Pro Se

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Court Holds that First Amendment Protects the Refusal to Act as a Snitch

Reversing a lower court decision finding that the First Amendment did not protect a prisoner's right to refuse to be an informant (snitch), the Second Circuit, in *Burns v. Martuscello*, 890 F.3d 77 (2018), broke new ground by holding that when prisoners refuse to snitch or to lie when directed to so by corrections staff, they are engaging in conduct protected by the First Amendment.

The facts that produced this decision are as follows. In 2010, Mark Burns (Burns) was working in the Coxsackie C.F. commissary when, he says, a can fell off a shelf, hitting his face and neck. As a result of the accident his face was red and that he had a scratch on his neck. A Captain and a Sergeant however, told him that his wife had called and said that she had told them another inmate had cut him. Burns protested this and referred them to Officer Jablonsky (Jablonsky) who had witnessed the accident and documented it in an inmate injury report. According to Burns, the Captain and the Sergeant said that based on his wife's call, they were recommending Involuntary Protective Custody (IPC) but that Burns could avoid this if he agreed to give them the name of the inmate who had assaulted him and be a snitch on an ongoing basis. When Burns refused, the Sergeant wrote an IPC recommendation. Burns requested that Jablonsky be called as a witness.

While the hearing was pending, Burns states, the Captain and the Superintendent approached him about becoming a snitch. This time, the two said that they believed Burns had been assaulted by staff, and unless he agreed to name his assailant and be a snitch on an ongoing basis, he would remain in IPC indefinitely.

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Little Boxes . . . All the Same

A Message from the Executive Director, Karen L. Murtagh

Have you ever heard of the song, "Little Boxes" written by Malvina Reynolds and performed by Pete Seeger? I'll reprint the lyrics at the end of this piece, but the gist of the song is that it is political satire, poking fun at the explosion of suburbia in America in the 1960's, the shoddy construction of the suburban developments (ticky-tacky) and the conformity that came with it.

When I was a young girl, I spent many summer nights sitting around a campfire playing guitar with my siblings and friends and singing all sorts of campfire songs, including "Little Boxes." I had forgotten about that song until recently, when a whole bunch of little boxes were delivered to my house. As I was unpacking them, I began thinking about the good, the bad and the ugly of boxes.

The good is that they are incredibly useful to transport stuff. They keep things protected and compact. They are often used in gift giving to hide the contents so that it will be a surprise to the person opening it! They come in all sizes and weights and, when you are done with them, you can easily collapse them and either store them for future use or put them in a recycling bin.

The bad is that, for the most part, you can't see inside them. Unless you open them and remove the contents, you don't really know what is there. If you leave things in boxes for too long, they often become old and obsolete. I was recently going through a number of boxes that I had stored up in my attic and realized that most of the things in them were no longer of any use. Old clothes that were out of style and musty. An old computer monitor, no longer compatible with any current technology. Old law books with overruled cases and outdated laws. I had boxed these things up years ago thinking that someday I would use them again, but then I put them away, time passed and I forgot about them.

The ugly is that we often use boxes for the wrong purpose. Boxes are not meant for people, they are meant for things. The only time people should be put in boxes, if ever, is when they are no longer alive. And yet, over the years, we have developed all sorts of boxes to put people in.

In the mid-1950's, when cheap suburban developments started popping up all over America, many people flocked to fill them. In the song "Little Boxes", these houses are referred to as boxes, separated only by color but, below the colors, any differences in the houses (and the people who lived in them) were superficial; uniqueness gave way to conformity for those who lived in these boxes.

And then came the boxes on employment applications. Boxes for sex (only options, male or female), boxes for U.S. citizenship (yes or no), and boxes for criminal history. Many employers require perspective employees to check a box if they have a criminal record. This process prevents applicants with a criminal background from having any chance to get their foot in the door, despite their qualifications, but it gives the employer peace of mind.

Over the past several years there has been a movement to "ban the box" – a reference to the removal of the box from employment applications. Some of these efforts have been successful, especially here in New York where New York's largest cities – Buffalo, Rochester, New York City and Albany have all enacted legislation prohibiting employers from asking applicants about their past criminal record on job applications.

Buffalo was first to enact a "ban the box" law in 2013, Rochester followed in 2014, New York City passed "ban the box" legislation referred to as the Fair Chance Act (FCA) in 2015 and Albany joined the ranks in 2017. To be clear, the new laws do not prevent employers from conducting background checks. Instead, employers must first interview the applicant and issue a conditional job offer; a process designed to prevent employers from judging an applicant solely on their criminal record. Once a conditional job offer is made and an employer runs a background check, the job offer can *only* be rescinded if the employer determines: (1) that the applicant's criminal conviction is closely related to the job, or, (2) that employing the applicant would constitute a risk to people or property.

Another box that has crept into use is on the Common Application and most other college applications where a box has been added requiring a perspective student to indicate whether he/she has ever been adjudicated guilty or convicted of a misdemeanor or felony. Again, preventing an individual from having any chance at bettering him/herself based solely on a checkmark in a box, but giving the college peace of mind.

Over the past two years, there has been movement in New York on this issue also. In 2016 the State University of New York announced a major policy revision stating that the university system would be "banning the box" – eliminating it from the 2018 admissions application. However, there has been some criticism regarding the new policy because, upon a closer look, it doesn't appear as if the box has been banned entirely but rather, moved to another place in the application process. Now students only have to check a box for a felony conviction if they seek on-campus housing or participate in internship, clinical, field or study abroad programs. The problem with this is that most New York State Universities require first year students to stay on campus and a large percentage of students either study abroad or engage in internships, or both. As such, as noted by William G. Martin, a professor of Sociology at SUNY-Binghamton: "While well-intentioned, the new policy all too easily renders the formerly incarcerated segregated, second-class students, excluded and alienated from normal student life and social rights."

