Pro Se

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STATE COURT HOLDS PRISONER ENTITLED TO DAMAGES FOR TIME SPENT IN PRISON AS A RESULT OF DOCCS-IMPOSED POST-RELEASE SUPERVISION

In 2000, Francis Moulton was sentenced to a determinate term of 3½ years. Although the sentencing court did not impose a term of post-release supervision (PRS), the Department imposed a five year term of PRS when Mr. Moulton went into DOCCS custody. In April of 2008, having been released to post-release supervision, Mr. Moulton was arrested on new charges and for violating (PRS) and detained for a parole revocation hearing.

While Mr. Moulton was in jail awaiting disposition of the parole charges, the Court of Appeals decided Matter of Garner v. NYS Dept. of Correctional Services, 859 N.Y.S.2d 590 (2008) and People v. Sparber, 859 N.Y.S.2d 582 (2008). In these two cases, the Court held that because only a court has the **authority** (power) to impose a sentence, DOCCS could not add post-release supervision to any sentence. In Sparber, the court made clear that the sole remedy for a sentencing court's failure to impose PRS was to vacate the sentence and **remit** (send back) the case for re-sentencing.

Several months after Garner and Sparber had been decided, Mr. Moulton was subject to a parole revocation hearing. During this hearing, his attorney argued that the post-release supervision imposed by DOCCS was a **nullity** (without legal effect). Nonetheless, the ALJ found that Mr. Moulton had violated the terms of parole and sentenced him to spend the remainder of his sentence – 11 months – in prison. Mr. Moulton remained in prison until October 2008, when after filing a petition for a writ of habeas corpus, he was released.

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Also Inside . . .

ENROLLING IN MEDICAID COULD HELP INCREASE YOUR CHANCES OF SUCCESSFUL REENTRY

A Message from the Executive Director - Karen L. Murtagh

States have a constitutional obligation to provide adequate health care to those they incarcerate. Due to the recently passed Affordable Care Act and studies showing that continuity of care reduces recidivism, states now have reasons beyond their constitutional obligation for wanting to ensure adequate health care for prisoners.

Historically, states have covered all of the health care costs associated with a prisoner's medical care because when a person went to prison, he/she lost Medicaid eligibility. However, in the late 1990's, the U.S. Department of Health and Human Services issued a statement indicating that prisoners who were taken to an outside hospital for outside medical care for at least 24 hours could qualify for Medicaid reimbursement if they were otherwise Medicaid eligible. This could have been a huge deal for states but for the fact that few prisoners were Medicaid eligible because, at the time, most states extended Medicaid benefits only to children under five, pregnant women, people with disabilities and the elderly.

More recently, with the enactment of the Affordable Care Act, states have expanded Medicaid eligibility to all poor adults, making most prison and jail inmates immediately Medicaid eligible. Although this expansion will no doubt save the states millions of dollars every year, there is another hidden benefit – a proven reduction in recidivism with a related increase in the likelihood of successful reentry into society. In a November 26, 2013 article published in *Governing the States and Localities*, reporter Chris Kardish noted that "[s]tudies have shown that, particularly with ex-inmates with severe mental health or substance abuse issues, immediate access to health care upon release helps reduce recidivism. A 2007 study of two counties in Florida and Washington over a two-year period linked access to Medicaid with a 16-percent reduction in the average number of subsequent lock-ups."

With this knowledge, DOCCS has launched a new initiative to enroll eligible inmates for Medicaid coverage. The enrollment initiative began in September of 2013, when seventeen designated facilities hired Medicaid Enrollment Clerks who are responsible for processing Medicaid applications where inmates meet the criteria for enrollment. Currently applications for eligible prisoners are being sent to and processed by the Clinton County Department of Social Services. These applications are based upon a priority list from Central Office. Applications for prisoners from the NYC area are not being processed at this time, but Medicaid Enrollment Clerks will be assisting with applications for *all* eligible prisoners who are approved for release once these lists have been exhausted.

For the months of September to November 2013, 1,384 applications were submitted to Clinton County DSS for processing and 1,312 of those were approved. As of December of 2013, the clerks have also begun to process applications of prisoners at nearby facilities within the same Hub.

Once a prisoner has been approved for Medicaid, only the in-patient costs of his or her treatment will be covered. This means that coverage only kicks in when a prisoner is sent to an outside hospital.

If you are notified by DOCCS's staff that you are eligible for Medicaid, PLS strongly encourages you to apply. The importance of enrolling cannot be overstated. If you enroll in Medicaid while you are in prison, your coverage will continue for five months after you are released. This should allow you enough time to renew your coverage. If you remain eligible for Medicaid, your coverage will be switched to your county of residence and you will not need to submit another application.

Medicaid will improve your access to health care upon release and provide you with continuity of care such as medications or access to drug and/or alcohol treatment programs. It is this connection between release and immediate enrollment in community treatment that will help increase your chances of successful reintegration into your community.

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The court turned to standard false-imprisonment analysis to determine whether Mr. Moulton had stated a claim upon which relief could be granted. To establish a claim of false imprisonment the plaintiff must show that:

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

Only the last element – whether the confinement was privileged – was disputed in this case. The **burden is on the defendant** (the defendant must prove) to show that the confinement was privileged.

