term where the individual was not able to secure suitable housing. In this case, the petitioner was a Level III sex offender. When he was not released on the maximum expiration date of his determinate term, he brought this habeas corpus action, asking that the court order his release. The Supreme Court, Sullivan County, denied the relief, finding that the petitioner had failed to secure suitable housing.

Between the lower court's dismissal of the petition and when the case reached the Appellate Division, the petitioner was released from DOCCS custody. Normally this would "moot out" the appeal. That is, because the petitioner had already been released from DOCCS custody, there was no actual case or controversy left for the court to resolve. However, in this case, the court decided that although the application for release from DOCCS custody was moot, the issue – whether DOCCS was authorized to retain petitioner in a maximum security facility past his maximum expiration date – was significant, would typically evade appellate review, and was likely to **recur** (happen again) given the number of inmates with mental health issues and the recognized difficulty in securing acceptable housing for Level III sex offenders. For this reason, the court concluded that the case fell within one of the exceptions to the mootness doctrine and converted the action from one for habeas relief to an action for a declaratory judgment.

Continued on Page 3 . . . .

Also Inside . . .

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A Message from the Executive Director – Karen L. Murtagh

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Karen L. Murtagh

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Turning to the issue before it, the court first noted that Level III sex offenders must find suitable housing that is located over 1,000 feet from school grounds and that DOCCS is authorized to place prisoners who have completed their determinate terms in Residential Treatment Facilities (RTF), some of which are located in correctional facilities operated by DOCCS. However, in this case, when the petitioner's maximum expiration date was reached, DOCCS did not transfer the petitioner to an RTF; instead, he remained in a correctional facility that did not include an RTF for 8 months beyond his maximum expiration date.

The court wrote that while the Board of Parole can deny parole release to a prisoner on his or her conditional release date if he or she has not secured housing, DOCCS cannot keep a prisoner beyond his maximum expiration date to finalize the terms of post-release supervision; DOCCS is bound by the sentence and commitment order whether the inmate is a drug offender or a sex offender. Thus, when petitioner reached his maximum expiration date, DOCCS was required either to release him or place him in an RTF. In the event that an individual cannot get the mental health services that he needs in an RTF, prior to the expiration of the individual's determinate term, DOCCS is required to seek a court order for hospitalization pursuant to the Mental Hygiene Law.

In reaching this result, the court rejected the respondent's argument that DOCCS is authorized to incarcerate individuals who cannot find an approved residence for their entire term of post-release supervision.

Based on the above analysis, the court reversed the judgment of the lower court and declared that where a person's sentence has expired and his or her release is subject to the mandatory condition set forth in Executive Law §259-c(14) [prohibiting Level III sex offenders from living within 1000 feet of a school], that person must be released either to suitable housing or to an RTF.

News & Notes

Lawsuit Seeks Injunctive Relief to End Sexual Abuse of Female Prisoners

The Legal Aid Society, along with the law firm Debevoise & Plimpton LLP, filed Jones v. Annucci, a class action lawsuit in the U.S. District Court for the Southern District of New York on behalf of women prisoners alleging they have been sexually abused while in the custody of the New York Department of Corrections and Community Supervision (DOCCS). The six plaintiffs in Jones v. Annucci represent the estimated 2,300 women prisoners in DOCCS custody, all of whom, the lawsuit alleges, face a substantial risk of sexual abuse while in DOCCS custody.

Plaintiffs seek an injunction requiring DOCCS to take necessary steps to prevent women in its custody from being sexually abused by male correction officers.

The lawsuit alleges that within DOCCS women's prisons, a culture of indifference exists that allows sexual abuse by staff against prisoners to flourish. The lawsuit also alleges that, despite awareness of the pervasive problem of staff sexual abuse, DOCCS has failed to protect women in its custody by failing to enact and enforce adequate policies and procedures concerning supervision of officers, the investigation of complaints of sexual abuse made against officers, and the ability to appropriately discipline officers. According to the complaint, under DOCCS policies, officers are not subject to any greater supervision and are allowed to maintain their job assignments even when they have been the subject of repeated and similar allegations of abuse. Further, the complaint alleges, correction officers are not thoroughly searched upon entering the prisons and are able to bring in contraband such as drugs and alcohol, which, the lawsuit alleges, they may use to manipulate and coerce prisoners. Finally, the lawsuit alleges that

there are no cameras in areas frequently used to commit abuse, and investigations are unprofessional and inadequate. In addition, the complaint states that DOCCS fails to protect women who report sexual abuse from retaliation by correction officers.

Pro Se will keep you informed of developments in this case.

STATE COURT DECISIONS

Disciplinary and Administrative Segregation

Conflict Between Urinalysis Records and Testimony Leads to Reversal

In Matter of Katsanos v. Prack, 2016 WL 818979 (3d Dep't Mar. 3, 2016), the petitioner argued that he had failed to produce a urine sample due to shy bladder and therefore should not have been found guilty of refusing to comply with urinalysis testing procedures. At the hearing, the petitioner gave the hearing officer medical records documenting his condition and his problems submitting urine samples. The hearing officer ignored the petitioner's testimony and records, and relying instead on the misbehavior report, found that although the petitioner had not refused to give a sample, neither had he told the officer that he was unable to submit the sample in the presence of others. The court ruled that due to the inconsistency in the request for urinalysis form, the absence of any testimony concerning the administration of the test or petitioner's medical condition, and the hearing officer's failure to consider the medical documentation, the determination of guilt was not supported by substantial evidence. Because the petitioner had already completely served the penalty imposed at the hearing, the court wrote, expungement was the proper remedy.

