

Pro Se

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Correction Law §138(4) Insulates Prisoner's Conduct From Discipline

In December 2017, DOCCS introduced a pilot program known as the Secure Vendor Program (SVP) at Green Haven, Taconic and Greene Correctional Facilities. The SVP pilot project gave eight vendors the exclusive right to send packages to individuals at those three prisons. Daniel Miller was in custody at Green Haven when SVP was put into place. Mr. Miller wrote a letter to vendors who were not among the chosen eight, urging them to fight back against the policy by filing lawsuits. DOCCS removed the letter from the mail and charged Mr. Miller with having violated Rule 103.20. This rule provides that “an inmate shall not request or solicit goods or services from any business . . . without the consent and approval of the facility superintendent or designee.”

The misbehavior report alleged that Mr. Miller's letter had “undermined the process of the New York State [DOCCS] to complete a smooth transition to implement a pilot program which has already established secured vendors.” At the conclusion of a Tier II hearing on this charge, the hearing officer found Mr. Miller guilty of having violated Rule 103.20, commenting that Mr. Miller's actions

“cannot be tolerated and are an attempt to hinder the department with new package procedures.”

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COVID 19 CONTINUES TO STRAIN STATE RESOURCES

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

The impact of the COVID-19 pandemic has ravaged the economies of countries throughout the globe. The United States is no exception and remains a hotspot in the spread of the virus.

New York, initially the hardest hit of all the states, has since flattened the curve and led the way in demonstrating the steps necessary to maintain a viable road to recovery. This is true both inside and outside of prison walls, and we commend the Governor, our legislative leaders, DOCCS and the citizenry for working so closely and cooperatively together to achieve these laudable results.

That said, the road to recovery will be a long and challenging one, and we must all remain vigilant to ultimately achieve positive fiscal and personal health outcomes.

Indeed, here at PLS, the challenges have been enormous. The State has designated PLS services to be “essential,” and rightly so.

Between January 1, 2020 and July 23, 2020, PLS received 6,423 new requests for services. Last year, during this same timeframe, we received 4,844. The increase – an average of 225 cases per month – is due mainly to complaints regarding COVID-19 in the prisons and has significantly impacted our office operations. Despite it all, I am proud to say that the PLS staff have gone above and beyond to ensure that we continue to respond to every request.

With respect to the information in the letters, we have routinely provided DOCCS with lists summarizing the COVID-19 related complaints. During regularly scheduled bi-weekly phone calls with the DOCCS’ Executive Team, we discuss these complaints and other pressing concerns and DOCCS updates us on the status of coronavirus in the prisons. In turn, our concerns are relayed to facility superintendents by the DOCCS’ Executive Team during their weekly scheduled calls.

Our advocacy surrounding COVID-19 in the prisons has, I believe, significantly improved DOCCS management of the situation. Specifically, DOCCS has heard and responded to our requests on the following issues:

- Send in OSI investigators and randomly review videotapes of the prisons to oversee and compel staff compliance with COVID-19 protocols.
- Create a COVID-19 dedicated website to demonstrate transparency regarding DOCCS’ management of the coronavirus within the prisons.
 - Increase testing at various prisons and for certain more vulnerable populations.
 - Expand releases by modifying the release criteria.
 - Resume social visits with family members and friends.
 - Provide workbooks to incarcerated individuals in drug treatment so that they can complete required programming and secure time-served credit; such individuals, but for COVID-19 and DOCCS’ subsequent prohibition on movement, would have been immediately transferred to the Willard Drug Treatment Program upon reception into DOCCS.
- Resume mental health programming and services in the RMHTUs, ICPs and other similar programs.
- Resume programming, including ART, ASAT, SOCT, Thinking for Change, Advanced Aggression Program and Trauma Programs.

We are continuing to work with DOCCS to make additional improvements in the following areas, especially in light of the unique challenges for incarcerated individuals presented by the pandemic:

- Safe working conditions and the provision of protective equipment for incarcerated individuals performing essential work.
- The complete resumption of facility programs.
- Fair and consistent early release consideration.
- The complete resumption of mental health programming and services.
- Facility-wide testing for hotspot prisons.
- Working to eliminate racism in NYS prisons.
- The development of alternatives to in-person legal visits.

COVID-19 has, without doubt and quite dramatically, impacted PLS’ budget and its ability to meet increased demands. To be sure, the ultimate resolution to the State’s fiscal deficit depends on the infusion of federal assistance. But, as Assembly Correction Committee Chair David Weprin recently noted in an Op-ed penned for the Gotham Gazette, “an inclusive recovery must include new sources of revenue so that we don’t have to balance our budget on cuts alone . . . and new tax revenue (must) directly benefit individuals from our most vulnerable communities.”

We share Assemblyman Weprin’s call for an “open, honest decision-making process” that mitigates the fiscal impact on the most vulnerable during these challenging times.

To you, our clients, we appreciate and ask for your continued patience and indulgence as we navigate these difficult waters together.



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The determination of guilt was affirmed by the Office of Special Housing and Inmate Disciplinary Programs, following which Mr. Miller filed an Article 78 proceeding raising the claim that the determination of guilt was not supported by substantial evidence.

In *Matter of Daniel Miller v. Anthony Annucci*, 185 A.D.3d 932 (2d Dep’t July 22, 2020), the Appellate Division granted the petition, annulled the determination of guilt and directed the respondents to expunge all references to the finding from the petitioner’s institutional record. In reaching this result, the court found the petitioner’s conduct was insulated from discipline by Correction Law §138. Correction Law §138(4) provides that, “Inmates shall not be disciplined for making written . . . requests involving a change of institutional conditions, policies, rules, regulations, or laws affecting an institution.” Mr. Miller’s letter, the court

wrote, was a request “involving a change of institutional policies.” The letter invited certain vendors that were adversely affected by the new policy to file a lawsuit in opposition to the policy. Thus, the court found, the respondents had disciplined Mr. Miller in violation of the Correction Law.

The court also found that that the letter written by Mr. Miller did not solicit goods or services from any business. Therefore, even without considering Correction Law §138, the determination of guilt was not supported by substantial evidence. Thus, the court held, the record did not support the determination that Mr. Miller had violated Rule 103.20.

Daniel Miller represented himself in this Article 78 action.

News and Notes

Violations of Rule 113.25, Drug Possession

PLS has learned that DOCCS is releasing individuals from disciplinary confinement for violations of Rule 113.25 that are based on the testing of substances. This applies to individuals who have been found guilty of violating the rule and to those whose hearings have not yet been completed. It does not apply to people who were charged with or found guilty of other rule violations in addition to drug possession.

At this time, **DOCCS is not dismissing, reversing or expunging the charges.** Hearings that were not completed have been adjourned. The releases from disciplinary confinement relate only to the testing of substances; they do not relate to urinalysis drug testing.