In Moulton, the defendant argued that because the claimant had not challenged the validity of the arrest warrant or the jurisdiction of the issuing court, he had failed to preserve any issue about the State's privilege to detain him. The Third Department disagreed, finding that Mr. Moulton's claim was premised on his continued detention and return to DOCCS, not on an unlawful arrest. Further, the court found, Mr. Moulton had sufficiently alleged that his confinement was not privileged and it was the defendant's burden to show that its confinement of the claimant post-Garner was privileged.

In considering whether the defendant had shown that the post-Garner confinement was privileged, the court stated:

"When claimant's post-Garner parole revocation hearing was held nearly two weeks after DOCCS-imposed PRS was categorically declared invalid in this state, defendant did not have the privilege to ignore that mandate or to find him in violation of any invalid term of PRS or to resentence him to the remainder of his term."

Thus, the court held, the State was not entitled to privilege-based immunity for incarcerating Mr. Moulton on a parole violation premised upon DOCCS-imposed PRS that was then known to be a nullity under controlling law.

In reaching this result, the court distinguished the facts of Moulton from the facts in Donald v. State, 929 N.Y.S.2d 552 (2011), a case in which the claimant also sought damages for wrongful confinement based on DOCCS-imposed PRS. In Donald, the court noted, the Court of Appeals had ruled that DOCCS's discretionary actions in imposing PRS and confining the claimant for violating it, while determined to have been a mistake by Garner, were privileged and rendered the State immune from liability. The critical distinction, the court found, was that the claimant in Donald was incarcerated on a violation of DOCCS-imposed PRS *before* the Garner decision. In Moulton, the claimant was detained, had a parole revocation hearing and was re-incarcerated *after* the Garner decision, and all of this occurred at a time when the defendant knew or should have known that the term of PRS was a nullity and the claimant could not validly be punished for violating the terms of PRS until it was imposed by a court.

The court concluded that during the period between Mr. Moulton's arrest on April 18, 2008 and the issuance of the Garner decision on April 29, 2008, the defendant was entitled to rely on then-existing interpretations of the law regarding DOCCS-imposed PRS and had therefore established privilege for Mr. Moulton's arrest and detention. However, the defendant had not established that Mr. Moulton's post-Garner confinement was privileged. For the latter period, the court held, Mr. Moulton had stated a cause of action for false imprisonment and was entitled to summary judgment.

Francis Moulton represented himself in this Court of Claims action.

News and Notes

In Memorium: Jack Young

It is with great sadness that we inform you of Jack Young's death. Jack was a staff attorney in the Plattsburgh Office of PLS from December 2012 until December 2013. This was Jack's first job as a lawyer where he engaged in direct advocacy. He brought great focus, intelligence and heart to seeking justice for prisoners. During the short time that Jack was a prisoners' rights lawyer, he successfully advocated for prisoners administratively and in court. Equally important, Jack changed the lives of his clients and the lives of their families and loved ones by bringing a bit of humanity, compassion and respect to them. He offered rays of hope where there may have been none. Jack did great and worthy things at PLS, and most importantly, Jack made a difference.

LETTERS TO THE EDITOR

Letters to the editor should be addressed to:

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

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

Letters/documents sent for consideration for placement in Letters to the Editor will not be returned.

NYCHA Allows Former Inmates to Reside in Public Housing

For many years, the New York City Housing Authority (NYCHA) has refused to allow former prisoners to live in public housing. Recently however, NYCHA began a pilot program involving the placement of 140 former prisoners in public housing. In addition to housing, help finding jobs will be offered to the former prisoners. Individuals who were released in the previous 18 months and those being released going forward are eligible for the program. Former prisoners must be related to the current tenant, accept assistance from social service workers with finding employment and, where appropriate, participate in drug treatment. It is hoped that this program will result in the reduction in the number of prisoners who go to homeless shelters upon release from prison.

Pro Se Not Delivered to Sing Sing Inmates

The August and October 2013 issues of *Pro Se* that were sent to inmates at Sing Sing Correctional Facility were refused by the prison. The newsletters were returned to the organization that packages and mails *Pro Se* for us. We were not notified that the packages had been returned until shortly before we sent out the December 2013 issue. We contacted the Superintendent's office at Sing Sing and the organization that handles our packaging/mailing. The problems were resolved and the August and October issues were re-mailed to Sing Sing. We do not anticipate this problem happening again. We apologize for the delay in receiving those issues of *Pro Se*.

This problem affected inmates at the Sing Sing Correctional Facility only.

Pro Bono Event

Though 2014 has just started, we are working steadily to develop another great program for National Pro Bono Week. Submissions should be no more than 5 pages and address issues related to being a juvenile or immigrant in prison, experiences with solitary housing/SHU, or how being incarcerated has affected your family. Please send submissions to the Pro Bono Coordinator, Prisoners' Legal Services of New York, 41 State Street, Suite M112, Albany, NY 12207, by June 30, 2014.

Important Notice Regarding Your *Pro Se* Subscription

***Pro Se* is not considered legal mail. As such, DOCCS will not forward your *Pro Se* newsletters to you if you are transferred. It is important that you let the staff at *Pro Se* know your location each time you are transferred.**

Due to the cost of postage, we cannot re-mail issues of *Pro Se* to inmates. You may miss issues if you do not inform us of your current location.

You can contact *Pro Se* at: *Pro Se*, 114 Prospect Street, Ithaca, New York 14850.

Pro Se Victories!

Matter of Diego Arroyo v. NYS Board of Parole, Franklin County Supreme Court, Index No. 2013-343. Diego Arroyo successfully challenged a denial of parole.