And finally, over the past several decades, correctional facilities across the country have increasingly placed people in solitary confinement (the box) as punishment for misconduct or to separate them from the general population. In response there has been a nationwide push to limit the use of solitary confinement. In New York State, due to litigation by PLS, Prisoners' Rights Project, Disability Advocates, Inc., and New York Civil Liberties Union and legislative efforts by various advocacy groups, there has been a movement to reduce the number of people that are sent to the box and the amount of time a person spends in the box, but we still have a long way to go.

Whether it is a rejection of conformity, an effort to prevent people from discrimination or an acknowledgment that solitary confinement is physically and mentally harmful to people, the consistent theme throughout our history is that boxes are meant for things, not people.

LITTLE BOXES
By Malvina Reynolds

Little boxes on the hillside
Little boxes made of ticky tacky
Little boxes
Little boxes
Little boxes all the same.

There's a green one and a pink one
And a blue one and a yellow one
And they're all made out of ticky tacky
And they all look just the same.

And the people in the houses all go to the university
And they all get put in boxes, little boxes all the same
And there's doctors and there's lawyers
And business executives
And they're all made out of ticky tacky and they all look just the same.

And they all play on the golf course and drink their martini dry
And they all have pretty children and the children go to school
And the children go to summer camp
And then to the university
And they all get put in boxes, and they all come out the same.

And the boys go into business and marry and raise a family
And they all get put in boxes, little boxes all the same.

There's a green one, and a pink one
And a blue one and a yellow one
And they're all made out of ticky tacky
And they all look just the same.

…Continued ***from Page 1***

At the close of the hearing, the hearing officer accepted the recommendation and placed Burns in IPC. Burns remained in IPC from June 2010 through January 2011. He was in his cell 23 hours a day and his access to the library, religious services and other prison resources was sharply limited. During this period, Burns reports, the Sergeant and the Superintendent repeatedly demanded that he serve as a snitch. During this time, Burns filed many grievances relating to his IPC status.

Upon his release from IPC, Burns filed a §1983 action claiming that by retaliating against him for the exercise of his First Amendment rights, the defendants had violated his right to free expression. Following the close of discovery, the defendants moved for summary judgment.

A court will grant a motion of summary judgment where the application of the law to the undisputed facts shows that judgment should be granted in favor of the moving party. With respect to the First Amendment claim, the district court held that Burns had not engaged in protected speech since no court had held that there was a right to refuse to serve as a prison informant.

In reviewing a grant of summary judgment, the appellate court does not defer to the findings of the lower court. Rather, it looks at the facts in the light most favorable to the party against whom the motion was made (the non-moving party) and draws all reasonable inferences in that party's favor.

To survive a motion for summary judgment, a retaliation claim must show:

1. That the speech or conduct was protected;
2. That the defendant took adverse action against the plaintiff; and
3. That there was a causal connection between the protected speech and the adverse action.

Reviewing the record before it, the Second Circuit first noted that while neither it nor the U.S. Supreme Court had ever ruled on this issue in a prison context, in *Jackler v. Byrne*, 658 F.3d 225 (2d Cir. 2011), the Second Circuit had found that 1) the refusal by a probationary police officer to retract his truthful report and make statements that would have been false constituted speech by the officer as a citizen on a matter of public concern and that 2) after the probationary officer refused to retract his truthful report and make statements that would have been false the defendants were not entitled to retaliate against him in the interest of promoting efficient operation within the police department.

The *Jackler* decision also noted that the First Amendment protects the "right to decide what to say and *what not to say*." (emphasis added). To compel a person to speak, the *Jackler* decision went on, "is a severe intrusion on the liberty and intellectual privacy of the individual." And, while recognizing that there is some difference between compelled speech and compelled silence (the context in which free speech issues more typically arise), the U.S. Supreme Court in *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 796-97 (1988) stated, "[I]n the context of protected speech, the difference is without constitutional distinction[,]" as freedom of speech must include the decision not to speak as well as the decision to speak.

A prisoner retains those First Amendment rights that are not inconsistent with his/her status as a prisoner. In deciding whether a prisoner's First Amendment rights have been violated in a "single incident" (as opposed to pursuant to a policy), the court looks at whether the limitation on speech is reasonably related to legitimate penological interests. The defendants

argued that their actions were in the service of prison safety. However, the court found, forcing an inmate to snitch, at least on the facts presented here (demands that Burns falsely implicate another inmate or a member of the security staff in an assault on him) is not reasonably related to legitimate penological interests. Thus, the Court held, Burns had a First Amendment interest in refusing the demands of guards to provide untruthful information.

With respect to the issue of requiring an inmate to provide truthful information on an ongoing basis, the court concluded that safety risks as well as legitimate concerns about personal loyalty play a role in the decision to reveal information and incriminate others. In addition, the Court found that forcing an inmate to serve as an informant on an ongoing basis is not related to maintaining prison safety. For example, the court found that forcing inmates to serve continuously as snitches may well prompt further violence, as others may seek retribution for perceived betrayals. Thus, the court concluded, coercing inmates to serve as informants is at best an exaggerated response to prison concerns. "In light of the unobtrusive but foundational nature of the right not to speak," the court wrote, "we think it clear that inmates generally retain a First Amendment interest in declining to speak."

Finally, the court held that on the evidence before it, there was a basis for concluding that that the defendants had retaliated against Burns' exercise of his First Amendment rights when the defendants put him in IPC for over six months, thereby preventing him from moving within the facility, socializing, and engaging in prison programming.

Noam Biale and Michael Gibaldi of Sher Tremonte, LLP represented Mark Burns in this §1983 lawsuit.

News and Notes

The Right to Special Education in Prison, SHU and Keeplock

Prisoners who are under 22 years old and have a disability must be given special education while they are in prison. This includes when they are in SHU or Keeplock. For more information about a prisoner's right to a special education, including when a prisoner is in SHU or Keeplock, write to Maria Pagano in the Buffalo Office of Prisoners' Legal Services, 14 Lafayette Square, Suite 510, Buffalo, New York 14203.