Theodore Katsanos represented himself in this Article 78 proceeding.

Failure to Take Testimony on Retaliation Leads to Reversal of Hearing

In his defense at a Tier III hearing for a urinalysis testing violation, Petitioner Trevault asked for a witness who, he said, would testify that an officer had threatened to manipulate the test results. According to the witness refusal form, the witness refused to testify and refused to sign the witness refusal form or to state the reason for the refusal. The officer who talked to the witness did not testify. Thus, there was no testimony regarding the reason for the refusal or about the circumstances that had caused the officer to conclude that the witness would not state why he did not want to testify. Under these circumstances, the court wrote in Matter of Tevault v. Prack, 2016 WL 818928 (3d Dep't Mar. 3, 2016), there was an absence of evidence regarding whether there had been any inquiry into the reason that the witness had refused to testify. In the absence of such evidence, the court found, it could not be found that the respondent had made any inquiry into the reason for the witness's refusal. Under the circumstances, the court held that the violation was constitutional and the proper remedy was expungement.

Richard Tevault represented himself in this Article 78 proceeding.

Guilty Plea Does Not Eliminate Need for OMH Testimony

In Matter of Howard v. Prack, 2016 WL 818856 (3d Dep't Mar. 3, 2016), the petitioner pled guilty to drug use, explaining that he used the drug to help him cope with mental health issues. On appeal, the respondent acknowledged that the petitioner's mental health was at issue and that the hearing officer had therefore violated 7 NYCRR § 264.6(c), the regulation which requires that a hearing officer seek the testimony of an OMH clinician when an accused inmate's mental health is at issue. Here, the court noted, the hearing officer had failed to seek such testimony. Under the circumstances, the court held, the proper remedy is

a new hearing to address petitioner's mental health status.

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Stanley Howard represented himself in this Article 78 proceeding.

Valid Reason for Refusing a Direct Order is Not a Defense

Petitioner Polanco was charged with disobeying an order to move from one cell to another. At his hearing, he asked to call as witnesses inmates who, he said, would support his defense that he had a valid reason for not following the order. In Matter of Polanco v. Annucci, 24 N.Y.S.3d 566 (4th Dep't 2016), the court rejected the defense, noting that, "It is well settled that petitioner, a prison inmate, was required to promptly obey the order even if he disagreed with it." Because the proposed witnesses had no information on whether the petitioner had refused the order, the court found, their testimony was properly excluded.

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Wilfredo Polanco represented himself in this Article 78 proceeding.

Failure to Serve in Accordance With Order to Show Cause Leads to Dismissal

In Matter of Davis v. Prack, 23 N.Y.S.3d 757 (3d Dep't 2016), following the filing of the petition, the court issued an order to show cause requiring the petitioner to serve the respondent and the Attorney General by first class mail. He also ordered that all papers, including *the original* affidavit of service, be submitted to the court at least eight days prior to the return date. Finding that the petitioner had failed to submit the original affidavit of service, the court dismissed the petition.

On appeal, the Third Department, noting that, in the absence of a showing by the inmate that imprisonment presented an obstacle to compliance, an inmate's failure to comply with the directives set forth in an order to show cause requires the dismissal of the petition on jurisdictional grounds, affirmed the dismissal. Here, the respondent had moved to dismiss the petition for failure to file the original affidavit of service. The petitioner opposed the motion, submitting a photocopy affidavit of service indicating that he had timely served the respondent. However, the appellate court found, there was no evidence that the petitioner had filed the original affidavit of service with the Supreme Court as directed by the order to show cause. Because the petitioner had neither complied with the order to show cause nor produced evidence that his imprisonment presented an obstacle to doing so, the court found that the lower court had properly dismissed the petition.

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Lavar Davis represented himself in this Article 78 proceeding.

Proper Exclusion Leads to Inability to Preserve Objections

In Matter of Barnes v. Venettozzi, 23 N.Y.S.3d 488 (3d Dep't 2016), an inmate had been found guilty of violating certain prison disciplinary rules at a Tier III hearing, which determination was upheld upon the inmate's administrative appeal. The inmate then challenged the determination in an Article 78 proceeding. By judgment dated April 1, 2013 (the "April 1, 2013 Judgment"), the Supreme Court dismissed the inmate's petition on the merits on the basis that, among other things, (1) the inmate had been properly removed from the hearing, and (2) he had failed to timely object when one of his requested witnesses was not called. The inmate moved to reargue the April 1, 2013 Judgment on the issue of the witness denial, but did not raise the issue of his removal from the hearing. He also did not file a notice of appeal with respect to the April 1, 2013 Judgement.

On re-argument, the Supreme Court upheld its ruling in a judgment entered October 21, 2013 (the "Decision on Re-argument"). The inmate timely appealed the Decision on Re-argument. However, by the time he had done so, he had missed the deadline to appeal the April 1, 2013 Judgment, which included the ruling that his removal from the hearing had been proper. Consequently, the appellate court declined to consider that issue − even though the inmate had attempted to raise the issue again on appeal − and instead only addressed

whether the inmate had failed to object to the denial of his requested witness. Proceeding on the witness denial issue alone, the court determined that "[w]hile petitioner's failure to preserve this claim may be attributable to his removal from the hearing, which he did not challenge on his re-argument motion, this does not alter the conclusion that the issue is unpreserved, and there is no discretionary authority or interest of justice jurisdiction in proceedings to review administrative determinations pursuant to CPLR Article 78." Barnes, citing Khan v. New York State Dept. of Health, 730 N.Y.S.2d 783 (2001).