After exhausting his administrative remedies, Diego Arroyo filed an Article 78 action alleging that in denying parole, the Board of Parole relied almost exclusively on his instant offense and criminal history and did not make the future-focused risk assessment that the 2011 amendments to Executive Law § 259-c(4) require. The court, relying on Matter of Linares v. Evans, 975 N.Y.S.2d 930 (3d Dep't 2013), wrote that the Third Department has repeatedly overturned parole denial determinations based on the Board's failure to use the COMPAS risk and needs assessment tool in connection with hearings held after October 1, 2011. Here, the court found no indication that a COMPAS risk and needs assessment tool had been used in connection with Mr. Arroyo's Parole Board appearance and therefore overturned the denial and ordered a new hearing.

Matter of Alberto Polanco v. Andrea Evans, Cayuga County Supreme Court, Index No. 2013-0692. In this Article 78 proceeding, Alberto Polanco successfully challenged a denial of parole release for deportation only based on the Board's failure to use the COMPAS risk needs assessment tool when its members determined that Mr. Polanco should not be released.

Like the court in Matter of Diego Arroyo v. NYS Board of Parole, above, in deciding Mr. Polanco's case, the court looked to the Appellate Division, Third Department for guidance. Here, citing the decision in Matter of Garfield v. Evans, 968 N.Y.S.2d 262 (3d Dep't 2013), the court found that the failure of the Parole Board to use a COMPAS risk and needs assessment tool entitles an inmate to a new hearing. As there was no indication that a COMPAS risk assessment tool had been used, the court found that Mr. Polanco was entitled to a new hearing.

Matter of Alberto Rodriguez v. Albert Prack, Chemung County Supreme Court, Index No. 2013-1378. Alberto Rodriguez successfully challenged a Tier III hearing based on the hearing officer's denial of his right to be present.

Mr. Rodriguez **advised** (told) the escort officer that he could not attend his hearing because he was hearing voices. The escort officer told the hearing officer that Mr. Rodriguez appeared to know who and where he was and did not appear to be hearing voices that the officer could not hear. A confidential source testified that Mr. Rodriguez was healthy enough to attend the hearing and was using his illness as an excuse. The issue before the hearing officer was whether Mr. Rodriguez had voluntarily **waived** (given up) his right to be present at the hearing and whether the hearing officer **was obligated to** (had to) personally question Mr. Rodriguez about his mental state.

Relying on 7 N.Y.C.R.R. §254.6, the regulations that **govern** (control) what a hearing officer must do when mental health is at issue, the court found that where there is a mental or cognitive disability, the issue of whether the hearing officer must personally question the accused depends on the facts of the case. Here, the *escort officer* testified that he had warned Mr. Rodriguez that the hearing would be held in his absence if he failed to attend. Mr. Rodriguez said that the officer had not warned him of this. The credibility determination – the decision as to whom to believe – the court found, was complicated by Mr. Rodriguez's serious mental illness and the testimony that Mr. Rodriguez tries to use his illness as an excuse. And, while Mr. Rodriguez signed the form saying that he had been told that the hearing would take place without him and that he understood what this meant, there is no testimony **corroborating** (confirming) the escort officer's observations of Mr. Rodriguez's mental state.

The court found the following factors to be important to its decision:

1) That it is the hearing officer's, not the escort officer's, responsibility to determine whether the accused's mental state prevents him from appearing at the hearing;

2) That the escort officer did not testify that he had any training or qualifications in the observation of mental illness;

3) That no witness had **corroborated** (confirmed) the escort officer's observations of the accused's mental state;

4) That at this hearing, it was important for the accused to testify about the context in which he made the statements that led to the misbehavior report (threatening an OMH clinician during a therapy session); and

5) That the accused claimed that no one had told him the consequences of refusing to attend.

Based on these findings, the court concluded that Mr. Rodriguez's right to be present may have been violated and therefore ordered a new hearing.

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 a copy of the decision as Pro Se does not have the staff to return submissions****.*

STATE COURT DECISIONS

Sentencing

Where Court Corrects an Illegal Sentence, the Defendant Cannot Re-Negotiate the Legal Portions of the Sentence

In People v. Rahman, 2013 WL 6724720 (Sup. Ct. Bronx Co. Dec. 19, 2013), Justice Massaro held that where a defendant appears for resentencing due to the imposition of an illegal sentence, the defendant may not re-negotiate the legal terms of his sentence. In response to a letter from DOCCS informing the court that with respect to several charges, the law dictated that determinate sentences be imposed. The court however, had imposed indeterminate sentences with respect to these counts. When Mr. Rahman appeared for resentencing, he asked the court to modify the entirety of his sentence, not just the sentences deemed illegal by DOCCS. The People opposed his application.

After trial, the defendant had been sentenced to a term of 15 years, to run consecutive to a sentence imposed in another county. The defendant argued that when the court re-sentenced him on two of the counts, it could, in its discretion, modify the entire sentence "in the interest of justice and for good cause shown." This interpretation of the law was based on defendant's argument that because a portion of the sentences imposed were unlawful, he had not yet commenced service of his sentence. Criminal Procedure Law §430.10 provides that "when the court has imposed a sentence of imprisonment and such sentence is in accordance with law, such sentence may not be changed, suspended or interrupted once the term or period of the sentence has commenced. Alternatively, the defendant, relying on People v. Minaya, 445 N.Y.S.2d 690 (1981), argued that even if his sentence had commenced, a court has the inherent power to correct its mistakes.