A federal law called the Individuals with Disabilities Education Act or IDEA requires DOCCS to give prisoners special education services if they have a disability. Special education is a teaching plan that is designed for a student based upon his or her needs. The plan is called an Individualized Education Plan or IEP. An IEP can require that a student be given an aide to help him or her, be in smaller classes (fewer students in the class), go to a resource room, or attend classes with more than one teacher. An IEP can also require that DOCCS provide services such as speech or physical therapy, counseling, assistive devices, and interpreter services.

Sometimes people don't know whether they had an IEP when they were last in school. These are signs that a student had an IEP:

- The student was in smaller classes.
- The student had a classroom aide.
- The student went to a resource room.
- The student had other services like counseling, physical therapy, also called PT, or speech therapy.

People who got services such as those listed here while they were in school probably had an IEP. These people should also be getting the same services while in prison. A student in prison who is entitled to these services should get them even if he or she is in SHU or Keeplock.

If someone can't remember whether he or she had an IEP, they should think about what it was like in their last school:

- Were they in smaller classes?
- Did they have an aide?
- Did they go to a resource room?
- Did they get services like counseling, physical therapy, also called PT, or speech therapy?

If the answer to any one of these questions is yes, they probably had an IEP. And if they had an IEP the last time they were in school, they should be getting the same services while they are in prison, even if they are in SHU or Keeplock.

If a prisoner thinks that he or she should be getting special education but DOCCS has not been providing him or her with the kinds of services that were provided in school, the prisoner can tell the following people that he or she needs special education services:

(1) The prison's Committee on Special Education (CSE) chairperson;

(2) an education supervisor;

(3) a parent; or

(4) a professional security staff member.

Once a prisoner has an IEP, in most cases DOCCS cannot take him or her out of a special education setting – for example, by putting him or her in a cell study program – unless the prisoner opts out of education or DOCCS shows that due to security issues, the prisoner's need for special education cannot be met.

If a prisoner thinks that he or she should be receiving special education services, has not been receiving the services that he or she got before coming to prison, and is interested in learning more about his or her rights to a special education, he or she can write to Maria Pagano at the address provided in the first paragraph.

Letters to the Editor

Dear ***Pro Se***,

I want to thank you for sending the August 2018 issue of ***Pro Se***. I've been incarcerated for almost five years now. All during this time, I've received my issues of ***Pro Se*** every two months. ***Pro Se*** had helped me to understand the law and legal issues concerning the courts. I've always looked forward to receiving my next issue of ***Pro Se*** and at times when I felt down and out during my incarceration, ***Pro Se*** always lifted my spirits and gave me hope. So thank you for helping me and numerous other individuals.

I would also like to inform you not to send me the October 2018 issue of ***Pro Se*** because I'm going home on September 19! So for everybody that reads ***Pro Se***, Keep your head up and always speak up for you rights! Your day to go home will come too!

Sincerely,

Eddie Nunez

Letters to the Editor

Pro Se accepts submissions for Letters to the Editor. Letters are printed when space in an issue is available. Letters to the editor should be addressed to: ***Pro Se***, 114 Prospect Street, Ithaca, NY 14850, ATTN: Letters to the Editor.

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

PRO SE VICTORIES!

***Matter of Jack Maddaloni v. NYS BOP*, Index No. 0623/2018 (Sup. Ct. Dutchess Co. June 13, 2018). Jack Maddaloni successfully challenged the Board of Parole's denial of his application for release to parole supervision.** Reversing the denial, the court held that the Board had based its denial solely on the seriousness of the crime. The court noted that this violated the Board's responsibility to consider a wide range of statutory factors. The court ordered that the Board conduct a re-hearing within 60 days. On September 10, 2018, Mr. Maddaloni was released to parole supervision.

***Matter of Edwin Parra v. Anthony Annucci*, Index No. 7550-17 (Sup. Ct. Albany Co. July 11, 2018). Edwin Parra successfully challenged a Tier III hearing on the ground that by failing to determine the reason that Mr. Parra's requested witnesses had refused to testify, the hearing officer had violated Mr. Parra's right to call witnesses.** The court remanded the matter for a new hearing.

Pro Se Victories! *features summaries of successful unreported pro se litigation. In this way, we recognize the contribution of pro se litigants. We hope that this column will encourage our readers to look to the courts for assistance in resolving their conflicts with DOCCS. The editors choose which unreported decisions to feature from the decisions that our readers send us. Where the number of decisions submitted exceeds the amount of available space, the editors make the difficult decisions as to which decisions to mention. Please submit copies of your decisions as Pro Se does not have the staff to return your submissions.*

STATE COURT DECISIONS

Parole

Court Finds Rescission of Parole Not Supported By Substantial Evidence

In 1979, then 19 year old John Duffy killed his 15 year old friend. Convicted of murder in the second degree, John Duffy was sentenced to 20 years to life. At each of his 9 parole release hearings, the family of the victim of Mr. Duffy's crime vigorously opposed his release. Nonetheless, in 2016, following the 9th parole hearing, the Board approved Mr. Duffy's release. However, prior to his release, the parole board suspended Mr. Duffy's release so that it could view two videotapes made by the victim's family. The videotapes had been submitted to the Board at Mr. Duffy's 2001 and 2007 parole release hearings but were not made a part of Mr. Duffy's parole file. After viewing the videos, the Board conducted a rescission hearing and rescinded Mr. Duffy's parole release open date. Mr. Duffy filed an Article 78 proceeding challenging the rescission.