We will keep you informed as we learn of additional developments related to this issue.

Challenge to E-Stop Filed

On March 12, 2020, PLS, the New York Civil Liberties Union (NYCLU) and the Rutgers Constitutional Rights Clinic filed *Jones v. Stanford and Annucci* in the federal district court for the Eastern District of New York. The lawsuit is a direct challenge to a state statute and two DOCCS Directives that ban most sex offenders released to community supervision from accessing social media sites, or from possessing or accessing the internet or any internet-connected device without permission of the parole officer. The statutory e-STOP condition must be imposed on people serving sentences that require registration under the Sex Offender Registration Act (SORA), where the victim was under 18, or the person is a Level 3 sex offender, or the individual used the internet to facilitate the sex offense. DOCCS and Parole officials also interpret the provision to be required for any person classified as a Level 3 sex offender, even if that person is not currently serving a sentence for a sex offense.

Executive Law §259-c(15), known as the Electronic Security and Targeting of On-line Predators Act (e-STOP), requires that the Parole Board impose a mandatory release condition that, among other things, prohibits an individual from using the internet to access a commercial social networking website. The statute defines a “commercial social networking website” is defined in the statute as a website that offers access to people under eighteen years of age and permits users to: (1) create a public or user-accessible webpage or profile about themselves; (2) interact with other users over the age of eighteen; and (3) engage in direct or real time communication with other users. Typically, these are on-line platforms like Facebook, Instagram, and Twitter, etc. However, the definition is very broad and includes on-line shopping sites (e.g. Amazon) and media (e.g. New York Times).

DOCCS Directive 9201 requires DOCCS to impose the social network ban on those people identified in e-STOP. On information and belief, DOCCS also relies on Directive 9201 to impose the social network ban on all released sex offenders, including those who are not subject to the statute because they did not have an underage victim, they are not Level 3 offenders, and they did not use the internet, computers, or other electronic devices to facilitate their crimes.

DOCCS Directive 9202 is broader than e-STOP. It requires DOCCS staff to impose a release condition on all sex offenders released to community supervision, that the individual, “not own, possess, purchase, or have control of any computer, computer related material, electronic storage devices, communication devices, and/or the internet” without written permission from the individual’s parole officer. The Directive leaves the parole

officer with virtually unlimited discretion on whether to permit any access to a computer. We understand that parole officers rarely grant permission to possess a computer, and if they do, permission is typically limited to a single device for a specific purpose. Moreover, we have also heard that when parole officers grant permission, they typically do so orally and not in writing, creating an additional risk for the parolee who has no documentation of such permission.

The *Jones* lawsuit relies substantially on the U.S. Supreme Court decision in *Packingham v. North Carolina*, 137 S.Ct. 1730 (2017). *Packingham* was a challenge to a provision that prohibited people on North Carolina's sex offender registry from accessing social media websites. The *Packingham* Court found that in the 21st century, the internet is a core feature and forum for the First Amendment right to free speech. In striking down North Carolina's restriction, the Court observed that "to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights." The Court suggested that a social media ban that was only imposed on offenders who used computers or the internet to facilitate crimes might be constitutional but a social media ban imposed on all sex offenders in the absence of any evidence that individuals had a history of abusing computers or the internet could not be upheld.

The *Jones* lawsuit seeks declaratory and injunctive relief to prohibit defendants DOCCS and Parole from enforcing the unconstitutional provisions of the e-STOP law and the DOCCS Directives that further ban and restrict internet and social media access.

Update: Federal Habeas Petitions Relating to Conditions of Confinement

As COVID-19 continues its march through our nation's prisons, a number of state-sentenced incarcerated New Yorkers have sought release through federal habeas corpus petitions. These petitions are based on what the petitioners allege is the inability of prison administrators to protect incarcerated people, particularly older and medically vulnerable individuals, from the virus. The petitioners allege that DOCCS' inability to protect them violates the petitioners' 8th Amendment rights to be free from cruel and unusual punishment. In New York, the federal district courts that have considered these petitions have agreed on two points.

First, federal habeas petitions seeking release due to COVID-19 related conditions of confinement must be brought under 28 United State Code (U.S.C.) §2254; they cannot be brought under 28 USC §2241. *See, e.g., Steward v. Wolcott*, 2020 WL 2846949 (W.D.N.Y. June 2, 2020); *Elleby v. Smith*, 2020 WL 2611921, at *2 (S.D.N.Y. May 22, 2020). In addressing this issue, the *Steward* court wrote: "Three statutes give the district court habeas jurisdiction. Determining the appropriate statute hinges on 1) whether the petitioner is held in federal or state custody and 2) whether the petitioner challenges the imposition or the execution of [their] sentence." *Federal prisoners* proceed under §2241 when they challenge the execution of their sentence but proceed under §2255 when they challenge the imposition of their sentence. Only one statute – 28 U.S.C. §2254 – governs claims brought by *prisoners in state custody* whether their claims challenge the imposition or the execution of their sentence. Section 2254 expressly requires exhaustion of state court remedies before a federal habeas petition may be heard. In New York, the courts found, the state court remedy available to state-sentenced prisoners is a state habeas proceeding brought pursuant to Article 70 of the Civil Practice Law and Rules (CPLR). **Thus, prior to filing a federal habeas petition seeking release due to DOCCS inability to adequately protect prisoners from the virus, prospective federal habeas petitioners must first bring state habeas petitions seeking the same relief they intend to seek from the federal court.**

Second, whether a state prisoner is entitled to release due to unconstitutional prison conditions is an issue that has not yet been resolved in the Second Circuit. *See, Tripathy v. Schneider*, 2020 WL 4043042, at *4 (W.D.N.Y. July 17, 2020); *Slater v. Keyser*, 2020 WL 4016759, at *4, (S.D.N.Y. July 16, 2020); *Elleby v. Smith, above*, at *1. Thus, it is unclear whether federal habeas relief is available to an individual state-sentenced prisoner, or a class of state-sentenced prisoners, who demonstrate that their 8th Amendment rights have been violated. Since

the start of the pandemic, no federal district court in New York State has reached the issue of whether a state-sentenced prisoner is entitled to release due to unconstitutional prison conditions. To date, the habeas petitions filed by state prisoners have been dismissed either because the petitioners failed to exhaust their state court remedies or because of other threshold issues.

Update: Credit for Suspended Programs

The Impact of the Pandemic-Related Suspension of Programs

DOCCS officials initially stated that a prisoner's failure to program due to the virus-related program suspensions, through no fault of the individual would not have adverse consequences, for example, the loss of eligibility for early release. More recently, however, DOCCS has revised their position. This revision is based on the fact that DOCCS has already reopened a growing number of programs and plans to reopen additional programs. DOCCS now states that it is not going to completely and fully credit all time that otherwise might have been spent programming had the programs not been suspended. PLS continues to urge DOCCS to reconsider this issue.

