# Pro Se

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## Damages for Time Spent in Prison for Administratively Imposed PRS

In *Earley v. Murray*, 451 F.3d 71 (2d Cir. 2006) (2016 *Earley* decision), the Second Circuit established that DOCCS' practice of adding a term of post-release supervision (PRS) to the determinate terms of incarcerated individuals on whom the courts had not imposed PRS was unconstitutional. In 2018, in *Earley v. Annucci*, 2018 WL 5993683 (N.D.N.Y Nov. 15, 2018) (2018 *Earley* decision), after a one day **bench trial** (a trial at which the judge, rather than a jury, decides the facts), the United States District Court for the Northern District of New York ruled that Mr. Earley was entitled to compensatory damages for the 202 days that he spent in prison due to violations of administratively imposed PRS. Courts use the phrase "administratively imposed PRS" to stand for a term of post-release supervision that DOCCS, rather than a court, imposed.

To reach this decision, the court first rejected DOCCS' argument that because at the time of the 2006 *Earley* decision, it had been *possible* for the sentencing court to resentence Mr. Earley to add a term of post-release supervision – even though the court had not done so – Mr. Earley was only entitled to nominal damages for DOCCS's imposition of a term of post-release supervision. In support of this argument, the defendants relied on *Hassell v. Fischer*, 2016 WL 10920013 (S.D.N.Y. July 18, 2016), *affirmed as to Plaintiff's appeal; affirmed in part and vacated in part as to Defendants' appeal,* 879 F.3d 41 (2d Dep't 2018). In *Hassell*, while the sentencing judge had not sentenced Plaintiff Hassell to a term of PRS when the judge originally imposed the determinate term to which DOCCS then administratively added PRS, the plaintiff was eventually resentenced by the sentencing judge to a 5 year term of PRS. When Mr. Hassell sued for damages, the Second Circuit ruled

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# UPDATE ON FALSE POSITIVE DRUG TEST RESULTS

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

In the last issue of *Pro Se*, I informed our readers of a class action lawsuit that was filed by Prisoners' Legal Services of New York (PLS) and Emery Celli Brinckerhoff & Abady LLP (ECBA) on behalf of hundreds of incarcerated New Yorkers who were punished as a result of false positive drug test results in 2019. The case, known as *Nadya Steele-Warrick v. Microgenics Corporation, et al*., was filed in the Federal District Court for the Eastern District of New York.

As I mentioned, the lawsuit alleges that due to the negligence of the two companies that manufactured (Thermo Fisher Scientific, Inc.) and installed (Microgenics) the Indiko Plus urinalysis analyzers, hundreds of incarcerated New Yorkers tested positive for Suboxone/buprenorphine, a substance commonly used to treat opioid addiction, even though they had not consumed Suboxone/buprenorphine or any other prohibited substance.

Since that time, we have learned that it is more than likely that the Indiko Plus drug testing device has produced false positive results for at least one other substance, AB-Pinaca, a form of synthetic marijuana. AB-Pinaca is sometimes called K3. It is our understanding that, like the Suboxone/buprenorphine cases, DOCCS is reversing any disciplinary dispositions of guilt for AB-Pinaca that occurred after January 1, 2019 and that DOCCS is also working to restore any individual to the status he/she held prior to being found guilty of AB-Pinaca drug use. It is also our understanding that, going forward, no one in DOCCS custody will be disciplined for any drug charge unless the sample that tested positive is sent to an outside laboratory for a confirmatory test.

Currently, the proposed class in the case we filed is defined as "those individuals in DOCCS custody who in 2019 received a false positive result for Suboxone/buprenorphine from the Indiko Plus drug testing device." False positives for AB-Pinaca have not been pled as part of the class action that has been filed. However, we may amend the complaint to include claims relating to AB-Pinaca and possibly other drugs, depending on what our investigation reveals.

You should also know that the "class" has not yet been certified and no discovery has been done. Assuming the court does certify the class, if you fall within the current class definition or a subsequently amended class definition, you will be included as a class member and more than likely entitled to a portion of the relief obtained via the lawsuit.

If for some reason the class action is dismissed, you will still be able to file an individual case against Microgenics and Thermo Fisher Scientific, assuming you do so within the applicable statute of limitations time period. However, you should know that the class action PLS and ECBA have filed does not include or preserve claims against New York State or DOCCS.

If you contact us and you fit within the potential class, your name will be added to our database of potential class members. We will then send you occasional updates on the status of the case, so long as you make sure we have a current address for you. Updates about the progress of the case will also be reported in ***Pro Se***. ***However, due to the large number of individuals affected by this issue, we will be unable to investigate, research or otherwise assist with individual claims.*** Again, if you would like to pursue your own individual lawsuit, that is something you would have to do on your own.