In *Matter of Duffy v. NYS Board of Parole*, 163 A.D.3d 1123 (3d Dep't 2018), the court began its analysis by stating that the Board of Parole was only authorized to rescind the petitioner's parole if "there was substantial evidence revealing 'significant information' that existed before respondent made the parole release decision but 'was not known by [respondent]." As support for this principle, the court cited 7 NYCRR 8002.5(b)(2)(i) and 8002.5(d)(1) and *Matter of Thorn v. NYS BOP*, 66 N.Y.S3.d 712 (2017). The court then noted that at the 2016 hearing it was undisputed that respondent had taken into account the traumatic impact that the crime had had on the victim's family and nonetheless, granted the petitioner parole. For that reason, the court found that the

decision to rescind parole was not supported by substantial evidence.

The court did not end its decision there, going on to write that the videotaped statements submitted after the 2016 hearing were profoundly compelling and heart wrenching in revealing the family's grief and suffering. That said, the court wrote, the family statements submitted at previous hearings were similarly highly articulate and impassioned. Indeed, the court noted, some of the most moving materials shown in the videotapes that were submitted after the 2016 hearing were of photographs and a remembrance quilt, both of which had been introduced at previous hearings, as had the videotapes themselves. Thus, the court found, respondent was fully on notice, from the time of petitioner's first parole hearing, of the substance of the videotapes submitted after the 2016 hearing.

Apparently, the court wrote, over time, various submissions to the petitioner's parole file were separated and put in storage and did not find their way back to the Board until after the 2016 parole decision. The failure to consider these materials at the 2016 hearing cannot rationally be found to convert materials that had been provided to the Board 9 and 15 years earlier into new information that was not previously available or known.

The court also compared the facts underlying the rescission in Mr. Duffy's case with the facts underlying other unsuccessful judicial challenges to parole rescissions based on "new information" provided by victims or the family members of victims. In these cases the court found that the victim impact statements involved new factual information about which the Board had not previously known, either because the victims had not provided statements or had not been given the chance to do so. The court's review of the case law did not reveal any other cases involving a parole rescission decision that was based on additional input from a victim or the family member of a victim who had submitted an impact statement to the Board at a prior hearing.

There was a dissent to this decision in which three members of the court joined.

Mr. Duffy was released to parole supervision three weeks after this decision was issued.

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Cynthia Conti Cook of NYC Legal Aid Society represented John Duffy in this Article 78 proceeding.

Failure to Consider CPDO Leads to Rehearing

Mark Lackwood was sentenced to 15 years to life. After being denied parole 8 times, he filed an Article 78 challenge to his 2017 denial, arguing that because he was subject to a deportation order, the Board had erred by failing to consider his release for deportation only. The respondent argued that the Board had considered this factor.

In *Matter of Lackwood v. NYS BOP*, Index No. 2464/2017 (Sup. Ct. Dutchess Co. July 6, 2018), the court first noted that "a determination of the Board of Parole, **if made after consideration of the statutory factors**, is not subject to judicial review absent a showing of irrationality bordering on impropriety." (Emphasis added). The court found, the Board is required by Executive Law §259-i(2)(c)(A)(iii) and (iv) to consider any deportation order issued by the federal government, any recommendation for deportation made by the DOCCS Commissioner, and the petitioner's release plans.

After reviewing the transcript of the hearing and the decision of the Board, the court concluded that in making its decision, the Board focused primarily on the seriousness of the petitioner's offenses and his criminal history. It

noted that while the petitioner mentioned the deportation order, a job offer in Costa Rico, and living with his parents in Costa Rico, the record was devoid of evidence that the Board gave any consideration either to 1) the existence of the deportation order or 2) the petitioner's release plans. Further, the court found, the Board had failed to balance the seriousness of the petitioner's crimes against his very positive institutional record, low COMPAS score, program completion and letters of support. Finally, the court found, the Board's "concern" about post-release substance abuse was not supported by the record.

Based on its review of the evidence in the record, the court concluded that the denial of parole release showed "irrationality bordering on impropriety" and that the Board had failed to consider petitioner for release to deportation only. In addition, the court found that the Board's determinations that there was a reasonable probability that petitioner would not live and remain at liberty without again violating the law and that his release would be incompatible with the welfare of society and would so deprecate the seriousness of the crime as to undermine respect for the law, were without support in the record.

Based on these determinations, the court granted the petition, annulled the determination, and ordered that a new hearing be conducted within 60 days. Following the rehearing, petitioner was granted an open date and was released from prison on September 18, 2018.

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Martha Raynor of Lincoln Square Legal Services (Fordham University School of Law) represented Mark Lackwood in this Article 78 proceeding.

Court Rules Petitioner Violated PRS While at Fishkill RTF

When the petitioner in *Matter of Bennett v. Annucci*, 79 NYS3d 77 (2d Dep't 2018), was released to post-release supervision (PRS), he was transferred to a unit within Fishkill C.F. known as the residential treatment facility (RTF). While in the Fishkill RTF, he engaged in conduct that was found to have violated the terms of his PRS. After a hearing at which Mr. Bennett was found guilty, the hearing officer imposed a time assessment. Mr. Bennett then filed an Article 78 challenging his removal from PRS, arguing that because he was housed in a prison that did not comply with the statutory requirements for RTFs, he had never actually been released to PRS and therefore DOCCS lacked the authority to revoke his release.

The court rejected this argument, finding that petitioner had indeed been released to PRS and transferred to an RTF, a condition of parole which is contemplated by Penal Law §70.45(3):

"[T]he board of parole may impose as a condition of [PRS] that for a period not exceeding 6 months immediately following release from the underlying term of imprisonment the person be transferred to and participate in the programs of an [RTF]."

Under these circumstances, the court wrote, regardless of whether the Fishkill RTF complied with the statutory requirement for RTFs, the petitioner was subject to the PRS conditions and could be properly charged with violating those conditions. As this was the only basis for challenging the hearing, the court dismissed the petition.

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Robert Newman of NYC Legal Aid Society represented Rahdee Bennett in this Article 78 proceeding.