This decision demonstrates an easily overlooked procedural trap. The time an inmate has to appeal a decision is generally thirty days from the date he is served with a decision. Civil Practice Law and Rules §5513(a). Bringing a motion seeking permission to re-argue a decision does not preserve your right to appeal that decision, nor does it act as a substitute for serving a notice of appeal within the thirty-day period. While the inmate in Barnes properly and timely appealed the Decision on Re-argument, he did not timely appeal the original April 1, 2013 Judgment, thereby waiving his right to appeal issues addressed by that decision.

It is further important to understand that when a motion to reargue a decision is brought, it is a motion merely *seeking permission*, or leave of court, to reargue. A court will consider the re-argument only if it first grants such permission. The courts can, and sometimes do, decline to grant permission to hear re-argument, meaning the appellant is generally stuck with appealing the original decision. Of course, by the time it is learned that the court is denying a motion for leave to reargue, the thirty days to serve a notice of appeal concerning the original decision will have almost surely passed. Therefore, when a litigant receives a decision that he or she does not agree with, it is imperative that the litigant timely serves a notice of appeal of that decision, regardless of whether he or she plans on bringing a motion to reargue the decision.

"Good Faith" Denial of Reasonable Accommodation Results in Re-hearing Rather Than Expungement

In Matter of Medina v. Sheahan, 2016 WL 445850 (4th Dep't Feb. 5, 2016), an inmate brought an Article 78 proceeding challenging a Tier III hearing disposition on the grounds that the hearing officer had failed to provide reasonable accommodation for the accused's visual impairment disability. DOCCS conceded that the hearing officer had failed take the requisite steps to enable the petitioner to comprehend the charges against him and to understand and knowledgeably participate in the hearing. However, DOCCS argued that remittal for a new hearing was the appropriate remedy, instead of expungement, as the inmate argued, because good faith efforts had been made to provide the inmate with reasonable accommodation.

The court agreed with DOCCS and remitted the matter for a new hearing on the basis that the denial of reasonable accommodation was made in good faith. In so deciding, the court noted that several methods of magnifying the documents had been attempted, though unsuccessfully. "Therefore, because a good faith reason for the denial of petitioner's rights appears on the record, this amounts to a regulatory violation rather than a violation of petitioner's constitutional rights, requiring that the matter be remitted for a new hearing." Medina v. Sheahan, at *1; quoting Morris-Hill v. Fischer, 960 N.Y.S.2d 273 (3d Dep't 2013).

Anthony Medina represented himself in this Article 78 proceeding.

Court of Claims

Failure to Provide Cleaning Products When Toilet Overflowing States a Claim

In Boggs v. State, 25 N.Y.S3d 545 (Ct. Cl. 2015), the Court of Claims determined that a prisoner's allegations that raw sewage erupted from the toilet in his cell while he was confined to his cell for 23 hours per day and that DOCCS did not give him cleaning materials for nearly 12 hours after the sewage erupted, were sufficient to state a constitutional tort cause of action under the State's Constitution's prohibition against cruel and inhuman punishment (Article 1, §5). The Court further determined that although the inmate might also be able to bring a §1983 claim in federal court against an individual employee of the state in his or her individual capacity concerning the same underlying facts, this does not preclude the inmate from bringing a claim in the Court of Claims against the State of New York because the State is not a proper party in a §1983 action. Id., at 3-4.

With regards to the sufficiency of the allegations, the court noted that "Federal courts considering inmates' claims involving exposure to human waste have held that, depending upon the duration and severity of the exposure, such unsanitary conditions may constitute cruel and inhuman treatment in violation of the Eighth Amendment." Boggs v. State, 25 N.Y.S.3d 545 (Ct. Cl. 2015); quoting Willey v. Kirkpatrick, 801 F.3d 51, 68 (2d Cir. 2015). Further, the court noted that the Willey court recently "rejected a bright-line durational requirement in determining whether a prisoner's exposure to raw sewage may form the basis for an Eighth Amendment claim for cruel and inhuman treatment, holding that the viability of such a claim depends upon a balancing of both the duration and the severity of the exposure and that its qualitative offense to a prisoner's dignity should be given due consideration." Boggs v. State, 25 N.Y.S.3d at *5, quoting Willey v. Kirkpatrick, 801 F.3d at 68. Thus, the court determined, "[t]he allegations in the instant claim, that sewage covered 85% of the claimant's cell for a period of nearly 12 hours, if true, may give rise to a constitutional tort claim for violation of the prohibition against cruel and inhuman treatment. To the extent claimant alleges that prison staff ignored a supervisor's direct order to provide the claimant with a means to clean the unsanitary conditions in his cell, he sufficiently alleged the requisite state of mind necessary to survive a motion to dismiss for failure to state a cause of action." Boggs v. State, 25 N.Y.S.3d at *5.

Steven Boggs represented himself in this Court of Claims action.