DOCCS' current position is that they are only crediting the period of time between 3/16/20 and 4/10/20 to individuals who would otherwise have been actively programming in substance abuse treatment programs (ASAT, CASAT, IDDT).

DOCCS is not crediting any other time that had the programs not been suspended, would have been spent in 1) vocational or educational programs, with respect to which federal and state law require certification of attendance periods; or 2) any other programs, including ART, Thinking for Change, or step-down programs.

During the program interruptions, even though no programming was taking place, DOCCS required individuals in program housing to abide by the rules associated with that residence and program. During this period, DOCCS kept program pay rates the same. Neither of these facts alter the discretion DOCCS has with respect to whether to afford any program credit during the suspension periods.

It is our understanding that DOCCS is also not giving any credit to individuals with court-ordered Shock. Initially, DOCCS advised PLS and others it would give credit to such individuals who received essentially a "Shock-only" sentence, meaning individuals who were received into custody and would have gone directly to Shock but who were stranded at a reception facility when transfers were stopped. In previous notices, we advised that this is what DOCCS had indicated. However, we recently learned that DOCCS has decided not to provide any credit to such individuals. They are also not providing any credit to individuals who, when programs were suspended or shortly before, were already serving a sentence and became time-eligible for Shock (reached the date upon which they were within 3 years of their CR date). In short, it appears no one, not even those with a court-order for Shock, are getting credit from DOCCS for the time that but for the pandemic, they would have spent in Shock.

Based on the resumption of some programs and the anticipated resumption of others, we hope that few people will be directly adversely affected by the program interruptions. However, if based upon a specific failure to program due solely to the suspension of programs, the TAC takes away good time for failure to complete a suspended program, or Parole denies release based on your failure to complete a suspended program, you should object, appeal the denial, file a grievance, and also write to Donald Venettozzi, Director of Special Housing/ Inmate Discipline at DOCCS Central Office, 1220 Washington Avenue, Albany, NY 12227.

Update: DOCCS and the Courts Respond to the Pandemic¹

DOCCS

Eligibility for Early Release: DOCCS is currently considering for early release non-violent felony offenders who have not been convicted of sex offenses and who are within 90 days of a release date. People who meet these criteria are not entitled to release; rather, individuals who meet these criteria will be evaluated for release. Among the conditions that an individual who is eligible for early release must meet is having a parole approved address. There are other factors that may result in denial of early release even if an individual otherwise meets the threshold eligibility requirements.

Consideration for early release is ongoing. As eligible individuals approach the 90-day mark, DOCCS will review their backgrounds and release plans to determine whether they will be released. If you believe you qualify for release consideration, we urge you to contact your ORC to ensure that you have taken all the steps necessary to position yourself for early release.

DOCCS is also considering for early release pregnant and postpartum women who are non-violent felony offenders who have not been convicted of sex offenses and who would otherwise be released within 6 months. To be released, women who meet the criteria must have stable housing and health care.

Reopened Programs: of September 4, the following programs had resumed:

- Mental health programming in the RMHUs, ICPs and other similar programs, with both staff and prisoners required to wear masks;
- Step-Down programs, with both staff and prisoners required to wear masks;
- Staff-led programs such as ASAT, ART, SOCT, Trauma Programs, Advanced Aggression Program, and Transitional Services, with both staff and prisoners required to wear masks; and
- General library services have resumed, with staff and prisoners required to wear masks.

Academic and Vocational Programming: DOCCS is continuing the suspension of academic and vocational programming through the summer. The re-opening plan calls for lifting the suspension on academic and vocational programming at a later time.

Prison to Prison Transfers: DOCCS's has resumed internal transfers and movement, while instituting social distancing on transportation vehicles, with both staff and prisoners required to wear masks.

DOCCS has transferred all adolescent offenders from Adirondack AO Facility to Hudson AO Facility.

DOCCS continues to transfer to Adirondack C.F. individuals age 60 and older and who meet the facility's medical and OMH level restrictions. Adirondack is an OMH Level 2 facility.

Transfers from County Jails: DOCCS is accepting state-sentenced individuals and parole violators from the county jails. As of July 31, there were fewer than 700 individuals waiting to be transferred to DOCCS custody from the county jails.

¹ The information in the Update is current through September 4, 2020.

DOCCS's does not accept admissions from county jails where, at the time of the transfer there is even one current COVID-19 case in the jail. In addition, any individual in a county jail who is being transferred into DOCCS custody must, prior to transfer, be tested and have a negative test result and must be isolated following the testing. Individuals being transferred from a county jail must be beyond the quarantine period that follows the testing and must not be part of a contact trace at the time of the transfer. When an individual who is transferred from a county jail arrives at a DOCCS facility, the individual must be temperature checked and medically assessed before entering the draft area of the facility. Once the individual is cleared for entry, they will be given a mask.

Visitation: Visiting resumed at the maximum security prisons on August 5 and includes weekend and weekday visits. Visiting resumed at all other prisons on August 8.

- The capacity of visiting rooms has been reduced by 50% to allow for social distancing.
- Prisons with outside visiting areas are using these areas, weather permitting.
- During processing and in the visiting room, visitors and individuals must wear masks. Masks may be temporarily removed for processing and for approximately 15 minutes while eating a meal. Masks must remain but may be briefly pulled down while drinking a beverage or eating a snack from the vending machine. Masks must not have pictures, writings or sayings on them.
- Prior to the visit, visitors will be screened using a questionnaire and will have their temperatures checked. The questionnaire is on the DOCCS website: <https://doccs.ny.gov/system/files/documents/2020/07/doccs-covid-19-visitor-health-screening-questionnaire.pdf>
- Visitors who have traveled to New York from a state that has met the metrics to qualify for the travel advisory requiring individuals to quarantine for 14 days will be denied visits if the quarantine time has not been completed.
- With the exception of a hug at the beginning and end of a contact visit, physical contact during visits is not allowed.
- Each prisoner can have two weekend visits per month. Which weekends a prisoner is permitted visits is determined alphabetically or numerically by DIN. Which method is used is in the discretion of the superintendent of each prison.
- Subject to further restriction based on circumstances at a particular prison, each visit is limited to 3 visitors and one child under the age of 5 who must sit on an adult's lap.
- Cross visiting is not allowed.
- DOCCS staff will control movement in the visiting room to ensure that social distancing is maintained.
- A minimum of one porter is assigned to the visiting room to disinfect the tables between visits, the vending machines and other shared areas.
- The children's areas will be off-limits; this restriction will be evaluated after 30 days.