Miscellaneous

Court Finds Petitioner May be Entitled to Costs and Fees in FOIL Dispute

In June 2015, Matthew Cobado made a FOIL request to the State Police seeking documents relating to his criminal prosecution. That month, he received an acknowledgment of his request that also said he would receive a written response in December 2015. When December came and went without receiving a response, Mr. Cobado sent a follow up request. In early January 2016, the State Police said Mr. Cobado had not provided enough information in his request for the police to identify the records that Mr. Cobado was seeking. In response, in February, Mr. Cobado provided the missing information. Mr. Cobado's letter with the formerly missing information took the form of a second FOIL request for the same information. The State Police wrote that he could expect a written response to his request by August 2016. Mr. Cobado then complained about the time that had elapsed since his first request, and said that the State Police had 10 days to respond. When the 10 days expired without response, Mr. Cobado submitted an administrative appeal. Not having received a decision on his appeal, on August 29, 2016, Mr. Cobado filed an Article 78 challenge to the constructive denial of his request. A constructive denial occurs when an agency fails to respond to a FOIL request within the statutory or regulatory deadlines set for responding.

In October 2016, petitioner received a decision from the State Police on his administrative appeal. The decision granted him access to some of the records that he had requested but denied access to others based on statutory exemptions. Respondents then moved to dismiss the Article 78 as moot. In *Matter of Cobado v. Benziger*, 163 A.D.3d 1103 (3d Dep't 2018), the court agreed that the Article 78 was moot, citing *Matter of DeFreitas v. NYS State Police Crime Lab*, 35 N.Y.S.3d 598 (3d Dep't 2016). The *DeFrietas* court held that "where a petitioner receives an adequate response to a FOIL request during the pendency of his or her CPLR Article 78 proceeding, the proceeding should be dismissed as moot because a determination will not affect the rights of the parties."

That conclusion related to only one issue before the court. The other issue was whether the petitioner was entitled to the costs and fees relating to his Article 78. With respect to the costs and fees issue, the Appellate Division found that the Supreme Court had erred as a matter of law when it concluded that the statutory prerequisites for such an award had not been met. ("Statutory perquisites" are conditions required by a statute that must be met in order – in this instance – for a petitioner to be eligible for costs and fees).

A court is authorized to order an award of fees and costs in a FOIL case, the court wrote, when the petitioner has substantially prevailed and, as is relevant in this case, the agency failed to respond to a request or appeal within the statutory time. A petitioner has substantially prevailed when, in response to litigation relating to a FOIL request, he or she receives all of the requested information to which s/he is entitled. The voluntariness of an agency's disclosure after the commencement of the Article 78 proceeding does not **preclude** (bar) a finding that the petitioner has substantially prevailed. *See, Matter of Madeiros v. NYS Educ. Dep't*, 30 N.Y.3d 67, 79 (2017).

In this case, the court wrote, the FOIL officer failed to comply with the statutory deadlines for acknowledging receipt and the deadlines that she (the FOIL Officer) set in her untimely responses. And, petitioner did not receive a timely response to his appeal. While

recognizing that the petitioner did not timely appeal the June 2015 request and there was an additional issue with his 2016 request, the court focused on the fact that only after the petitioner filed the Article 78 did the State Police send a response to his FOIL request and it was only then that petitioner was given the documents to which he was entitled. Under these circumstances, the court wrote, the respondents failed to comply with the statutory time frames and the petitioner substantially prevailed. As the lower court had reached the opposite conclusion, the Appellate Division held that its decision was in error.

The Appellate Court did not calculate the amount of costs and fees to which the petitioner was entitled. Instead, it remitted (sent back) the matter to the lower court to determine whether petitioner is entitled to counsel fees and/or litigation costs, and if so, the amount to which he is entitled.

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Matthew Cobado represented himself in this Article 78 proceeding.

FEDERAL COURT DECISIONS

District Court Finds that Administrative Remedies Were Not Available to the Plaintiff

Background

In 2015, Stuart Dizak filed a §1983 action alleging that in retaliation for Mr. Dizak's exercise of his First Amendment rights, Officer Hawks and several other officers had assaulted him and that Officer Hawks then wrote a ticket falsely charging Mr. Dizak with rule violations. *See, Dizak v. Hawks,* 2018 WL 1894542 (N.D.N.Y. January 9, 2018). When the incident that gave rise to this lawsuit began, Mr. Dizak was walking through Greene C.F., carrying a complaint to the Green C.F. Superintendent about Officer Hawks' interference with Mr. Dizak's right to practice his religion.

Following the incident, which took place on December 11, 2013, Mr. Dizak timely submitted a grievance about the assault and a related retaliatory Tier III. On January 2, he was informed that his grievance, No. GNE-**7716**-12 (hereinafter Grievance 7716), had been referred to the Superintendent. On January 16, Mr. Dizak received a response from the Superintendent to Grievance No. GNE **7718**-12 (hereinafter Grievance 7718). Mr. Dizak immediately informed the Superintendent that the grievance he had submitted was Grievance 7716 and that the Superintendent's response did not address the use of excessive force that was the subject of Grievance 7716. The Superintendent did not respond.

It was not until after the time to appeal the Superintendent's response had expired that Mr. Dizak was informed that he had been given the wrong grievance number; in fact, his grievance was No. 7718. Responding to this news, he asked the grievance supervisor to forward his appeal to the Central Office Review Committee. She refused to do so, advising him that the appeal was untimely.

When Mr. Dizak attempted to appeal to the Central Office Review Committee (CORC), his attempt was rejected by Defendant Bellamy who wrote that he had been given the wrong grievance number but had been advised subsequently of the right number. She did not acknowledge that the facility staff had not given Mr. Dizak the correct grievance number until his time to appeal had expired.

In March 2013, Mr. Dizak filed a grievance contesting the failure to accept his appeal of grievance 7718. That grievance was denied and Mr. Dizak did not appeal to CORC.