It is our understanding that DOCCS is continuing to conduct its own investigation into this matter.

**. . . Continued from Page 1**

that because ultimately the term of PRS was court-ordered, and because the court ordered the amended sentence to run retroactively to the date of the original sentence, the defendants had acted responsibly (that is, they sought resentencing in a timely manner). The court also concluded that because the court-ordered term of PRS ran from the time that he was first released from prison, Mr. Hassell had not suffered any actual harm.

Thus, the *Hassell* court noted, while it was true that by administratively adding a term of PRS the defendants had violated Mr. Hassell's right to serve only the court-imposed sentence, the defendants had **mitigated** (lessened the harmful effects of) the injury by timely seeking resentencing. Further, the court noted, the sentencing court, by imposing the modified sentence to run from the date that the originally imposed sentence ran, mitigated any injury that might otherwise have resulted from the defendants' misconduct. For this reason, the *Hassell* court found that the plaintiff was entitled only to nominal damages. Nominal damages are awarded when a court finds that the defendants violated the plaintiff's rights but the plaintiff was not actually harmed by the violation.

Applying the *Hassell* court's reasoning to the facts before it, the 2018 *Earley* court ruled that with respect to the defendants' violation of Mr. Earley's constitutional right to serve only the sentence imposed by the sentencing judge, the defendants' failure to seek re-sentencing after the Second Circuit's 2006 decision eliminated any possible claim that the defendants had mitigated the damage they caused to Mr. Earley. In fact, the court noted, the defendants had affirmatively decided *not* to seek resentencing. Thus, the defendants had not taken any action to mitigate the harm caused by the defendants' wrongful imposition of PRS. For this reason, the court awarded damages to Mr. Earley for the 202 days that he spent in prison after he was found to have violated administratively imposed PRS.

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Jon R. Getz and Farina Mendelson of Vahey Muldoon Reston Getz, LLP, represented Sean Earley in this Section 1983 action.

Matthew Brinckerhoff and Alanna Kaufman of Emery Celli Brinckerhoff and Abady LLP submitted an *Amici Curiae* brief in support of Sean Earley on behalf of the plaintiff class in *Betances v. Fischer*, No. 11 Civ. 3200 (S.D.N.Y.).

# News and Notes

## *Pro Se* is Now Available on Tablets in General Confinement

Beginning with the October 2019 issue, DOCCS began placing *Pro Se* on the tablets that are available to individuals in general population. In addition to adding issues as they are published, DOCCS has agreed to keep the current and preceding five issues of *Pro Se* on the tablets. Readers will not be required to pay to have *Pro Se* put on their tablets. When an issue of *Pro Se* is published, it will be placed on an individual's tablet the next time they go to the kiosk. Please let us know what you think about having Pro Se on your tablet. Send your comments to:

Pro Se
Att'n: Tablets
Prisoners' Legal Services
114 Prospect Street
Ithaca, NY 14850

## Alcantara v. Annucci Update: RTF at Fishkill C.F.

In *Matter of Alcantara v. Annucci*, Index No. 2534-16 (Sup. Ct. Albany Co.), PLS is working with the Legal Aid Society and with Wilkie, Farr & Gallagher to challenge the Fishkill residential treatment facility (RTF). When the case was first filed in 2016, the State made a motion to dismiss. In 2017, the court issued a decision which dismissed many parts of the case, but left unresolved the heart of the case – the question of whether the Fishkill RTF complies with relevant statutes. The court ordered an evidentiary hearing on the actual conditions of Fishkill RTF. The parties then

engaged in discovery which included thousands of pages of documents and depositions of numerous DOCCS officials.

In 2018, around the time discovery in *Alcantara* was completed, the Court of Appeals decided *Matter of Gonzalez v. Annucci*, 32 N.Y.3d 461 (2018). *Gonzalez* addressed some of the same issues that are raised in Alcantara, in connection with the Woodbourne RTF. The Court dismissed the claims raised in *Gonzalez*. Among the claims rejected by the Court of Appeals was the claim that the Woodbourne RTF failed to comply with the relevant statutes.