In support of his argument for a "good cause" modification of his entire sentence, the defendant argued that the sentence was excessive. Before trial, the offer had been a 10 year term concurrent with the sentence in another county and the court had been supportive of a sentence of under 10 years. Further, the defendant had taken positive steps while in prison, earning an Associate's Degree in Paralegal Studies and a Bachelor's Degree in Human Psychology.

The court, relying on CPL §430.10 and People v. Minaya, rejected the defendant's arguments pertaining to these sources. The court read these sources as providing that once a defendant has begun serving a sentence, the sentencing court loses the authority to re-sentence the defendant as to the lawful portions of the sentence, while retaining the authority to resentence him as to the unlawful portions of the sentence. In addition, the court noted, citing People v. Davis, 784 N.Y.S.2d 536 (1st Dep't 2004), that the First Department had held that if a defect in sentencing does not affect all of the sentences, there is no basis for resentencing on a valid count.

As there was no suggestion that other than the two counts, the remainder of the defendant's sentence was not in accordance with law, the court held that it lacked the authority to change any portion of the defendant's sentence other than the two counts.

Court of Claims

Prisoner Recovers for Excessive Imprisonment; Court Holds DOCCS Conduct Not Privileged

While on parole, Alvin Torres was arrested for committing a new offense and for a parole violation. On the new charges, Mr. Torres received a sentence of "one year [jail] concurrent to parole time." After serving 8 months of the new sentence, Mr. Torres returned to DOCCS custody with only 9

days of parole jail time credit. This credit covered the period between when he was released from the misdemeanor sentence through when he was returned to DOCCS. With the reduced jail time credit, his maximum expiration date was 8/14/2010. Within a month of returning to DOCCS, Mr. Torres wrote to DOCCS arguing that he should be given parole jail time credit for the period he was in the local jail because the sentence imposed by the NYC Criminal Court ran concurrent to his parole time. He informed DOCCS of the docket number of the local case and advised DOCCS that his correct maximum expiration date was 10/11/09. DOCCS rejected Mr. Torres's argument and did not change his maximum expiration date.

In March 2010, Mr. Torres's lawyer advised DOCCS that he should have been credited with the period 4/8/08 through 12/11/08 as parole jail time. DOCCS then credited the time and released Mr. Torres from custody on 3/26/10.

Mr. Torres sued the State of New York, asserting that he was entitled to damages for the time that he spent either incarcerated or under parole supervision between 10/8/09 and 3/26/10.

In Torres v. State, 2013 WL 6038494 (Ct. Clms. Sept. 23, 2013), the Court of Claims granted Mr. Torres' motion for summary judgment. To prove a claim of false imprisonment, the court wrote, the claimant must show that the defendant intended to confine him; that the claimant was conscious of the confinement; that the claimant did not consent to the confinement and that the confinement was not otherwise privileged. Here, the only issue in dispute was whether the confinement, while wrongful, was privileged.

The State argued that the confinement was privileged because the law requires that the court deliver a copy of the sentence and commitment order to the correctional facility to which the defendant is committed – in this case, Rikers Island, not DOCCS – and because it was not DOCCS' policy to request sentence and commitment orders to verify whether time served in a local jail was to run concurrently to a state sentence when a parole violator is returned to state custody. DOCCS' policy was to treat all local sentences as running consecutively to parole time owed unless the defendant furnished DOCCS with a certified copy of the local sentence and commitment order showing that the court imposed the local sentence to run concurrent to the previously imposed state sentence. DOCCS also relied on Penal Law §70.40(3)(c)(iii) as support for its position. Penal Law §70.40(3)(c)(iii) provides that a person who has been declared delinquent from parole and who has been incarcerated pursuant to a new arrest and conviction will receive parole jail time credit with respect to the prior sentence *only* for such period of time spent in custody that exceeds the term of the new sentence.

The court rejected the defendant's argument. The court held that when the county sheriff (or the Commissioner of NYC DOC) delivers a defendant to state custody pursuant to a sentence and commitment order, he has a duty to provide a certified transcript of such record to the person to whom the defendant is delivered. Thus, the court held, the NYC Commissioner of Correction was obliged to deliver, and DOCCS should have been in possession of, documentation from which DOCCS could have applied the proper parole jail time credit. The court found that the state's policy of not requesting an inmate's local jail time sentence and commitment orders and simply treating all local sentences as running consecutively to previously imposed state sentences, and its failure to produce a document based upon which it had concluded that Mr. Torres' local sentence ran consecutively to his previously imposed state sentence, undercut DOCCS' argument that claimant was being held under a valid process issued by a court having jurisdiction. Accordingly, the court held that the State failed in its burden to submit evidence sufficient to demonstrate the existence of a triable fact as to whether its actions were privileged when it incorrectly confined Mr. Torres beyond his maximum expiration date.

Negligence or Other Tort Claims Cannot be Filed as §1983 Claims in State or Federal Court

In December 2011, Michael Perkins filed a §1983 lawsuit in the State Supreme Court, Chemung County, claiming that several corrections officials had negligently or

intentionally deprived him of personal property. The defendants moved to dismiss the case for failure to state a claim for relief under §1983. The Supreme Court ruled in favor of the defendants, dismissing the action without prejudice, in the event that the plaintiff wanted to bring the action in the state Court of Claims. The plaintiff appealed the decision.