Exhaustion of Administrative Remedies

After the defendants had filed their answer to Mr. Dizak's complaint, they moved for summary judgment, asserting that Mr. Dizak had failed to "exhaust his administrative remedies." Forty-two United States Code §1997-e(a) provides that "until such administrative remedies as are available have been exhausted," no action may be brought with respect to prison conditions under §1983 by a prisoner. This section of the law is part of the Prison Litigation Reform Act or PLRA.

The administrative remedies available to prisoners in DOCCS custody, are found in Directive 4040, the Inmate Grievance Program. This Directive sets forth a three step process for grievances alleging harassment of prisoners by staff:

Step 1: Within 21 days of the incident about which the prisoner is complaining, the prisoner must file a complaint with the facility IGP clerk. Harassment Grievances are numbered and then given to the Superintendent for decision. The Superintendent must respond within 25 days. Where the Superintendent does not respond within 25 days, the prisoner must appeal (see next step).

Step 2: Within 7 days of receipt of the Superintendent's decision, the prisoner must file a notice of decision to appeal to CORC with the facility Inmate Grievance Clerk. CORC is required to decide the appeal within 30 days.

Where the prisoner fails to follow each of the required steps, including receiving a decision from CORC, and then files a §1983 lawsuit, he has failed to exhaust his administrative remedies. A great many lawsuits brought by prisoners are dismissed for failure to exhaust administrative remedies.

Recognizing that in some cases, the administrative remedies provided by departments of corrections are not actually available to a prisoner, the U.S. Supreme Court has recognized an exception to the requirement that prisoners exhaust their administrative remedies. In *Ross v. Blake*, 136 S.Ct. 1850 (2016), the Court identified three circumstances in which a court might find that administrative remedies are not available:

1. The grievance system operates as a dead end with officers unable or consistently unwilling to provide any relief to **aggrieved inmates** (inmates who have filed grievances).

2. A grievance system might be so **opaque** (unclear), that it is, practically speaking, impossible to follow;

3. Prison administrators **thwart** (stop) prisoners from using the grievance system by **machination** (scheming), **misrepresentation** (giving prisoners bad advice about the grievance process) or **intimidation** (threats).

Applying the law to the facts before it, the *Dizak* court first found that because the plaintiff did not appeal Grievance 7718, the defendants had successfully shown that he failed to exhaust his administrative remedies. The burden then shifted to the plaintiff to show that the administrative remedies were not available to him. On this issue, the court found in favor of the plaintiff.

First, the court noted, the parties agree that:

1. The plaintiff was informed that his grievance number was 7716.

2. The superintendent's decision was labeled grievance number 7718.

3. The plaintiff was not advised of the error in the grievance number until "long after" the time to appeal the

superintendent's January 16 decision had expired.

While the defendants argued that the plaintiff should have known that the Superintendent's decision, although differently numbered, was in fact a decision of the plaintiff's grievance, the court did not agree. Rather, the court held, the link between the December 11, 2012 incident and the Superintendent's determination was less than clear and one that the summary judgment record shows left the plaintiff confused.

The court then found that 1) the confusion that arose from the mistake in numbering plaintiff's grievance, 2) the failure of the Greene grievance office to inform Plaintiff of the mistake before the time to appeal the Superintendent's determination to CORC had expired; and 3) the refusal of DOCCS staff to fix the problems that resulted from the Greene grievance office mistake, including the plaintiff's failure to file a timely appeal to CORC of the Superintendent's decision, rendered the DOCCS IGP procedure unavailable to plaintiff with regard to Grievance 7718.

Based on this analysis, the court denied the defendants' motion for summary judgment with respect to the excessive force and retaliation claims against Defendant Hawks. This January 9, 2018 report and recommendation issued by the Magistrate Judge was approved and adopted by the District Court judge on February 20, 2018.

Stuart Dizak represented himself in this Section 1983 action.

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PRO SE PRACTICE

THE DNA DATABANK AND DNA DATABANK FEE

In 1994, the Legislature passed a law requiring "designated offenders" – persons convicted of certain violent felonies, sex offenses and escape offenses – to give blood samples for forensic DNA testing and data banking. As originally enacted, the statute only applied to persons convicted on or after January 1, 1996.

In 1999, the Legislature re-wrote the law. The 1999 law greatly expanded the list of "designated offenses" for which a DNA sample was required. For most offenses, it also provided that a DNA sample can be taken even if the individual involved was convicted before the effective date of the law, so long as he or she is still serving the sentence for the offense. For other offenses added to the statute in 1999, however, particularly drug offenses, a DNA sample could only be taken if the individual was convicted o*n or after December 1, 1999*. (For yet a third category of offenses, primarily those involving escape and absconding, blood could be taken only if the individual was *also* convicted of some *other* "designated offense" within the last five years.)

In 2005, then Governor Pataki signed an Executive Order requiring the Department of Correctional Services and the Division of Parole, now merged to form the Department of Corrections and Community Supervision, or DOCCS, to take a DNA sample from all inmates as a condition of release to temporary release or to parole. Under the Governor's order, that condition applies regardless of whether the inmate has been convicted of one of the "designated offenses" specified in the law.

Most recently, in 2012, the Legislature revised the law to provide that anyone convicted of a felony or a misdemeanor – the only exception being criminal possession of marijuana in the fifth degree – is required to provide a DNA sample.

This memo answers basic questions that an incarcerated individual might have about the DNA database law.

DOES THE DNA DATABANK LAW APPLY TO ME?

Yes. Because you have been convicted of a felony, you are required to provide a DNA sample.

WHERE CAN I READ THE LAW?

The DNA databank law is codified in the New York State Executive Law, at §995(a-f). In addition there are regulations concerning the law, published by the New York State Division of Criminal Justice Services (DCJS) which can be found at 9 NYCRR [New York Codes, Rules and Regulations] §§6190 through 6192. Your law library should have these materials.

IS THE DNA DATABANK LAW LEGAL?