- Incarcerated individuals in quarantine or isolation will not be permitted to have visits until they have been determined to have recovered.
- The Family Reunion Program remains closed; this decision will be periodically reviewed with the intention to gradually re-open.
- Packages brought by visitors will be allowed as per the current policy.
- Limits will be placed on the number of visitors allowed in the hospitality centers, processing areas, and pathways to the visiting room, in order to maintain social distancing.
- The details for visiting at each facility are posted on the facility pages of the DOCCS website.

Phone and Email Contact with Loved Ones and Family:

- At least through September 30, each incarcerated individual will receive 2 free 15-minute calls per week. Free calls are available beginning at 7:00 am on Saturday and are associated with the first two calls made during the week and do not carry forward from week to week. Individuals serving disciplinary confinement sanctions will be provided access to the phone as per policy;
- Each incarcerated individual with access to a general confinement tablet and kiosk will continue to receive two free stamps per week to use for secure messaging. (This is not available to individuals serving disciplinary confinement sanctions). Stamps are added to an individual's account on Friday afternoon, do not accumulate and are replenished on a weekly basis based on use;
- At least through September 30, every secure message sent by a friend or family member on Wednesday will be accompanied by a free pre-paid stamp that will allow the individual to reply to the sender;
- The vendor continues to make the previously announced four free games available at one time;
- The vendor is offering access through the Newsstand application without charge at least through the month of August; and
- DOCCS will continue to provide five (5) free stamps per week for general correspondence

Testing: During the last week of June, DOCCS significantly increased the amount of testing for individuals in DOCCS custody. In addition to testing people who have symptoms of COVID-19, DOCCS offered tests to everyone who is housed in the regional medical units and all prisoners who are 55 years of age and older. In August, DOCCS offered testing to all individuals incarcerated at Fishkill, Green Haven, Shawangunk and Wallkill Correctional Facilities.

As of September 6, DOCCS had tested 8,585 incarcerated individuals. Of that number, 755 people tested positive for COVID-19. Of those who tested positive, 738 people have recovered. As of September 6, there had been 7,816 negative tests and there were 14 tests pending results.

Tragically, seventeen incarcerated New Yorkers have died from COVID-19. Sixteen of the deaths occurred before May 12. The most recent death from COVID-19 in DOCCS custody occurred on July 23. The individual

who died had been housed at Green Haven. He spent several weeks in the hospital before he passed. Sixteen of the incarcerated New Yorkers who died were in hospitals at the time of their deaths.

Reducing the Spread of the Virus: One of the most effective measures for reducing the spread of COVID-19 is to have people wear masks. DOCCS provides all incarcerated individuals with surgical-type masks.

Correction officers, parole officers and civilian staff are required to wear masks while on duty. Incarcerated individuals are encouraged to wear masks and are required to do so during programming.

We encourage you to wear a mask. Masks protect the person who wears the mask as well as protecting others.

State Court Operations

On March 20, 2020, New York Governor Cuomo issued Executive Order 202.8. **The terms of this order have been extended on a monthly basis. The most recent extension was on September 4.** This Executive Order **tolled** – stopped the clock running – on **all state court filing deadlines**, including *state* statutes of limitations, **through midnight on October 4, 2020.**

Changes in State Statutes of Limitations and Court Filing Deadlines

This suspension includes any state statute of limitation for commencing actions that are set by Criminal Procedure Law, the Family Court Act, the Civil Practice Law and Rules, the Court of Claims Act, the Surrogate's Court Procedure Act, and the Uniform Court Acts, or by any other statute, local law, ordinance, order, rule, or regulation.

Example: On March 20, you received a decision on a Tier III appeal. The four-month statute of limitation on your Article 78 would normally begin running on March 20. Due to the suspension of statutes of limitation, the clock stopped running on that deadline on March 20 and will start running again on October 4, 2020. Thus, in the example, you will have 4 months from October 4, within which to file an Article 78 petition. In effect, you do not count the days in the period during which all these deadlines are tolled when you are figuring out your filing deadline.

Effective June 10, 2020, Administrative Order 121.20 allows unrepresented parties (*pro se* litigants) to file, serve, and be served by non-electronic means (paper filings). If you are represented, you will be required to file through the New York State Courts Electronic Filing System (NYSCEF).

Many courts are conducting hearings via video or teleconference rather than conducting in-person hearings.

Changes to the State Court Appeals Process

Appellate Divisions, All Departments

All departments of the Appellate Division have expanded their requirements for electronic filing. However, *pro se* incarcerated litigants are considered “exempt litigants” under 22 NYCRR 1245.5 (Joint Rules of the Appellate Division on Electronic Filing) and do not have to participate in electronic filing. Given the changing rules about submitting paper copies, we recommend you contact the Appellate Division you will be filing in and request any rules about submitting paper copies and other requirements for *pro se* incarcerated litigants.

All departments of the Appellate Division are accepting filings in essential and non-essential matters.

First Department

The Court has resumed operations, including calendaring appeals and motions and scheduling conferences. On May 8, 2020, the court rescinded its order temporarily suspending perfection and filing deadlines. The deadlines in September through December 2020 have been reinstated. The court has continued to suspend requirements for submitting paper copies of records, appendices and briefs.

Second Department

On July 7, the Second Department lifted the suspension of filing deadlines for perfection of non-actively managed civil matters as follows:

- The deadline for perfecting appeals which were due to be perfected between 3/16/20 and 5/14/20 is now 9/9/20;
- The deadline for perfecting appeals which were due to be perfected between 5/15/20 and 7/9/20 is now 9/23/20;
- The deadline for perfecting appeals which were due to be perfected between 7/10/20 and 8/10/20 is now 10/13/20; and
- The deadline for perfecting appeals which were due to be perfected after 8/10/20 shall be determined in accordance with §1250.9 of the Rules of Practice of the Appellate Division (22 NYCRR 1250.9).

Civil Appeals

The Court has lifted the suspension of deadlines for any pending civil matters, including the filing of response and reply briefs.

Third Department

On May 22, 2020, the court vacated its earlier orders suspending the deadlines for perfection, filing and other deadlines.

Fourth Department

On April 13, 2020, the court rescinded its earlier order suspending perfection, filing, and other deadlines. If your deadline to perfect was after May 22, 2020, that deadline remains in place. All hearings and appearances are being conducted via teleconference.

Changes to Federal Court Procedures

The federal courts have not announced tolling provisions comparable to those of the state courts. You are still responsible for complying with statutes of limitations and deadlines relating to federal court claims and filings.

PRO SE VICTORIES!