DOCCS Ordinarily Not Liable for Alleged Acts of Malpractice by Outside Doctors

In Garofolo v. State, 23 N.Y.S.3d 667 (3d Dep't 2016), the Appellate Division, Third Department, considered whether DOCCS could be held vicariously liable for alleged malpractice by doctors who are not employed by DOCCS. The court found that under the circumstances of this case, DOCCS was not vicariously liable because the doctors were independent contractors, and no ostensible, or apparent, agency existed between DOCCS and the outside doctors which otherwise could have subjected DOCCS to vicarious liability.

Ordinarily, the court wrote, an entity, such as DOCCS, is liable only for the medical malpractice of its employees and not that of independently contracted doctors. Garofolo, 23 N.Y.S.3d at *2. Where ostensible, or apparent, agency exists, however, DOCCS can be vicariously liable for malpractice of independent doctors. "Ostensible agency imposes vicarious liability upon [DOCCS] for the alleged malpractice of an independently contracted doctor when an inmate has reasonably relied upon the appearance of the doctor's authority created by the words or conduct of DOCCS." Id. In order for vicarious liability to attach, an inmate must have reasonably believed that the treating physician was provided by DOCCS, or was otherwise acting on the defendant's behalf. Id. "Essential to such a claim is the existence of words or conduct *on the part of DOCCS* that give rise to the appearance and belief that the doctors were acting on its behalf."

Id. (emphasis added), see also Hallock v. State, 64 N.Y.2d 224, 230 (1984).

In Garofolo, the court found that DOCCS took no action that created an apparent agency relationship upon which the inmate could have reasonably relied as an indication that the doctors were acting on its behalf. Prior to undergoing surgery, the inmate requested a second opinion. DOCCS honored the inmate's request and informed him that he would have to do so at his own expense. The inmate subsequently underwent surgery performed by outside doctors, "outside of the prison and without the involvement of any prison employees[.]" Garofolo, 23 N.Y.S.3d at *2. Furthermore, the inmate signed consent forms that did not reference DOCCS. Thus, the court found that no ostensible agency existed, and therefore DOCCS could not be vicariously liable for any actions of the outside doctors.

Importantly, although the court's decision here precludes the inmate from pursuing a claim for damages against DOCCS in this particular instance, it does not preclude the inmate from bringing a traditional medical malpractice case against the treating physicians directly. "Doctors that provide medical care for inmates − whether in an employment or independent contractor context − remain subject to the traditional rules of medical malpractice." Garofolo, 23 N.Y.S.3d at *2; see also Rivers v. State, 552 N.Y.S.2d 189 (3d Dep't 1990).

Basichas & Associates represented Steven Garofolo in this Court of Claims action.

Prisoner Seeks Damages for Wrongful Confinement to SHU

Following the judicial reversal of a Tier III hearing, Dwayne Bethune filed a claim for damages for the roughly 60 days that he spent in SHU as a result of the reversed hearing. He argued that the State is not immune from liability when it acts in a manner that is inconsistent with its own rules and regulations. Here, the claimant argued, the hearing officer violated DOCCS regulations when he interviewed two witnesses – a Syva representative and a correction officer – off the record and out of Mr. Bethune's presence in the absence of a determination that taking the testimony in Mr. Bethune's presence would jeopardize institutional safety and correctional goals.

Reviewing the issues, in Bethune v. State, 2015 WL 9999014 (Ct. Clms. Dec. 7, 2015), the court first noted that a cause of action for wrongful confinement must establish that:

1. The defendant intended to confine the claimant;
2. The claimant was conscious of the confinement;
3. The claimant did not consent to the confinement; and
4. The confinement was not otherwise privileged.

The question before the court was only whether the confinement was not otherwise privileged. Here, the court of claims held, the alleged violations of the DOCCS regulations do not provide a basis for a wrongful confinement claim. The basis for the court's conclusion was that the State only loses its absolute immunity from suit for a violation of a due process safeguard at a prison disciplinary hearing where the alleged regulatory violation implicates a constitutional right. Thus, in Bethune, the viability of the claim requires a threshold determination of whether or not the regulations which the claimant alleges were violated implicated a constitutional due process safeguard upon which liability may be based.

The court went on to find that the right violated – to have witnesses testify in the accused's present – implicated only the right to confront and cross examine, a right which an inmate does not have at a prison disciplinary hearing. [Editorial Note: This analysis is subject to question. The witnesses whose testimony was taken out of the claimant's presence were witnesses called by the claimant. Their testimony, the claimant believed, would have been favorable to him. Thus, he would not have been confronting witnesses against him or cross examining hostile witnesses. Further, taking testimony out of the accused's presence implicates his right to attend the hearing, a fundamental right established by the Supreme Court in Wolff v. McDonnell, 418 U.S. 539 (1974)].

The court found that the other right involved – the failure to record the testimony of the two witnesses – was also only a regulatory right.

Based on its conclusions that neither of the rights that were violated by the hearing officer were fundamental rights, the court concluded that the violation of regulatory rights could not form the basis for a claim of wrongful excessive confinement. As a result, the court concluded, the defendant had established its entitlement to summary judgment.

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Wayne Bethune represented himself in this Court of Claims action.

Miscellaneous

Limits on Family Court's Authority to Control Repayment of Retroactive Support

In Cordero v. Commr. of Social Services, 25 N.Y.S.3d 419 (3d Dep't 2016), a father who has been incarcerated since 2009 had his child support obligation suspended upon consent, leaving child support arrears owing. The local support collection unit, through the Department of Social Services (DSS), subsequently issued an income execution order against the father's inmate account, garnishing his weekly program stipend from DOCCS in order to recoup the arrears. The father then commenced a support proceeding seeking to suspend the income execution order until such time as he is released from prison and has had an opportunity to obtain employment.