In Perkins v. McGrain, 975 N.Y.S.2d 924 (3d Dep't 2013), the court affirmed the dismissal. In doing so, the court stated that contrary to the plaintiff's argument, the lower court had not dismissed the case based on Correction Law §24, which unlawfully prohibited suing DOCCS employees in state court. While acknowledging that in Haywood v. Drown, 556 U.S. 729 (2009), C.L. §24 had been declared unconstitutional as to §1983 actions, the court noted that the actions challenged in the plaintiff's case – wrongful loss or destruction of property − were not constitutional violations and therefore could not be challenged in a §1983 action. Rather, the court held, the plaintiff had "adequate state post-deprivation remedies," such as a Court of Claims action. Based on this analysis, the court found "no basis to disturb the Supreme Court's dismissal of the complaint."

Michael Perkins represented himself in this §1983 action.

Miscellaneous

Third Department Interprets Son of Sam Law

In Matter of Hutchinson v. Fischer, 2013 WL 67800178 (3d Dep't Nov. 15, 2013), the court considered the question of whether, where an inmate who has been convicted of a violent felony offense, receives a settlement of under $10,000, the law permits DOCCS to notify the NYS Office of Victims' Services (OVS) of the award. In this case, the petitioner settled a §1983 lawsuit for $7,500.00. DOCCS then notified OVS of the award. In response, OVS commenced an action for damages on behalf of one of the inmate's victims. The court before which the action was pending issued a temporary restraining order that enjoined the petitioner from **accessing** (getting) the award. The petitioner filed a grievance stating that DOCCS should not have reported the settlement to OVS. The Central Office Review Committee (CORC) denied the grievance, following which petitioner filed an Article 78 challenge to the CORC decision.

Judicial review of the denial of an inmate grievance is limited to whether the determination is arbitrary and capricious, irrational, or affected by error of law. The court rejected the petitioner's argument that Executive Law §632-a prohibits DOCCS from reporting an inmate's receipt of an award when the award is under $10,000.00. Executive Law §632-a requires that whenever a violent felony offender who is in DOCCS custody receives an award of $10,000.00 or more, DOCCS must report the award to the OVS.

The court found that while the statute requires notification when the value of a payment to a prisoner exceeds $10,000.00, "nothing in the law, however, prohibits the reporting of a lesser amount." Additionally, the court pointed out, DOCCS Directive 4036(I) provides that "in accord with the provisions of the federal Prisoners' Litigation Reform Act of 1995, the Department shall make reasonable efforts to notify crime victims that monetary damages are about to be paid to an offender pursuant to a civil action against a federal, state or local correctional facility." The Directive further provides that the way for DOCCS to do this is to notify the OVS of the award.

Alton Hutchinson represented himself in this Article 78 proceeding.

Prisoner Succeeds in Obtaining Some Records from State Police; Others Denied

In Matter of Karimzada v. O'Mara, 975 N.Y.S.2d 248 (3d Dep't 2013), the petitioner challenged the response that the State Police made to his request for records relating to the taking and DNA testing of a blood sample while he was in

prison. The State Police denied the request, stating that the records were **exempt** (not included in the records that the police are required to disclose) from disclosure under Executive Law §995-c. The Supreme Court agreed that the records were exempt under the Executive Law.

Petitioner requested lab reports, raw data, logbook entries, chain of custody forms, and other records relating to the taking and transporting of the blood sample and the results. The Third Department first noted that the law favors the disclosure of all government records. An agency seeking to bar disclosure must justify its argument. In addition, under the Freedom of Information Law (FOIL), the need for the records or the reason they were requested does not matter, nor does the fact that the person requesting the records is a prisoner. One basis upon which an agency may deny access to records is if the records are **exempt** (the law permits the agency to withhold them) under a statute other than the FOIL.

Executive Law §995-c states that DNA records in the State DNA Identification Index shall only be released for specific purposes. Executive Law §995-c defines a DNA record as:

"DNA identification information prepared by a forensic DNA laboratory and stored in the state DNA Identification Index for the purposes of establishing identification in connection with law enforcement investigations or supporting statistical interpretation of the results of DNA analysis. A DNA record is the objective form of the results of a DNA analysis sample."

The court noted that petitioner had received the actual DNA results from another source. The remaining requested documents, the court found, did not fall within the definition of DNA documents governed by the Executive Law. Thus, the court held, Executive Law §995-c, which limits disclosure of a particular type of DNA record, does not apply to documents that petitioner is seeking.

The court held that the respondent State Police had failed to prove that the only ground cited for denying the documents would exempt these documents from disclosure. For this reason, the court ruled that petitioner was entitled to receive the documents that he requested.

Mohammed Karimzada represented himself in this Article 78 proceeding.

In Considering Whether a State Agency's Position is Justified, Court is Limited to the Grounds that the Agency Raised

In Matter of Karimzada v. O'Mara, 975 NYS2d 248 (3d Dep't 2013), discussed in the preceding article, the court discussed a second point which is of significance to all Article 78 actions. That point is that where an agency relies on an argument to support its position, the court must assess whether that argument is a sufficient basis for the position that the agency is taking. If it is not, and the petitioner is otherwise entitled to the relief that he seeks, the court must grant the petition.