Robert Cardew v. State of New York, Claim No. 130690, Motion No. M-94610 (Ct. Clms. Feb. 5, 2020). Robert Cardew won a summary judgment motion relating to his claim that DOCCS was responsible for losing his calculator and damaging his typewriter. In granting his motion, the court noted that summary judgment is a drastic remedy which should only be granted where there are no issues of fact and the claim can be decided as a matter of law. The court granted judgment on the issue of liability to Mr. Cardew. This means the court found that DOCCS was responsible for the damage and loss of Mr. Cardew's property. The court found that there were disputed issues of fact with respect to the value of the destroyed and lost items and therefore set a trial date for establishing the depreciated value of the typewriter and the established limitation of value for typewriters that prisoners are permitted to possess.

Thomas Hoyer won his administrative appeal of a parole denial. In January 2020, Mr. Hoyer, who was a juvenile at the time he committed the offense that led to his incarceration, appeared before the Parole Board for the tenth time. The Board denied him parole and imposed a 12 month hold, finding that his release "would be incompatible with the welfare and safety of the community and would so deprecate the serious nature of his crime as to undermine respect for the law." In its decision, the Board stated that it was departing from the low risk COMPAS assessment because Mr. Hoyer's account of the offense provided "a confusing recollection of the sequence of events, as well as other crimes and/or activities that Mr. Hoyer was involved in at the time." Mr. Hoyer's appeal stressed his rehabilitation and his remorse for the crimes he was convicted of having committed. In response, the Appeals Unit vacated the denial and remanded for a de novo hearing.

STATE COURT DECISIONS

Court of Claims

Negligence of DOCCS Employees Caused Prisoner's Death

Pro Se focuses on judicial decisions that discuss alleged and proven violations of the rights of prisoners. We are pleased when the courts recognize that a prisoner's rights were violated. Underlying every victory in court, however, is a person – the plaintiff in the lawsuit – who has been wronged or injured. The wrong or injury may be, for example, a violation of due process of law that resulted in unlawful confinement to SHU or a physical injury caused by excessive force.

Among the saddest victories are those relating to conduct by DOCCS employees that results in the death of an incarcerated person. While we appreciate the role of the courts in recognizing the harm caused by state employees and in holding the State or state employees liable, the context in which such decisions arise is tragic. The following article relates to the death of Darrick Griffin, a fifty-year old man who died in custody as a result of negligence by DOCCS medical staff.

On May 11, 2017, Darrick Griffin reported to the infirmary at Green Haven C.F. complaining of a nosebleed, a headache and pressure in his head, neck and eyes.* His blood pressure and heart rate were low and he had a temperature of 100 degrees. When his blood pressure improved, facility medical staff sent Mr. Griffin back to his cell. He returned an hour after he first arrived, complaining of a severe headache and neck pain. He was admitted to the infirmary and for the next week was given Tylenol. Over the course of the week, medical notes show that he had a headache, high blood pressure and low heart rate.

Mr. Griffin did not see a doctor until he had been in the infirmary for three days. Although medication to lower his high blood pressure was prescribed, it was not administered until 24 hours after the

prescription was written. On May 17, Mr. Griffin's temperature rose to 102 degrees. A physician determined that he had no meningeal symptoms. (Meningeal symptoms are symptoms related to the membranes – meninges – surrounding the brain and spinal cord). Later that day, a nurse noted that Mr. Griffin was confused and his temperature elevated.

On May 18, Mr. Griffin was found on the floor, disoriented and confused. He continued to have a fever and his blood pressure was dropping. Although a doctor ordered that he be taken to the hospital ASAP, the ambulance did not arrive until several hours later, during which period his condition worsened.

Four days later, Mr. Griffin died in the hospital of a brain aneurysm.**

Following Mr. Griffin's death, Desiree Griffin, as the administrator of Mr. Griffin's estate, filed a claim against the State for wrongful death and conscious pain and suffering, alleging that the medical staff at Green Haven failed to diagnose the presence of the aneurysm, its rupture or the acute nature of Mr. Griffin's illness. After the defendant filed an answer, the claimant moved for summary judgment.

In its decision on the motion, in *Griffin v. State of New York*, Motion No. 93951 (Ct. Clms. Oct. 22, 2019), the court first reviewed what a party moving for summary judgment must show to win a motion for summary judgment. Rule 3212(b) of the Civil Practice Law and Rules (CPLR) provides that a party moving for summary judgment must make a "prima facie showing" that they are entitled to judgment as a matter of law by submitting sufficient admissible evidence to show that there are no material facts in dispute and the undisputed facts establish the moving party's entitlement to a judgment in its favor. "A motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility," the court wrote, quoting *Ruiz v. Griffin*, 71 A.D.3d 1112, 1115 (2d Dep't 2010).

In support of the motion, the attorney representing Mr. Griffin's estate submitted an attorney affirmation and the expert affidavit of Dr. John Kirby, an internist. Also included in the record were:

- The final report of the New York State Medical Review Board issued by the NYS Commission of Correction. The Medical Review Board issued the report after investigating the causes and circumstances surrounding the death of Mr. Griffin; and
- A complete copy of Mr. Griffin's DOCCS medical records.

The Medical Review Board found the following failures in the treatment provided to Mr. Griffin by the medical staff at Green Haven:

1. The facility medical staff conducted an inadequate medical assessment when Mr. Griffin first went to the infirmary on May 11, 2017;
2. The facility medical staff failed to assess Mr. Griffin's condition when he returned to the infirmary on May 11;
3. The facility medical staff did not get a medical provider to assess Mr. Griffin's condition until three days after he was admitted to the infirmary;
4. The facility medical staff delayed the administration of hypertension medication for 24 hours;
5. The facility nursing staff failed to perform vital sign and neurological assessments as ordered by the medical providers;
6. Mr. Griffin was not assessed by his primary care provider until 6 days after his admission to the infirmary; and
7. The significant delay in getting an ambulance to transport Mr. Griffin to the hospital.

In addition to the Medical Review Board's findings, to determine the adequacy of the treatment that the medical staff at Green Haven provided to Mr. Griffin, Doctor Kirby also reviewed:

1. Mr. Griffith's death certificate;
2. The Commission of Corrections' final decision;
3. Mr. Griffin's prison medical records;
4. The DOCCS Health Services Policy Manual (HSPM); and
5. Letters from several incarcerated individuals to Ms. Griffin.

Based on his review of the above materials, Dr. Kirby concluded, with a reasonable degree of medical certainty, that if Mr. Griffin had received prompt medical attention in a hospital setting immediately after the episode for which he was admitted to the infirmary, he would have survived without ongoing neurological deficit. In a chilling statement, Dr. Kirby continued, "Mr. Griffin's death was inevitable the moment Green Haven medical personnel decided that an immediate emergency evaluation was not needed."