The Support Magistrate dismissed the petition on the grounds that it lacked the authority to modify the payment of retroactive child support because the child had received public assistance. "Family Ct. Act §440(1)(a) provides that, where a child has received public assistance, the payment of retroactive child support is to be enforced by the local support collection unit 'pursuant to an execution for support enforcement . . . or in such periodic payments as would have been authorized had such an execution been issued. In such case, [Family C]ourt shall not direct the schedule of repayment of retroactive support.'" Cordero, at *1, quoting Fam. Ct. Act §440(1)(a). Thus, the court determined that the Support Magistrate properly dismissed the father's petition because under the circumstances it lacked the authority to prevent or interfere with the support collection unit's efforts to recoup the support arrears by garnishing the father's weekly program stipend.

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Francisco Cordero represented himself in this Family Court proceeding.

Judicial Review of Denial of Application for Temporary Work Release

In Matter of Yorro v. Ledbetter, 2016 WL 734365 (Sup. Ct. Albany Co. Feb. 24, 2016), an inmate commenced an Article 78 proceeding challenging the denial, and subsequent administrative appeal decision affirming the denial, of her application for temporary work relief. The Supreme Court upheld the denial on the grounds that it was not arbitrary, capricious, or an abuse of discretion. In so deciding, the court noted that, "[i]t is well settled that participation in a temporary release program is a privilege, not a right." Yorro, at *1, quoting Matter of Peck v. Maczek, 830 N.Y.S.2d 846 (3d Dep't 2007); see also Correction Law §855[9] ("Participation in a temporary release program shall be a privilege.").

The petitioner argued that the denial was based on her criminal history for which she had already served her time, and that other factors should be considered, such as her improvement during incarceration and the fact that she would be obliged by the terms of parole supervision and her parole officer if granted such leave. The court rejected this argument, finding that all the factors considered in denying her application were appropriate to consider: "the nature of her crime, her extensive recidivist history, parole supervision history, that the instant offense is a parole violation, that she failed to benefit from prior work releases, public safety and community impact, and a noted custodial adjustment[.]" Yorro, at *1. "Inasmuch as those were appropriate factors to consider, it cannot be said that the determination was irrational or violated Petitioner's statutory or constitutional rights, and

therefore it will not be disturbed." Yorro v. Ledbetter, at *2.

Jacqueline Yorro represented herself in this Article 78 proceeding.

Court Rejects Challenge to CMC Status

In 1996, Xao He Lu was convicted of kidnapping and robbery. In 2012, DOCCS notified him that he was being classified as a central monitoring case (CMC) because of the nature of his offense, a determination that Xao He Lu appealed. Following the denial of the appeal, Xao He Lu filed an Article 78 challenge to the security status which the Supreme Court, Washington County, dismissed. In Matter of Xao He Lu v. DOCCS, 23 N.Y.S.3d 751 (3d Dep't 2016), the Appellate Division, Third Department, rejected the petitioner's argument that because he had not been classified CMC when he first went into DOCCS custody, so classifying him 16 years later was arbitrary and capricious.

In analyzing this claim, the court first referred to DOCCS Directive 0701 which states that an inmate may be classified as CMC at any time during his or her incarceration. In view of this portion of the Directive, and the portions permitting the nature of the crimes of conviction to be a proper factor to consider in determining whether an individual should be classified as CMC, the court found no basis to conclude that the CMC designation was arbitrary or capricious. The court therefore affirmed the lower court's decision dismissing the petition.

Xao He Lu represented himself in this Article 78 proceeding.

Mother, Incarcerated for the First 7 Years of Child's Life, Found to Have Neglected Child

In Matter of Duane FF, 24 N.Y.S.3d 421 (3d Dep't 2016), the court reviewed a decision by the Family Court, Clinton County, to modify a child's permanency goal from "return to parent" to "placement for adoption," and denied visitation to the child's mother and half sibling. The child's mother appealed the order, arguing that the family court lacked the authority to modify the permanency goal in the absence of a request.

The case arose when the appellant, the child's mother, two days after giving birth to the child, placed the child in temporary foster care with the Department of Social Services (DSS). A few days later, she was sentenced to 7 years in state prison. Following the sentencing, DSS filed a neglect petition alleging that because the mother was not available to parent her child and had no relatives who could do so, the child was at risk of imminent harm. After a neglect hearing, the court determined that the child was neglected by the mother and **sua sponte** (on its own, without a motion by a party), modified the child's permanency goal from "return to parent" to "placement for adoption" and denied visitation to the mother and the child's half sibling.

On appeal, the court found that the Family Court had the authority to change the placement goals based on the facts which came out at the hearing. In this case, the mother testified that her earliest release date was 2020, with the possibility of an early release date in 2017, provided she took several programs. The father was in prison and the mother's relatives were not available. The foster parents were interested in a long term placement. Further, while DSS advocated return to the parent as a long term goal, the court observed, it was unable to explain how this goal could be reached, in light of the mother's lengthy prison sentence.

Looking at these facts, the court found that the lower court had correctly concluded that the mother could not correct the conditions that had had led to the child's placement in foster care – her incarceration and the absence of other custodial possibilities – and that for this reason, the Family Court's modification of the permanency goal should not be disturbed.