In Karimzada, the respondent argued that Executive Law §995-c justified its refusal to disclose certain documents. The court ruled that in fact Executive Law §995-c did not exempt from disclosure the documents that the petitioner had requested. Because the respondent had relied on a statute that did not exempt the requested documents from disclosure, the court granted the petition. While there may have been other statutes, for example Article 6 of Public Officer's Law, known as the Freedom of Information Law, which exempts from disclosure the records which the petitioner requested, the court was limited to considering the grounds **invoked** (raised) by the agency. Citing Matter of Trump-Equitable Fifth Ave. Co. v. Gliedman, 457 N.Y.S.2d 466 (1982), the court held that "courts may not substitute what they deem to be a legitimate or more appropriate basis."

Mohammed Karimzada represented himself in this Article 78 proceeding.

Agency Must Provide Court with Records it Argues Are Exempt from Disclosure

At the request of a staff member, Paul Kairis was transferred from one prison to another. Mr. Kairis then made a Freedom of Information Law request for the records pertaining to the staff separation that led to his transfer. DOCCS, citing Public Officers Law §87(2)(a), (b) and (f), denied the request, stating that the documents were exempt from disclosure. These FOIL subsections provide that the following records are exempt from disclosure:

> (a) [Records that] are specifically exempted from disclosure by state or federal statute;
>
> (b) if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article;
>
> (f) [Records that] if disclosed could endanger the life or safety of any person.

While the Supreme Court dismissed the proceeding, on appeal Respondent Fischer conceded that the matter had to be sent back to the lower court. The reason that the court, in Matter of Kairis v. Fischer, 973 N.Y.S.2d 887 (3d Dep't 2013), directed this result is that "while the documents related to the 'staff separation' may well be exempt from disclosure, remittal is necessary so that the respondent may identify the specific documents and submit them to the Supreme Court for [. . .] review." That is, without actually reviewing the documents, the lower court was not in a position to rule on whether the documents were exempt under the cited FOIL subsections.

Paul Kairis represented himself in this Article 78 proceeding.

Federal Court Decisions

Second Circuit Holds that Dismissal of Article 78 Does Not Collaterally Estop Section 1983 Action

In Kotler v. Donelli, 528 Fed.Appx. 10 (2d Cir. 2013), the Second Circuit was asked to decide whether the dismissal of an Article 78 petition challenging a Tier III hearing decision was a bar to a Section 1983 action seeking damages for time spent in SHU as a result of the same hearing. When presented with this argument, the District Court ruled that the Article 78 decision dismissing the petition was a bar to a subsequent Section 1983 action for damages.

According to the complaint, this case began when officers at Bare Hill C.F. decided that Kerry Kotler, an elected representative on the Inmate Grievance Committee, was "overly adversarial." A weapon was allegedly discovered during a search of Mr. Kotler's living area. Following a Tier III hearing for weapon possession, at which Mr. Kotler raised the defense that the weapon had been planted, the hearing officer found him guilty and imposed a penalty that included banning Mr. Kotler from serving on the grievance committee for three years. When Mr. Kotler challenged the hearing in an Article 78, the Third Department concluded, based primarily on the reasonable inference that a weapon found in an area within Mr. Kotler's control belonged to him, that there was substantial evidence supporting the determination.

In considering what impact the Third Department's conclusions should have on the District Court's review of the Tier III hearing, the District Court noted that New York generally grants **preclusive effect** (does not allow a party to litigate issues which have already been decided by a court) to both factual questions and legal issues reviewed in Article 78 proceedings. "But," the Second Circuit wrote in Kotler, "we have noted that there is a substantial question as to whether, under New York law, collateral estoppel should ever apply to fact issues determined in a prison disciplinary hearing

and reviewed for substantial evidence in an Article 78 proceeding, given the procedural laxity of such prison hearings and the limited nature of substantial evidence review." In making this point, the Court wrote that it had raised this issue in Colon v. Coughlin, 58 F.3d 865 (2d Cir. 1995), but in that case, had not needed to resolve the issue because, the Colon Court had concluded, the state court had not in fact decided the issues raised by Plaintiff Colon in the federal court. The Court also acknowledged that in Giakoumelos v. Coughlin, 88 F.3d 56 (2d Cir. 1996), it had given the Third Department's decision in an Article 78 proceeding preclusive effect and dismissed the federal action. In Giakoumelos, the Court found that the issues raised in the federal court action were identical to those decided against the plaintiff in the state court action.

In Kotler, the Court concluded, as it concluded in Colon, that it did not have to decide whether **collateral estoppel** (a phrase which includes issue preclusion as well as other doctrines which limit a court's authority to decide cases where another court has considered the same issues) should ever apply to factual determinations made in a prison disciplinary proceeding. The basis for this conclusion was the Court's recognition that New York State law in fact *favors* the flexible application of the doctrine:

> The doctrine of collateral estoppel 'is grounded on concepts of fairness and should not be rigidly or mechanically applied.'

LaFleur v. Whitman, 300 F.3d 256, 271 (2d Cir. 2002) (quoting D'Arata v. N.Y. Cent. Mut. Fire Ins. Co., 563 N.Y.S.2d 24 (1990).

"New York courts have on numerous occasions," the Court, citing Giakomelos v. Coughlin, wrote, "stressed the importance of an analysis of each case's unique circumstances, rather than a rigid application of bright-line rules, in deciding the preclusive effect of a prior judgment."