Turning to the law relating to medical negligence, the court noted that the State owes a duty to provide for the health and care of incarcerated individuals and to provide them with adequate medical care. Citing the First Department's decision in *Coursen v. New York Hospital-Cornell Med. Center*, 114 A.D.2d 254, 256 (1st Dep't 1986), the *Griffin* court noted that a claim that the State violated its duty of care to a prisoner can be based on negligence principles or on a more particularized claim of medical malpractice. Simple negligence principles, the court wrote, are applicable to those cases where the alleged negligent act may be readily determined by the trier of fact based on common knowledge.

Where the *treatment* received by the patient is in issue, consideration of the professional skill and judgment of the practitioner is required and the theory of medical malpractice applies. To prove that a medical provider has engaged in medical malpractice, the *Griffin* court wrote, a plaintiff must prove that the provider "departed from accepted community standards of practice and that such a departure was the proximate cause of the plaintiff's injuries." A claim for medical malpractice may also arise where nurses and physicians' assistants fail to follow protocols that bear a substantial relationship to the provision of medical treatment.

Here, based on the court's review of the medical records, the expert affidavit of Dr. Kirby and the Commission of Corrections' final report, the court concluded that the claimant had made a *prima facie showing* (submitted enough evidence) of entitlement to judgment as a matter of law with respect to the defendant's liability for medical malpractice and **ministerial neglect** (conduct which involves obedience to instructions, but demands no special discretion, judgment or skill).

Resolving the issue of ministerial neglect in the claimant's favor, the court found that the Commission of Corrections' final report showed that the defendant had violated the following policies, rules and requirements:

- On May 11, the provider failed to write an admission note reporting the findings of the physical exam and admission history as required by the HSPM and to meet nursing note requirements;
- The nursing staff failed to follow medical provider orders to record vital signs every shift; and
- Medical staff delayed requesting an ambulance to transfer Mr. Griffin to the hospital in violation of 9 NYCRR 7651.12(b)(d).

In making its finding that the defendants had engaged in medical malpractice, the court relied on Dr. Kirby's opinion that the prison nursing staff and medical provider in the prison infirmary **deviated from** (did not adhere to) accepted standards of medical practice when they failed to recognize the urgency of Mr. Griffin's condition and failed to make a prompt referral to a hospital where he could have been promptly and properly tested and diagnosed.

Having found that the claimant had established an evidentiary basis for liability, the court considered whether the defendant had raised a triable issue of fact. To do so, the court noted, the defendant would have had to file an affidavit from a medical expert disputing Dr. Kirby's opinion that the defendant had departed from accepted medical practice. The defendant, however, had not submitted an expert affidavit, or any affidavit or exhibits, and thus, the court ruled, had failed to raise a triable issue of fact.

Accordingly, the court granted the claimant's motion for summary judgment on liability. The court has not yet considered the issue of damages.

* The facts were taken from the court's decision in *Griffin v. State of New York*, Motion No. 93951 (Ct. Clms. Oct. 22, 2019).

**A brain aneurysm is a bulge or ballooning in a blood vessel in the brain. It often looks like a berry hanging on a stem. A brain aneurysm can leak or rupture, causing bleeding into the brain. This bleeding is known as a hemorrhagic stroke. This description of an aneurysm is from the Mayo Clinic's website: <https://www.mayoclinic.org/diseases-conditions/brain-aneurysm/symptoms-causes/syc-20361483>

Stephen N. Dratch of Franzblau Dratch, P.C., represented Desiree Griffin, the administrator of the estate of Darrick Griffin, in this Court of Claims action.

Miscellaneous

Court Rejects Challenge to Loss of Merit Time Release Date

The Parole Board granted Aaron Lown merit release. Merit release allows incarcerated individuals to leave prison before the expiration of their minimum term. Two weeks after the decision, Mr. Lown received a misbehavior report charging him with absconding and thereby violating the terms of temporary release. The hearing officer found him guilty at a Tier II hearing and imposed a period of keeplock. After Mr. Lown was released from keeplock, DOCCS revoked his merit release allowance and advised him that he would not be eligible for release until the expiration of his minimum term.

There is a two-step process for obtaining a merit release date. First, DOCCS, applying statutory and regulatory criteria, considers whether an individual meets the criteria for a merit time allowance. If

DOCCS determines that the individual meets the criteria, the Board of Parole then decides whether to grant the individual early release. This process is set forth in 9 N.Y.C.R.R. 280.1:

“Inmates serving sentences for certain nonviolent crimes may receive merit time allowances against their sentences provided they have achieved certain significant programmatic objectives, have not committed any serious disciplinary infractions and have not filed any frivolous lawsuits. . . . When granted, merit time allowances enable inmates to appear before the Board of Parole for possible release on parole on their merit eligibility dates. A merit time allowance is a privilege to be earned by the inmate and no inmate has the right to demand or require that any such allowance be granted.”

Mr. Lown filed an Article 78 challenge to the decision to deprive him of his merit release date. The Supreme Court, Erie County dismissed the proceeding.

On appeal, the respondents filed additional documents in support of their position that they had not submitted to the court below. The court ruled that it would consider these documents. The court noted that it does not normally consider records that were not filed with the lower court. However, in limited circumstances, such as where neither party disputes the authenticity of the newly submitted records, and where remitting the case to the lower court to consider the documents and reach a second decision would be an unnecessary burden to the judiciary, *see, e.g., Crawford v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 35 N.Y.2d 291, (1974), the appellate court will consider the submission.

The documents at issue showed that after Mr. Lown filed his Article 78 proceeding, DOCCS revoked his merit time allowance and issued 1) a notice temporarily suspending Mr. Lown's merit time parole release date, and 2) a rescission report indicating that petitioner no longer met the criteria for merit time release. After the lower court dismissed the proceeding, the Board of Parole rescinded its prior determination granting Mr. Lown parole release on his merit time eligibility date.

Turning to the merits of the case, the court, in *Matter of Lown v. Annucci*, 183 A.D.3d 1246 (4th Dep't 2020), summarized the petitioner's argument. Petitioner argued that DOCCS had acted in excess of its jurisdiction by unilaterally rescinding the petitioner's merit time parole release date. The court found this argument was moot – that is, an issue presenting no real controversy – because the additional documents established that the Parole Board, not DOCCS, had rescinded its previous determination to grant petitioner a merit time parole release date.

The court then turned to the petitioner's other arguments – that that the Board had acted contrary to the law and had failed to perform a duty placed on it by the statute or regulation and that the Board had violated Mr. Lown's constitutional right to due process of law by not conducting a rescission hearing. The court agreed that these issues were ripe for judicial review. It ruled in favor of the respondents on these issues, finding that neither the statutes or the regulations, nor principles of constitutional law, require that the Board conduct a rescission hearing under the circumstances presented by Mr. Lown's case.

Pursuant to Correction Law §803(4), an inmate has no right to demand or require a merit allowance, the court wrote, and such allowances shall be final and shall not be reviewable if made in accordance with the law. Further, according to 7 N.Y.C.R.R. 280.4(b)(4), a merit time allowance may be revoked at any time prior to an inmate's release on parole if the inmate commits a serious disciplinary offense.