With respect to the Family Court's conclusion that it would not order visitation, the appellate court agreed that there is a presumption that visitation with the non-custodial parent is in the best interests of the child, even when the parent is incarcerated. Nonetheless, the court wrote, an application for visitation may be denied where there are

"compelling reasons and substantial proof" that visitation would be harmful to the child. To determine whether visitation with an incarcerated parent is in the child's best interests, the court is required to consider the totality of the circumstances. In this case, the Family Court found that where the child was 3½ months old when the permanency hearing took place, and the round trip from the child's foster home to the mother's prison would take 12 hours, there was a substantial basis for the court's denial of visitation.

FEDERAL COURT DECISIONS

Complaint Alleging Destruction of Evidence States Claim for Violation of Right to Petition

In the complaint filed in Hamilton v. Fischer, 2015 WL 8207439 (W.D.N.Y. Dec. 7, 2015), the plaintiff alleged that his First Amendment right of access to the courts was violated by correction officers when, as the plaintiff was going to meet with an investigator from the Inspector General's office, those officers, two months after having urinated through the plaintiff's air vent, assaulted him and took the towel he had used to soak up the urine. The plaintiff had planned to give the towel to the investigator as proof of that the officers had urinated in his cell. Further, during this assault, one of the officers grabbed plaintiff by his dreadlocks, yanked his head back and in doing so, caused so much pain that the plaintiff defecated. The other officer battered the plaintiff in the head with his baton. The meeting with the IG did not take place that day nor was the urine soaked towel returned to the plaintiff.

Inmates have a First Amendment right to petition the government for redress of grievances. The right of access to the courts is one aspect of the right to petition the government. In the prison context, this right requires prison officials provide a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts. See Bounds v. Smith, 430 U.S. 817 (1977). In order to establish a claim that an inmate's right of access has been violated, the inmate must show "actual injury." See, Lewis v. Casey, 518 U.S. 343 (1996). That is, the plaintiff must show that the defendant took (or was responsible for) actions that hindered the plaintiff's efforts to pursue a legal claim.

In this case, the defendants argued that the plaintiff failed to show an actual injury because there was no evidence that the plaintiff was not able to pursue his § 1983 claim because of the allegedly lost property (the urine soaked towel) and he had not shown what legal claim was impaired or impeded. Further, the defendants argued, Lewis restricted the legal claims covered by Bounds' right to access to "civil rights actions," i.e., actions under 42 U.S. Code §1983 to vindicate "basic constitutional rights.

The court found that the statement in Lewis that Bounds "does not guarantee inmates the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip and fall claims," was intended to clarify that Bounds requires only that prison officials provide inmates with what is needed in order to attack their sentences and to challenge their conditions of confinement. The internal complaint that plaintiff Hamilton wanted to file with the IG's office about the two officers urinating into the vent of his cell, the court found, would have challenged the conditions of his confinement. Moreover, the court wrote, citing Govan v. Campbell, 289 F.Supp.2d 289, 297 (N.D.N.Y. 2003), the right of access is one aspect of the right to petition, which also includes the right to file grievances in prison. Further, the court found that by alleging that the defendants had impeded his ability to pursue his complaint with the IG had alleged an injury in fact.

The court held that the plaintiff had raised a genuine issue of material fact as to whether the defendants took or were responsible for actions that hindered Plaintiff's efforts to pursue a legal claim. For that reason, the court denied the defendants' motion for summary judgement with respect to plaintiff's First Amendment claim.

Derrick Hamilton represented himself in this Section 1983 action.

An Inmate Must Sufficiently Plead Personal Involvement of Individual Defendants in §1983 Claim

In Donohue v. Manetti, 2016 WL 740439 (E.D.N.Y. Feb. 24, 2016), the plaintiff brought a §1983 claim in the Eastern District Court of New York against a doctor, nurse, sheriff, and the sheriff's two employees, alleging violations of his Eighth and Fourteenth Amendment rights for administering inadequate medical treatment while he was incarcerated at Nassau County Correctional Center ("NCCC"). In its decision, the court only addressed whether the plaintiff had stated a cause of action against the named individuals sufficient to proceed against each of the defendants, and found that he had done so with respect to the doctor and nurse, but not as to the sheriff or the sheriff's two employees. Id.

Concerning the alleged inadequate medical treatment, the plaintiff alleged that upon entering NCCC, he was assessed by a doctor. He claimed that he had an "active prescription verifiable in a pharmacy of his psychotropic mental health medication, which he had been taking for approximately twenty years to alleviate symptoms of long term depression, acute anxiety, and panic attacks." Id., at *2. Allegedly, the doctor summarily told the plaintiff that "things are different now and we don't hand out pills anymore – deal with it." Id. As a result, the plaintiff claimed that he suffered "otherwise alleviated long term depression and unnecessary panic attacks." Id. The plaintiff filed a grievance, and claimed that the sheriff "did nothing except support [the doctor's] inaction[.]" Id. The plaintiff did not allege that the sheriff, or its two named employees, reviewed or responded to the grievance.