Reviewing the facts of Plaintiff Kotler's case, the Court decided that the State court judgment should not be given preclusive effect. The Court found that the following facts were relevant:

1. Prison disciplinary hearings are procedurally more lax than other administrative hearings. Prisoners have a right to assistance from an employee and a restricted right to call witnesses. Most cases granting preclusive effect to factual findings reviewed in Article 78 proceedings arise in the context of civil servant disciplinary hearings at which the employees have greater procedural protections, including the right to counsel. Kotler, the Court noted, was placed in SHU immediately after being charged and had little opportunity to investigate his claims before the hearing began.

2. There is now critical evidence that was unavailable at the disciplinary hearing or in the Article 78 proceeding. At the hearing, Kotler could only speculate as to whether someone else had planted the weapon and the Third Department denied his request for discovery. In discovery in this case, Kotler has uncovered evidence that the defendant wanted to remove Kotler from the grievance committee and had been advised that he could do so if Kotler was guilty at a Tier III hearing. This, the Court found, created a genuine dispute as to whether prison officials planted the weapon.

3. It would be inappropriate to defer to the hearing officer's factual findings because he is now a defendant in this case and because he allegedly told Kotler, "When the boss says get rid of you, I got to get rid of you." When the Third Department affirmed the hearing determination, it did not have this evidence before it. A jury verdict in favor of Kotler, based on the preponderance of the evidence now available, would not, the Court stated, undermine the authority of the Third Department's decision that there

was substantial evidence of guilt before the hearing officer.

The Court concluded that the district court had erred in granting summary judgment to the defendants on the basis of their collateral estoppel defense because in the state courts, Kotler did not have a full and fair opportunity to litigate the issue of whether he was framed in retaliation for bringing a lawsuit. The court reversed the district court's judgment and returned the case to the district court for a trial.

Kerry Kotler represented himself in this §1983 action.

Pro Se Practice

Protecting Your Right to Appeal

As a person convicted of a crime in New York, you have the "absolute" and "fundamental" right to appeal your conviction, whether you went to trial or pleaded guilty. See People v. Ventura, 17 N.Y.2d 675 (2011); People v. Montgomery, 24 N.Y.2d 130 (1969); Criminal Procedure Law (C.P.L.) § 450.10. You also have the right to a court-appointed lawyer on your appeal, if you cannot afford to hire a lawyer. See Evitts v. Lucey, 469 U.S. 387 (1963). This article explains how to **exercise** (use) these important rights.

For more information about the process of appealing a criminal conviction, consult Chapter 9 of *A Jailhouse Lawyer's Manual* or contact Prisoners' Legal Services about its memos, "The Process of Appealing a Criminal Conviction" and "How to Request Permission to File a Late Notice of Appeal."

A. Filing a Notice of Appeal

While you have an absolute right to seek appellate review of your conviction, New York law requires that you first file a document with the trial court stating that you are appealing from that court to the appellate court. See C.P.L. § 460.10(a). That document, called a Notice to Appeal, is essential to **preserving** (keeping alive) your appellate rights. You or your lawyer must properly file a Notice of Appeal with the Court that convicted you within 30 days of the day upon which you were sentenced. An Appellate Court will only consider your appeal if you (or your lawyer) properly file a Notice of Appeal. In addition, an Appellate Court will only consider assigning you appellate counsel if you (or your lawyer) properly file a Notice of Appeal.

You can file a Notice of Appeal even if you pleaded guilty and even if you agreed to waive your right to appeal when you pleaded guilty. These circumstances may limit what claims you can later raise on appeal, but they do not prevent you from filing a Notice of Appeal and will not affect your right to have an appellate lawyer review your conviction. Even if you are not sure you want to appeal or think it will be a waste of time, you can and should file a Notice of Appeal. Filing a Notice of Appeal preserves your right to appeal if you later change your mind and decide you want to appeal. Not filing a timely Notice of Appeal may cause you to **sacrifice** (give up) your right to appeal.

1. Timely Notice of Appeal

A Notice of Appeal must be filed within 30 days of the date that you were sentenced. See C.P.L § 460.10(1)(a). It must be filed with the clerk of the court in which you were convicted, and a copy must be served on the District Attorney's office that prosecuted you. See C.P.L. § 460.10(1)(a),(b).

Your trial lawyer might have filed a timely Notice of Appeal for you. If you are not sure if he or she did so, you should file one yourself just in case.

2. Motion to Extend the Time to File a Notice of Appeal

If you are past the 30-day deadline for filing a Notice of Appeal, you might still be able to preserve your right to appeal by asking the appropriate Appellate Division to extend the time for filing a Notice of Appeal. To be eligible to file a late Notice of Appeal, you must be within a year and 30 days of your sentencing. You must also be able to explain the delay. See C.P.L. § 460.30(1). If you need to file a motion to file a

late appeal, you can write to PLS and request the memo, "How to Request Permission to File Late Notice of Appeal." This memo includes instructions and a sample motion.

Which Appellate Division you should file the motion in depends on the county in which you were convicted. If you do not know the proper Appellate Division, request an Address Packet from PLS or consult Appendix II of *A Jailhouse Lawyer's Manual*. Note that if you are within the original 30-day deadline, you file the Notice of Appeal in the court of your conviction. But if you are trying to file a late Notice of Appeal, then you must file a motion with the Appellate Division.