Applying this law to the facts before it, the court found that petitioner had committed a serious disciplinary offense – absconding. Thus, the court held, he was statutorily ineligible for discretionary release prior to the date on which his minimum term expired. “In the absence of such eligibility,” the court wrote, the statutory predicate for the Board's previous grant of parole release on a date prior to the expiration of the petitioner's minimum term of imprisonment was eliminated by operation of law.

Finally, the court held that the Board had not violated petitioner's right to due process of law when it rescinded his merit time parole release date without

a hearing on the ground that DOCCS had revoked his merit time allowance. The court reached this result based on its finding that a merit time allowance is a statutory and regulatory predicate to petitioner's eligibility for early parole release. Thus, petitioner did not have a constitutionally protected liberty interest in a merit time allowance itself and the Board did not violate petitioner's right to due process when it rescinded his merit time parole release date.

The Buffalo Office of Prisoners' Legal Services represented Mr. Lown in this Article 78 proceeding.

FEDERAL COURT DECISIONS

Court Finds Officer Lied About Prior Misconduct

In the complaint captioned *Marcus Telesford v. Wenderlich*, 16-CV-6130 CJS/MJP (6/3/2020 W.D.N.Y.), the plaintiff alleged that Officer Tillinghast, along with several other members of the security staff at Southport C.F., physically and sexually assaulted him.* During discovery, the plaintiff requested that Defendant Tillinghast produce complaints filed against him by prisoners for falsifying documents and fabricating misbehavior reports. In addition, the plaintiff served interrogatories requesting any grievances or complaints from prisoners with respect to Officer Tillinghast having used excessive force or having engaged in sexual assault. Following a discovery dispute, the court ordered the defendants to produce a sworn statement, and any documents relating to complaints filed by prisoners against Officer Tillinghast for falsifying documents and fabricating misbehavior reports. See, *Marcus Telesford v. Wenderlich*, 2020 WL 2897012 (W.D.N.Y. June 3, 2020).

In response to these requests, defendants' counsel filed a Declaration in which he indicated that a search had been conducted and that no responsive documents had been found.

Following submission of the Declaration, Plaintiff Telesford sent the court a document with a section titled *Pro Se Victories*. Underlined content in the document referred to the decision in *Markus King*

v. Correction Officers Tillinghast, Kelly and Belz, Index No. 6491 (W.D.N.Y. Jan. 31, 2019), in which a jury had found that Defendant Tillinghast had used excessive force against Plaintiff King. Based on this decision, the plaintiff stated, the defendant had not been truthful when he said in response to the interrogatories that there were no complaints ever filed against Officer Tillinghast for excessive use of force on any prisoners in the past.

In order for Plaintiff King's lawsuit to go to trial, Plaintiff Telesford explained, he first had to file a grievance, and therefore Defendant Tillinghast's representation that there were no prior complaints filed against him for excessive force and sexual harassment was untrue.

The plaintiff requested that the court impose sanctions on the defendant for the failure to comply with the court order requiring the defendant to produce documents relating to complaints filed by other prisoners against Officer Tillinghast for excessive use of force and sexual harassment.

In response, the court ordered the defendant to produce all grievances filed by Markus King that were responsive to the plaintiff's discovery request. The court also requested a sworn statement from both the Inspector General and DOCCS Central Office explaining how grievances and inmate complaints are maintained and what searches had been conducted for the purpose of responding to plaintiff's discovery requests.

Discovery Sanctions

Rule 26 of the Federal Rules of Civil Procedure (FRCP) sets forth the discovery process in federal litigation. Rule 37 of the FRCP provides that a party found to have violated its Rule 26 obligations is subject to sanctions. In addition, the *Telesford* court wrote, even in the absence of a discovery order, a court may impose sanctions on a party for misconduct in discovery under the court's inherent power to manage the court's own affairs. "Sanctions under the court's inherent power," the court wrote, citing *Walker v. Smith*, 277 F.Supp.2d 297, 301 (S.D.N.Y. 2003), "are appropriate when a party has acted in bad faith, vexatiously [in a way that is intended to annoy or cause problems], wantonly or for oppressive reasons." Bad faith is shown when a

party's actions are motivated by harassment, delay or other improper purposes." See, *Kortright Capital Partners LP v. Investcorp Inv. Advisers Ltd.*, 327 F. Supp.3d 673, 688 (S.D.N.Y. 2018). "An appropriate sanction, the *Telesford* court wrote, "is one that will 1) deter parties from violating discovery obligations; 2) place the risk of an erroneous judgment on the party that wrongfully created the risk; and 3) restore the prejudiced party to the same position that it would have been in absent the discovery violation."

The *Telesford* court found that based on the existence of the grievance filed by Markus King against Defendant Tillinghast alleging excessive force and sexual assault, sanctions were warranted against him. The court found that Defendant Tillinghast was aware that a grievance had been filed against him by Markus King and that he had a duty to tell his lawyer of the existence of the King grievance and the related lawsuit. His failure to do so and his decision to conceal his past history of using excessive force, the court concluded, was an act of bad faith.

With respect to Plaintiff Telesford's legal work on this issue, the court wrote, "Despite limited resources and his *pro se* status, Plaintiff's persistence demonstrated that representations made on behalf of Defendant Tillinghast as to the existence of grievances filed against him relating to excessive use of force and sexual assault were not truthful."

The court imposed a sanction of \$250.00 on Defendant Tillinghast and commented that, "[I]t is the court's hope that this sanction will deter Defendant Tillinghast and other defendants named in this lawsuit, and defendants in other cases from violating discovery duties. It is further hoped that this sanction will place the risk of an erroneous judgment on Defendant Tillinghast rather than Plaintiff as it will restore Plaintiff to the position he should have been in had Defendant Tillinghast complied with his discovery obligations at the outset."

*This article discusses the portion of the plaintiff's litigation relating to a request for sanctions against Officer Tillinghast for failing to honestly respond to the discovery requests for past complaints by incarcerated individuals against Officer Tillinghast relating to his use of excessive force and

sexual assault. The plaintiff alleged that other defendants also lied about such issues and sought sanctions for other discovery violations. His allegations with respect to the other defendants and violations failed for various reasons.

Marcus Telesford represented himself in this Section 1983 action.

IMMIGRATION MATTERS

The past two months saw several important immigration decisions from the Supreme Court and the Second Circuit Court of Appeals. First, in the closely watched case of *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891 (2020), a divided Supreme Court struck down the Trump administration's decision to rescind the Deferred Action for Childhood Arrivals (DACA) program. DACA is a program enacted by President Barack Obama in 2012. DACA provides certain undocumented immigrants with a pathway to live and work legally in the United States. In June 2017, the Attorney General instructed the Department of Homeland Security (DHS) to rescind the program based on his conclusion that DACA was unlawful.