In 2019 the State filed a motion for summary judgment seeking dismissal of all remaining claims in *Alcantara* on the ground that *Gonzalez* was dispositive. The State argued that the *Gonzalez* decision foreclosed the claims in *Alcantara*, and that the *Alcantara* case could not go forward in light of *Gonzalez*, and therefore must be dismissed. The State also relied on the affidavit of an Offender Rehabilitation Counsellor (ORC) who works with the RTF therapy program in Fishkill C.F. to argue that the program satisfies the State's duty to provide rehabilitative programming in RTF. Plaintiffs' attorneys argued that the RTF therapy program was not sufficient, and also that the Fishkill RTF was not community-based, as required by statute. In December 2019, Albany County Supreme Court issued a decision on the motion for summary judgment.

First, the court rejected the State's claim that the Court of Appeals' decision in *Gonzalez* required dismissal of *Alcantara*. The Court found that a footnote in which the *Gonzalez* Court observed that, "similar claims relating to Fishkill Correctional Facility as an RTF are pending in discovery proceedings before Albany County Supreme Court" was evidence that the Court of Appeals was permitting and not foreclosing consideration of the case based on the more fully developed factual record in *Alcantara.* Therefore, the court found that *Gonzalez* was instructive but not dispositive of in *Alcantara.*

The court then considered the RTF program inside Fishkill C.F. Under Correction Law §73(3) an RTF must have "programs directed toward the rehabilitation and total reintegration into the community . . ." The court noted Fishkill RTF residents participate in the 28 day RTF therapy program, followed by a work assignment. Other programs may be available to RTF residents upon request. The court noted that there is no statutory requirement that the RTF program be tailored to the specific needs of sex offenders, and found that even if complaints about the efficacy (effectiveness) or usefulness of the RTF program are true, they do not raise a factual question about whether DOCCS is complying with its statutory obligation to provide rehabilitative programming in the RTF. The court thus found that DOCCS had met its burden of showing that the RTF program inside Fishkill C.F. is at least minimally adequate, and does not violate DOCCS' legal obligations. For these reasons, the court granted summary judgment to the State with respect to the RTF programs inside Fishkill C.F.

The court reached a different conclusion with respect to the RTF programs outside of Fishkill C.F. Correction Law §2(6) defines an RTF as a "community based residence in or near a community where employment, educational and training opportunities are readily available . . ." The State argued that the facility storehouse satisfies the requirement for community-based programs in the RTF. The court disagreed for several reasons. The court noted the storehouse is only one-tenth of a mile outside the facility fence, and provides no opportunity for interaction with anyone not affiliated with Fishkill C.F. except for truck drivers making deliveries to the storehouse. In addition, only a small fraction of the RTF population has the opportunity to work in the storehouse, since only eight RTF residents can be assigned to the storehouse at one time.

The court further noted undisputed evidence that RTF residents have no opportunity to participate in rehabilitative programs in any community outside of Fishkill C.F., including in the nearby communities of Fishkill, Beacon, and Poughkeepsie. The court cited deposition testimony by Fishkill's Deputy Superintendent of Security that RTF residents are "never permitted to work off of the prison grounds," as well as other undisputed evidence that RTF residents cannot participate in work release programs that are available to the general prison population. The court found

undisputed evidence that the Fishkill RTF does not provide the community-based programs required by statute.

Although the plaintiffs did not make a motion or cross motion for summary judgment, the court exercised its authority under CPLR §3212(b) to "search the record and grant summary judgment to the non-moving party." The court granted summary judgment to the plaintiffs because the lack of community-based programs in Fishkill RTF was established by undisputed evidence. Since the entire case has been resolved on summary judgment, meaning the court was able to issue a judgement on the law and undisputed facts, there will be no evidentiary hearing.

The *Alcantara* case is a declaratory judgment action. For this reason, the court's decision is limited to a determination of whether DOCCS is violating the law in the way it operates Fishkill RTF. The court did not order the defendants to take any specific action to remedy the problem. We expect this decision will be appealed.

## Phone Calls in Disciplinary Confinement, Keeplock Pending a Hearing, or Ad Seg

As of September 13, 2019, Correction Law §137(6)(g) requires that within 24 hours of an individual's admission to disciplinary confinement, keeplock pending a disciplinary hearing, placement in a segregated confinement unit or placement in a residential mental health treatment unit (RMHU or RMHTU), and once a week after that, until the individual is released from this form of confinement, DOCCS must permit the individual to make at least one personal phone call. DOCCS may deny an individual this phone call when allowing the call would create an unacceptable risk to the safety and security of incarcerated individuals or staff.