In a motion to extend the time to file a Notice of Appeal, you must show that your failure to file a timely Notice of Appeal resulted from one of two situations:

(a) improper conduct of a public servant or your trial lawyer, or the death or disability of your lawyer. See C.P.L. § 460.30(1)(a). Improper conduct generally means conduct that interfered with your ability to file a timely Notice of Appeal. If a correction officer did not allow you to mail a Notice of Appeal, that would be an example of improper conduct of a public servant. If your trial lawyer did not inform you of your right to appeal, that would be improper conduct of your trial lawyer. See People v. Corso, 40 N.Y.2d 578, 581 (1976).

(b) an inability to communicate with your trial lawyer about your appeal, but only if not the result of a "lack of diligence or fault" on the part of either you or your lawyer. See C.P.L. § 460.30(1)(b). That generally means that some aspect of your incarceration that was outside your control prevented you from **communicating with** (talking or writing to) your lawyer about your appeal.

Your motion should include an affidavit from you explaining why you did not file a Notice of Appeal on time. See C.P.L. § 460.30(2). The affidavit must be signed and notarized.

3. Writ of Error Coram Nobis

If more than one year and 30 days have passed since you were sentenced, it will be very hard to **revive** (bring back to life) your right to appeal. The only way to do so is by filing a writ of error coram nobis with the appropriate Appellate Division. The court will only grant the writ if you show, first, that your trial attorney violated your constitutional right to effective assistance of counsel by failing to honor your request to file a timely Notice of Appeal and, second, that you could not have discovered the lawyer's failure to do so within one year and 30 days of your sentencing date. See People v. Syville, 50 N.Y.3d 391 (2010). Note that unlike typical ineffectiveness claims, which are brought in the trial court, this particular claim is brought by motion in the Appellate Division.

B. Obtaining a Lawyer for Your Appeal

You may think that if you had assigned counsel at your trial or plea, the court will automatically assign you a lawyer for the appeal, or that your assigned trial lawyer will continue to represent you on appeal. Neither, however, is the case in New York, and these mistaken beliefs can **jeopardize** (threaten) your chance to appeal, or, even worse, result in your losing the chance to appeal your conviction and/or sentence altogether.

A poor person in New York who wants to appeal his criminal conviction will not have a lawyer appointed for the appeal unless he first establishes that he is **indigent** (does not have enough money), and cannot afford to hire an attorney. You have to prove, no matter how obvious it is, that you have no money or property even if you had appointed counsel at your trial or plea. Further, the law does not guarantee a convicted defendant any help from a lawyer in making the "poor person" application to the court. See People v. West, 100 N.Y.2d 23 cert. denied 540 U.S. 1019 (2003). In West, the Court of Appeals held that the information sought by the court before assigning counsel – "income, its source(s), a list of property owned and its value" – is "personal information . . . uniquely available to the appellant," and not requiring counsel's assistance to "uncover or develop it." Id. at 28-29.

To have a lawyer assigned for an appeal, the law requires a criminal defendant to be **proactive** (step up and act on his or her own behalf). Outlined below are the **crucial steps** (most important steps) that you should take as soon as possible after you are sentenced in order to protect your appellate rights. Detailed instructions and forms are outside the scope of this article, but the PLS memo, "The Process of Appealing A Criminal Conviction" has instructions and forms that can assist you.

- First, as described in Part A, either you or your trial lawyer must file a Notice of Appeal within 30 days of your sentencing (or you must try to file a late Notice of Appeal).

- Next, prepare a motion asking for poor person relief (also known as an *In Forma Pauperis*, or "IFP," motion) and for the assignment of counsel. CPLR 1101(a) addresses what the motion should contain: "The moving party shall file an affidavit setting forth the amount and sources of his or her income and listing his or her property with its value; that he or she is unable to pay the costs, fees and expenses necessary to prosecute or defend the action or to maintain or respond to the appeal; the nature of the action; sufficient facts so that the merit of the contentions can be ascertained . . . ." In other words, the motion must include an affidavit explaining that, based on your financial circumstances, you cannot afford to pay for an appellate lawyer.

A simple affidavit that includes information about your current financial situation should be enough to get the court to appoint you a lawyer on appeal. If you paid for your lawyer in the trial court or made bail—circumstances that might suggest to the court that you had money available at that time—you should include an explanation of why that money is not now available to you to hire a lawyer.

Your affidavit **must** be notarized.

- File the motion with the appropriate Appellate Division and serve the appropriate District Attorney's Office. (Note that this motion is filed in the Appellate Division, while the Notice of Appeal is filed in the court in which you were convicted.)

Delay in filing a motion for poor person relief and the assignment of counsel can be fatal to your appeal. If too much time passes, the court might decide that you "abandoned" your appeal even if you filed a timely Notice of Appeal, and, either on its own or on the People's request, dismiss your appeal. See West, 100 N.Y.2d at 26 (the right to appeal must be "affirmatively exercised and timely asserted"); C.P.L. § 470.60(1) (permitting dismissal of appeal for "failure of timely prosecution or perfection thereof"). What constitutes "too much time" depends on the case, but the passage of a year or more puts your appeal at risk.

Appellate attorneys Lauren Stephens-Davidowitz (Office of the Appellate Defender) and Barbara Zolot (Center for Appellate Litigation) wrote this article.

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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, Mt. McGregor, Otisville, Queensboro, Shawangunk, Sing Sing, Sullivan, Taconic, Ulster, Wallkill, Walsh, Washington, Woodbourne.

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ITHACA, 114 Prospect Street, Ithaca, NY 14850

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PLATTSBURGH, 121 Bridge Street, Suite 202, Plattsburgh, NY 12901

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

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