The plaintiff also alleged that he was denied proper medical care in connection with pain medication he received for an old neck injury. Id., at *2. He also claimed that after putting in several sick calls, he was taken to an outside hospital where he was prescribed a non-narcotic pain medication, Tramadol, and a supporting pain medication. Upon return to NCCC, however, the plaintiff claimed a nurse took over his care and discontinued the medications, and instead prescribed him a medication which he was allergic to. He further alleged that this allergy was clearly noted on his medical chart and that the nurse "willfully" ignored the notation. As a result, the plaintiff suffered severe allergic reactions, including "severe swelling of his neck suffocating him." Id. The next day, he informed the nurse of the allergic reaction, and the nurse replied, "I wish you would have died." Id. Plaintiff filed a grievance against the nurse.

In considering whether the inmate sufficiently pleaded a cause of action against the doctor, nurse, sheriff, and the sheriff's two employees, the court noted, "[b]ecause Section 1983 imposes liability only upon those who actually cause a deprivation of rights, a plaintiff must establish a given defendant's personal involvement in the claimed violation[.]" Id., at *4, quoting Patterson v. Cnty. Of Oneida, 375 F.3d 206, 229 (2d Cir. 2004). With regards to the doctor and nurse, the court found that the plaintiff had alleged facts sufficient to state a claim of personal involvement in the purported constitutional violations. Donohue v. Manetti, at *5. The claims that the doctor momentarily conducted the plaintiff's intake and refused to provide him medication that he had been receiving for twenty years sufficiently alleged the doctor's personal involvement. With respect to the nurse, the court determined that the plaintiff's claims that she deliberately switched his medication to one that he was allergic to, ignoring notations in his medical record of his allergy, followed by telling him, "I wish you would have died," likewise sufficiently alleged the nurse's personal involvement. Id.

In contrast, the court determined that the plaintiff failed to state a claim that the sheriff, or the sheriff's two employees, was personally involved in the purported constitutional violations. Donohue v. Manetti, at *6. In so deciding, the court noted that there was no indication that the sheriff "routinely reviews grievances [or that he] reviewed, investigated, or responded to [the] grievances in this instant." Id. Thus, the court determined that the plaintiff was attempting to impose liability on the sheriff and his two employees "based solely upon the supervisory position he holds." Id. There were no allegations made with respect to what the sheriff's two employees did; they are merely listed as the sheriff's employees, "the grievance clerks."

Id. "Supervisor liability in a §1983 action depends on a showing of some personal responsibility[.]" Id., quoting Hernandez v. Keane, 341 F.3d 137, 144 (2d Cir. 2003). Applying this rule, the court found that no allegations were made of personal responsibility of the sheriff or the sheriff's two employees.

In sum, the court found that the complaint sufficiently pleaded the personal involvement of both the doctor and nurse, both of whom allegedly met with and either denied the plaintiff medication, or willfully changed his medication to one that he was allergic to, to proceed with his §1983 claim against them. On the other hand, the court determined that the complaint failed to allege any personal involvement of the sheriff or the sheriff's two employees sufficient to maintain a claim as to them. The court did, however, grant the plaintiff thirty days to submit an amended complaint in order to give him a chance to flesh out his allegations against the sheriff and the sheriff's two employees. Donohue v. Manetti, at *11.

Thomas Donohue represented himself in this §1983 action.

PRO SE PRACTICE

Paternity Actions: Establishing That You Are the Biological Father of a Child

This article provides basic instructions on how to *commence* a paternity action in a New York State court. Paternity actions are used to determine whether the person bringing the petition is the biological father of a child. The article is written for men who wish to petition the court to determine by way of a genetic marker or DNA test whether they are the father of a child. It does not address all the ways a paternity proceeding can become complicated once underway, nor does it address all the ways to deal with complications should they arise. It cannot, nor does it try to, address the legal impact a determination of paternity might have on you. If you bring a paternity action, you should request to have assigned counsel, both in your cover letter to the Clerk of the court (when filing the initial papers), and, more importantly, on the record at the initial appearance before the court so that you can have a court-appointed attorney assist you and advise you of your rights and obligations specific to your circumstances.

It is important to note at the outset that there is an important distinction between a "biological" and "legal" father under New York State law. It is possible to be the biological, but not legal, father of a child. Conversely, it is possible to be the legal, but not biological, father of a child. This guide does not attempt to address the ways in which such situations can come about. Ultimately, however, when it comes to your legal rights and obligations with respect to a child, as well as that child's mother, whether you are the child's *legal* father is what matters. That being said, a finding that a person is the biological father of a child often leads to a determination that that person is also the legal father of that child.

A final note: if a court determines that you are a child's legal father, the court is required to issue an order of child support ordering you to financially contribute towards the support of that child. The extent of your obligations under such an order is largely dependent on the underlying facts and circumstances of your situation, about which you should speak with your attorney.

Will I Be Allowed to Bring, and Proceed With, a Paternity Action?

In order to bring a paternity action to establish whether you are the biological father of a child, you must have a good faith reason to believe that you are the biological father of that child. In order to support such a good faith belief, you must be able to truthfully state that you could be the father, including that you had sexual intercourse with the child's mother during the time period she conceived the child.

Even if you have a good faith belief that you might be the child's biological father, a court could refuse to order a paternity test if it determines that

doing so would not be in the best interests of the child. There are a number of reasons why a court could make such a determination. For example, a court may determine that it is not in the best interests of a child to proceed where someone else has already been found to be the child's legal father, or, similarly, where a court has determined you are not, or no longer are, the child's legal father. These examples fall under a legal doctrine known as *res judicata* (which is Latin meaning essentially "a matter already judged").