Most states now have DNA databank laws similar to that of New York. DNA databank laws have so far survived every legal challenge that has been brought against

them. Courts have held, for example, that these laws do not violate a prisoner's:

- First Amendments right to practice his/her religion;
- Fourth Amendment right against unreasonable searches and seizures;
- Fifth Amendment right against self-incrimination;
- Eighth Amendment right against cruel and unusual punishment; or
- Fourteenth Amendment right to equal protection, due process and privacy.

Courts have also held that retroactive application of these statutes – that is, their application to crimes committed before the statute was passed – do not violate the *ex post facto* clause of the constitution or the double jeopardy clause. Finally, a court held that the adoption of regulations requiring parolees to submit to DNA testing is within authority of the Division of Parole. *See, Matter of Gallo v. Pataki*, 831 N.Y.S.2d 896 (Sup. Ct. Kings Co. 2007).

The most recent significant case concerning New York's DNA databank law was decided by the Second Circuit Court of Appeals in November of 2005. In that case, the Court held that the DNA databank law did not violate the Fourth Amendment's prohibition against "unreasonable" searches and seizures. The case was *Nicholas v. Goord*, 430 F.3d 652 (2d Cir. 2005). The analysis used by the Court in *Nicholas* is likely to result in the same holding should the 2012 law be challenged.

Below you will find additional questions and answers concerning the legality of the DNA databank law, along with case citations, in case you are interested in doing further research on your own.

HOW DOES THE LAW WORK?

After an individual is convicted of a felony or misdemeanor, he or she will be required to provide a blood sample. The law requires that individuals convicted of felonies or misdemeanors be informed of the requirements of Executive Law §995-c. Where an individual has been sentenced to a term of imprisonment, the sample will be collected by the "public servant" to whose custody the individual has been committed. The sample can also be taken by any court official, state or local correction official or employee, probation officer, parole officer, police officer, peace officer, or other law enforcement official. The law states that after the sample is taken, it will be forwarded to an authorized DNA laboratory for testing and analysis. After it is analyzed the results are forwarded to the state DNA databank (technically known as the "identification index"). See, Executive Law §995-c.

WHAT IS THE DNA DATABANK FEE?

Penal Law §60.35 provides that every person convicted of a felony or a misdemeanor is required to pay a DNA databank fee of $50.00. **Penal Law §60.35 requires that a DNA Databank fee be assessed <u>each time</u> someone is convicted of a felony or a misdemeanor. <u>Thus, if you are convicted of a felony and, due to a prior conviction, have already paid a DNA Databank fee, you will be required to pay the $50.00 fee again</u>.** In some cases, for example, when an individual is sentenced for two convictions relating to separate criminal offences, a defendant can

be required to pay two DNA Databank fees. *See, People v. Wade*, 27 N.Y.S.3d 895 (2d Dep't 2016).

DO THEY HAVE TO TAKE BLOOD? WHY CAN'T THEY TAKE A HAIR OR SALIVA SAMPLE INSTEAD?

The law provides only that a "sample appropriate for DNA testing" must be taken. Therefore, theoretically, a hair or saliva sample might be sufficient. The law, however, leaves the final decision as to what kind of sample is appropriate up to the Division of Criminal Justice Services. For the time being, DCJS has decided that a blood sample is the most reliable, hence "appropriate," sample. Every court that has considered this issue has held that taking a blood sample for DNA databank purposes does not constitute an unreasonable invasion of any of your constitutional rights. *See, e.g., Roe v. Marcotte*, 193 F.3d 72 (2d Cir. 1999) (holding that Connecticut law requiring sex offenders to provide DNA samples does not violate the 4th Amendment's prohibition on unreasonable searches and seizures).

WHO CAN SEE THE RESULTS?

Executive Law §995-c(6) states that DNA records contained in the state DNA identification index shall be released only to the following entities for the following purposes:

- to federal, state or local law enforcement agencies, or District Attorney's offices in connection with the investigation of a crime, or to assist in the recovery or identification of human remains, including the identification of missing persons;
- to a defendant or his or her representative, for criminal defense purposes; and
- to an "entity authorized by the [New York State Division of Criminal Justice Services] for the purposes of creating . . . a population statistics database" – but only after personally identifiable information has been removed.

IS THERE ANYONE WHO IS PROHIBITED FROM SEEING THE RESULTS?

Yes. The law contains a confidentiality provision. Executive Law §995-d prohibits DNA test results from being distributed, without your permission, to insurance companies, employers or potential employers, health care providers, private investigating services and so on.

HOW CAN I OBTAIN MY TEST RESULTS?

DCJS has published regulations concerning how to go about getting your test results. The regulations are published at 9 N.Y.C.R.R. §6193.3. Basically, you have to make a request to DCJS. In your request, you must provide your name, any aliases used, date of birth, NYSID number (if known); sex; race; date of sentence for the offense for which the sample was taken and the court which sentenced you (if known). You must also provide fingerprints from both hands, a passport sized color photograph taken within the last twelve months, your current address and phone number (if available). All of this information must be provided under your signature, which must be notarized and include the

following statement: "False statements made herein are punishable as a class A misdemeanor pursuant to §210.45 of the New York State Penal Law." The request should then be forwarded to the Division of Criminal Justice Services, Office of Forensic Services, 4 Tower Place, Albany, NY 12203-3764. According to the regulations, DCJS should provide you with a response within 30 days, by certified mail, return receipt requested.

WHAT HAPPENS IF I REFUSE TO GIVE A BLOOD SAMPLE?

If you refuse to give a blood sample you will, most likely, be given a "direct order" to provide the sample and, if you still refuse, you will be disciplined through the regular three tiered disciplinary system. You could, presumably, continue to be disciplined until you agree to provide a sample.

WHAT DOES THE GOVERNOR'S 2005 EXECUTIVE ORDER SAY?

On December 28, 2005, Governor George Pataki issued an Executive Order to the Department of Correctional Services and the Division of Parole (now merged to form the Department of Corrections and Community Supervision or DOCCS) to take DNA samples from all inmates as a condition of:

- admission to the Temporary Release Program, the CASAT Program, and the Shock Incarceration Program;
- release on parole, post-release supervision, presumptive release, conditional release; or
- as a condition of probation or interim probation supervision.