Chief Justice Roberts, writing for a five Justice majority, found that by ordering DHS to rescind the program, the Attorney General violated the Administrative Procedure Act (APA), which sets forth specific guidelines that federal agencies must follow to alter their rules and policies. This is a narrow ruling which saves DACA for the time being but does not bar the Trump administration from rescinding DACA provided it follows the dictates of the APA.

A lesser noticed and highly technical decision by the Supreme Court, *Nasrallah v. Barr*, 140 S. Ct. 1683 (2020), is of particular relevance to noncitizens who are deportable because of criminal offenses. In *Nasrallah*, the Supreme Court considered a statute (8 U.S.C. §1252) which limits the jurisdiction of the federal circuit courts of appeal to review decisions in immigration cases involving noncitizens removable for criminal offenses. Several circuit courts, including the Second Circuit, had concluded that this statute prohibited a circuit court from reviewing the factual

findings underlying a noncitizen's application for protection under the Convention Against Torture (CAT), a form of relief that prohibits a noncitizen from being deported to a country where they would more likely than not be tortured. *See Ortiz-Franco v. Holder*, 782 F.3d 81, 88 (2d Cir. 2015). In those circuits, a noncitizen could only seek review of constitutional claims or legal questions involved in the agency's adjudication of the CAT application, a highly limited form of review. *See id.*; 8 U.S.C. §1252(a)(2)(D).

The *Nasrallah* Court disagreed with those circuits, finding the statute did not bar a circuit court from reviewing factual findings underlying a CAT application. This decision will have the immediate beneficial effect of allowing noncitizens in the Second Circuit (which includes New York, Vermont, and Connecticut) to gain full review of CAT applications in federal circuit courts.

In the Second Circuit, a pair of decisions – *Williams v. Barr*, 960 F.3d 68 (2d Cir. 2020) and *Jack v. Barr*, --- F.3d ---, 2020 WL 4006785 (2d Cir. July 16, 2020) – limit the immigration consequences of Connecticut and New York convictions involving possession or sale of firearms. *Williams* and *Jack* involve the “categorical approach” – a procedure for determining the immigration consequences of state convictions which stems from a line of Supreme Court federal sentencing cases. The categorical approach looks to the plain text of the statute of conviction, and not to the underlying facts of the crime itself, to determine whether the minimum conduct criminalized by the statute necessarily matches the federal generic offense.

In *Williams*, petitioner Robert Junior Williams was born in Jamaica in 1989 and came to the United States in 2005 as a lawful permanent resident. In 2016, he pleaded guilty to carrying a pistol or revolver without a permit in violation of Connecticut General Statutes §29-35(a) and of carrying a dangerous weapon in violation of Connecticut General Statutes §53-206. He was subsequently charged by DHS with being removable for a “firearm offense” as defined by the Immigration and Nationality Act (INA).

The *Williams* Court concluded that his convictions were not removable offenses and that he was therefore entitled to retain his lawful permanent resident status. In so holding, the *Williams* Court looked to Connecticut's statutory definition of “pistol or revolver,” and noted that Connecticut's definition

allowed a defendant to be prosecuted for possessing an antique firearm that is loaded. The Court compared that offense to the federal definition contained in 18 U.S.C. §921(a)(3), and found that under federal law, a defendant *cannot* be prosecuted for possession of an antique firearm, regardless of whether the firearm is loaded or unloaded. The *Williams* Court therefore found that there was no categorical match between the Connecticut conviction and the federal definition of “firearm offense” – or in plain terms, that a person could be prosecuted in Connecticut for conduct that was not criminal under federal law (possessing a loaded antique firearm).

The *Williams* Court next considered the “realistic probability” test, which stems from the Supreme Court decision in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007). In *Duenas-Alvarez*, the Supreme Court observed that, if there is a categorical mismatch between a state conviction and a federal offense, a court may need to consider whether there is “a realistic probability, as opposed to a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime.” 549 U.S. at 193. In this case, that would mean that Mr. Williams would have to prove that Connecticut actually prosecuted people for possessing loaded antique firearms. Here, however, the *Williams* Court found that the realistic probability test simply did not apply because the plain terms of the statute were broader than the federal offense, and “[w]hen the state law is facially overbroad, we look no further.” 960 F.3d at 78.

Jack applied the same analysis to New York law. In *Jack*, the Second Circuit considered the petitions of two New York residents, Jervis Jack and Ousmane Ag, both of whom are lawful permanent residents who were ordered removed based on New York firearm convictions. The *Jack* Court noted that all of the relevant convictions involved New York’s statutory definition of “firearm,” which, like the statute at issue in *Williams*, allowed a defendant to be prosecuted for the possession of a loaded antique firearm. Applying *Williams*, the *Jack* Court concluded that the New York convictions encompass a broader range of conduct than the federal offense, and found that the realistic probability test does not apply because the statute is overbroad on its face. The *Jack* Court thus ordered that Mr. Jack and Mr. Ag’s removal proceedings be terminated and their lawful permanent resident status be restored.

The practical effect of *Williams* and *Jack* is that Connecticut convictions involving the definition of “pistol or revolver,” and New York convictions involving the definition of “firearm,” do not constitute “firearm offenses” under the INA, and therefore do not make a noncitizen deportable. Noncitizens who were previously ordered removed because of Connecticut or New York gun convictions can potentially apply *Williams* and *Jack* to regain their previous immigration status. Any noncitizen who believes they may be affected by these decisions can write to the PLS Immigration Unit in Albany (41 State St., Suite M112, Albany, NY 12207) or Buffalo (14 Lafayette Square, Suite 510, Buffalo, NY 14203) for more information.

Notices

Your Right to an Education



If you have a learning disability, need a high school diploma, or have questions about access to academic or vocational programs please write for more information to:

Maria E. Pagano
 Education Unit
 Prisoners’ Legal Services of New York
 14 Lafayette Square, Suite 510
 Buffalo, New York 14203
 (716) 854-1007

**Pro Se
114 Prospect Street
Ithaca, NY 14850**

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, Eastern, Edgecombe, Great Meadow, Greene, Hale Creek, Hudson, Marcy, Mid-State, Mohawk, Otisville, Queensboro, Shawangunk, Sing Sing, Sullivan, Taconic, Ulster, Wallkill, Walsh, Washington, Woodbourne.

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

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

ITHACA, 114 Prospect Street, Ithaca, NY 14850

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

NEWBURGH, 10 Little Britain Road, Suite 204, Newburgh, N.Y. 12550

Prisons served: Downstate, Fishkill, Green Haven.

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

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

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