A court may also determine that it is not in the best interests of the child to proceed under another legal doctrine known as equitable estoppel. Equitable estoppel operates as a bar to a person from asserting a legal claim or defense that is contrary or inconsistent with his or her prior action or conduct. Thus, if you have held yourself out as the child's father—for instance by paying child support and/or forming an emotional bond with the child—you may be estopped, or barred, from trying to prove that you are not the child's father as this would be inconsistent with your prior conduct. A court could further determine that it would not be in the child's best interests to proceed under such circumstances because a finding that you are not the biological father could result in the child losing your financial and emotional support.

Equitable estoppel can also be used to bar you from trying to challenge the paternity of the child of another person. For instance, in Dustin G. v. Melissa I., an appellate court ruled that a paternity petition should be dismissed, upon determining that testing was not in child's best interests and that, therefore, the petitioner was equitably estopped from challenging another individual's paternity of the child. 69 A.D.3d 1019, 1020 [3d Dept 2010]. The court found that despite the petitioner's knowledge that he might be the child's father, he took no action to assert his paternity or foster a relationship with the child until he commenced the paternity proceeding approximately seven years later, and that the individual who was named as the child's father on her birth certificate, and who signed acknowledgement of paternity, despite knowing that he was not child's father, lived with the child and developed a close father-daughter relationship with the child over her entire life. Id.

Lastly, a court could find that it is not in the best interests of a child to proceed where a presumption of legitimacy exists. Section 421 of the Family Court Act states, "A child born of parents who at any time prior or subsequent to the birth of said child shall have entered into a ceremonial marriage shall be deemed the legitimate child of both parents . . . regardless of the validity of such marriage." Thus, once the mother of a child marries another person—especially where that person holds himself out as the child's father—a legal presumption is created that the mother's husband is that child's legal father. The presumption is typically strongest where the child's mother is married at the time of conception and/or birth. Importantly, this presumption is rebuttable, meaning you should have an opportunity to prove that it would nevertheless be in the child's best interest to determine whether you are in fact the child's father. In such a case, you carry the burden of proving this to the court's satisfaction.

When May I Commence a Paternity Proceeding?

Generally, you may commence paternity proceedings anytime before the child turns twenty-one (21) years old. Of course, the longer you wait, the greater the chance that a court will find that it is not in the best interests of the child to have a paternity test performed.

If you have signed an acknowledgment of paternity, generally such an action conclusively determines that you are the legal father of the child, regardless of whether you are the biological father. There are limited ways to seek to rescind an acknowledgment of paternity, though how to go about doing so is beyond the scope of this guide. If you believe this is the situation you are in, Family Court Act §516-a is a beginning reference point. (This section of the Family Court Act is attached to the PLS memo, "How to Bring a Paternity Proceeding to Determine Whether You Are the Biological Father of a Child," which you may request by writing to the PLS office which handles requests for assistance from the prison where you are).

If another individual has acknowledged paternity of the child, this should not preclude you from pursuing your paternity claim. In such an event, courts have generally required that individual to be joined in the proceeding as a necessary party.

Where May I Bring a Paternity Proceeding?

You may file a paternity petition with the family court in the county where you, the mother, or the child resides or is found, regardless of where the child was born.

The court does have the discretion to transfer the case to a family court in another county for good cause. For instance, it is not uncommon for a family court to transfer a case to the county where the mother or child resides, especially if the family court in that county has handled other cases dealing with issues concerning the custody or care of the child.

If the mother resides outside of New York State, the court may nevertheless exercise personal jurisdiction over the mother if:

(1) the mother is personally served with a summons and petition within this state;

(2) the mother submits to the jurisdiction of this state by consent;

(3) the mother resided with the child in this state;

(4) the mother resided in this state and provided prenatal expenses or support for the child;

(5) the child resides in this state as a result of the acts or directives of the mother; or

(6) the mother engaged in sexual intercourse in this state and the child may have been conceived by that act of intercourse.

If the mother and/or child reside in another state, the family court may keep the case or forward the proceedings to a court where the mother and/or child reside. In such an event, the courts generally work together so that you and the mother are not required to travel long distances to participate in the proceedings.

How do I Commence a Paternity Proceeding?

A paternity proceeding is commenced by filing a verified paternity petition with the clerk of the appropriate family court. There is no filing fee. Upon filing of the paternity petition, the clerk of the family court will issue a summons requiring the respondent (mother) to show up in court at a specified date and time to respond to the paternity petition. The court usually takes care of having the mother served with the summons and paternity petition. In some instances, especially where service on the mother is not easily obtained, you may be required to have her served. Your court-appointed attorney should be able to assist you with this.

Note: You must file a separate paternity petition with respect to each child you are asking the court to determine the paternity of, even if they all have the same mother. Thus, if you are asking the court to determine whether you are the father of three different children, you must file three separate petitions.

Isaac Lindbloom, an attorney in the Ithaca Office of PLS, wrote this article. If you want detailed instructions on filing a paternity petition, write to the regional PLS office that responds to requests for assistance from inmates at the prison where you are currently living and ask for a copy of the memo, "How to Bring a Paternity Proceeding to Determine Whether You are the Biological Father of a Child."

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, Greenhaven, Hale Creek, Hudson, Lincoln, Marcy, Midstate, 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, Chateaugay, Clinton, Franklin, Gouverneur, Moriah Shock, Ogdensburg, Riverview, Upstate.

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