DOCCS has adopted regulations to implement this order which requires the provision of a DNA sample as a condition of admission to one of the above-mentioned programs. See, e.g., 7 NYCRR 1800.4(a)(4), conditioning participation in Shock incarceration on the provision of a DNA sample.

IS THE GOVERNOR'S ORDER LEGAL?

Only one case challenged the legality of Governor's Pataki's 2005 executive order. That case, *Matter of Matter of Gallo v. Pataki*, 831 N.Y.S.2d 896 (Sup. Ct. Kings Co. 2007), held that requiring DNA testing as a condition of parole did not violate the DNA database law and that the parole operations manual, in which the requirement was adopted, was not a rule or regulation that was subject to the formalities of the Administrative Code.

In addition, court decisions in the past concerning Temporary Release programs, however, have emphasized that those programs are a privilege, not a right, and that DOCCS has broad discretion in determining the eligibility criteria for admission to them. Likewise, the courts have repeatedly held that the Division of Parole may impose various "special conditions" on parole and conditional release, above and beyond the statutory conditions of parole. If the Governor's order were to be challenged, we expect that the Governor will argue that imposing a DNA requirement on DOCCS and DOP programs is well within his authority under those prior

court decisions. As noted, the Second Circuit Court of Appeals has upheld the constitutionality of DNA testing of convicted felons. Given this history, it is unlikely that a legal challenge to the Governor's order would be successful.

ADDITIONAL LEGAL ISSUES CONCERNING THE DNA DATABANK

DNA databank statutes across the country have survived legal challenges under many different theories. Below is a brief summary of each of the most frequently used theories for attacking DNA databases and citations to some of the cases that have rejected those theories. Of course, not all of these theories have been tried in New York, or in the Federal Courts that cover New York. It is, thus, still theoretically possible that one or more of them might be convincing to a New York judge. Given the developing weight of the law, however, this is unlikely.

MY RELIGION FORBIDS THE DRAWING OF BLOOD. DOES THIS STATUTE VIOLATE MY RIGHTS UNDER THE FIRST AMENDMENT?

Probably not. The courts that have looked at this issue have held that because these statutes are neutral with respect to religion, are of general applicability, are not applied differently to anyone because of their religious beliefs, and only incidentally affect religious belief, they are acceptable under the First Amendment. The courts have also found that any small impact on religious freedom required by the taking of blood under these circumstances is counter-balanced by the state's interest in maintaining a permanent record of various offenders' DNA to help in solving past or future crimes and that, therefore, they do not unduly burden religious belief. *See*, *Shaffer v. Saffle*, 148 F.3d 1180 (10th Cir. 1998), *cert den.*, 119 S.Ct. 520; *Ryncarz v. Eikenberry*, 824 F.Supp. 1493 (E.D. Wash., 1993).

IS THE TAKING OF BLOOD AN UNLAWFUL SEARCH AND SEIZURE UNDER THE FOURTH AMENDMENT?

No. The Fourth Amendment protects you against unreasonable searches and seizures. It is because of the Fourth Amendment that the police typically need a "probable cause" warrant to search your person or your home. However, the Second Circuit Court of Appeals recently held that New York's DNA databank law does not constitute an unreasonable search or seizure in violation of the Fourth Amendment. *See*, *Nicholas v. Goord*, 430 F.3d 652 (2d Cir. 2005).

DOES THE STATUTE VIOLATE MY FIFTH AMENDMENT RIGHTS?

No. The Fifth Amendment protects you against self-incrimination. Under this amendment you cannot be forced to say anything that might incriminate you in a crime. However, this amendment has traditionally been applied only to oral, or "testimonial," evidence. It does not usually prevent you from being required to produce real or physical evidence. For that reason, courts that examined the question have uniformly held that DNA databank laws do not violate the Fifth Amendment rights of inmates. *See, e.g., Boling v. Romer*, 101 F.3d 1336 (10th Cir., 1997).

I WAS CONVICTED BEFORE THIS LAW WAS PASSED. DOES THE APPLICATION OF THIS LAW TO ME VIOLATE THE *EX POST FACTO* CLAUSE?

Again, no. The *ex post facto* clause of the constitution prevents the state from punishing you for conduct that occurred before the conduct was illegal. However, to be a violation of the *ex post facto* clause, a statute must actually punish you, or increase your punishment, for something you did before the passage of the statute. In many cases the new DNA statute will apply to inmates because of crimes or convictions for which they were convicted prior to the statute becoming law (on December 1, 1999). However, a New York case has held that because the taking of blood does not increase the *punishment* for the crime, it is not prohibited by the *ex post facto* clause. *Matter of Kellogg v. Travis*, 188 Misc.2d 164, 728 N.Y.S.2d 645 (2001).

WHAT IF I AM PUNISHED WITH ADMINISTRATIVE SANCTIONS, INCLUDING A LOSS OF GOOD TIME, FOR REFUSING TO GIVE BLOOD? WOULD *THAT* BE A VIOLATION OF THE *EX POST FACTO* CLAUSE IN THOSE CIRCUMSTANCES?

No. Courts that have examined this question have found that any administrative sanction suffered by an inmate's refusal to provide blood samples, including loss of good time, was a result of their failure to follow lawful orders, and did not result from the commission of the crime. Therefore, they have held, it did not cause a violation of the *ex post facto* clause. *See, e.g.*, *Gilbert v. Peters*, 55 F.3d 237 (7th Cir. 1995); *Kruger v. Erickson*, 875 F.Supp. 583 (D. Minn., 1995), *aff'd on other grounds,* 77 F.3d 1071 (8th Cir. 1996); *Cooper v. Gammon*, 943 S.W.2d. 699 (Mo. Ct. App. W.D. 1997).

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