## PRO SE VICTORIES!

***Matter of Gary Glen Goad v. Jeff Hale,*** **Index No. 1368-19 (Sup. Ct. Albany Co. Dec. 2 2019). Gary Glen Goad successfully challenged DOCCS' decision not to disclose records requested by Mr. Goad through the Freedom of Information Law (FOIL).** In relation to an incident involving Mr. Goad and several correction officers, Mr. Goad requested the Unusual Incident Report (UIR), Use of Force Reports (UOF), statements, photographs, incident reports and any other records. In response, DOCCS produced 48 pages of records (26 of which were redacted), and withheld six pages, asserting that the six pages were exempt under the federal law governing health care privacy. DOCCS claimed the redactions on the 26 pages were made pursuant to the FOIL exemptions 1) prohibiting the disclosure of information in the personnel files of correction officers and 2) permitting the non-disclosure of records that if disclosed, would be an unwarranted invasion of an officer's personal privacy. DOCCS also asserted that the requested photographs were exempt from disclosure because their disclosure would endanger the life or safety of the officers.

The court found that FOIL did not exempt from disclosure 4 of the 6 pages that DOCCS claimed were exempt. The court held that two Accident-Injury Investigation Reports were not personnel records but rather were routine agency records containing a factual report of an incident that were disclosable under FOIL. The court found that disclosure would not be an unwarranted invasion of privacy because they "merely describe the involved officers' injuries," were not relevant to the officers' continued employment or promotion and were not created or used primarily to evaluate an officer's performance of his duties.

The court further held that DOCCS should have disclosed the two Employee Accident Reports because 1) disclosure was not an unwarranted invasion of personal privacy and 2) they were not personnel records. The court agreed with DOCCS that references in the reports to previously existing medical conditions and the officers' addresses,

phone numbers and social security numbers were properly redacted, however the officers' names could not be redacted.

The court agreed with DOCCS that the photographs of the officers' injuries and the Workers' Compensation Benefit Election forms were exempt from disclosure, the former as an unwarranted invasion of privacy (where the court had ruled that the written descriptions of the injuries were not exempt from disclosure) and the latter because these records were protected from disclosure by the Workers Compensation Law.

## DOCCS Agrees to Reverse 31 Tier III Hearings Challenged in Article 78s

DOCCS agreed to the reversal of the Tier III hearings challenged in the following Article 78 proceedings which were decided between May 1, 2019 and December 31, 2019:

*Matter of Corey Ford v. Anthony J. Annucci*, 172 A.D.3d 1815 (3d Dep't 2019)

*Matter of Todd C. Mirabella v. John Colvin*, 172 A.D.3d 1807 (3d Dep't 2019)

*Matter of Gilberto Silva v. NYS DOCCS*, 172 A.D.3d 1862 (3d Dep't 2019)

*Matter of Andrew Benitez v. Anthony J. Annucci*, 172 A.D.3d 1855 (3d Dep't 2019)

*Matter of Jason Mercado v. Anthony J. Annucci*, 172 A.D.3d 1844 (3d Dep't 2019)

*Matter of Julio Smith v. Anthony Annucci*, 173 A.D.3d 1685 (4th Dep't 2019)

*Matter of Davide Coggins v. Anthony Annucci*, 173 A.D.3d 1678 (4th Dep't 2019)

*Matter of James R. Mercer, Jr. v. Anthony J. Annucci*, 173 A.D.3d 1595 (3d Dep't 2019)

*Matter of Pedro Castillo*, 173 A.D.3d 1588 (3d Dep't 2019)

*Matter of David Dacey*, 173 A.D.3d 1585 (3d Dep't 2019)

*Matter of Ralik Bailey*, 173 A.D.3d 1600 (3d Dep't 2019)

*Matter of William Bush v. Anthony Annucci*, 173 A.D.3d 1858 (4th Dep't 2019)

*Matter of Antoine Porter v. Anthony Annucci*, 173 A.D.3d 1855 (4th Dep't 2019)

*Matter of Evan Harrington v. Christopher Mille*r, 175 A.D.3d 789 (3d Dep't 2019)

*Matter of Joseph Simon*, 175 A.D.3d 787 (3d Dep't 2019)

*Matter of Gregory Scott v. NYS DOCCS*, 175 A.D.3d 777 (3d Dep't 2019)

*Matter of Justin T. Woodward v. Anthony Annucci*, 175 A.D.3d 785 (3d Dep't 2019)

*Matter of John Francis*, 175 A.D.3d 791 (3d Dep't 2019)

*Matter of Michael Delgado v. Anthony J. Annucci*, 175 A.D.3d 1680 (3d Dep't 2019)

*Matter of Rohan Brown v. NYS DOCCS*, 175 A.D.3d 1715 (3d Dep't 2019)

*Matter of Marcus Telesford v. Anthony J. Annucci*, 175 A.D.3d 1717 (3d Dep't 2019)

*Matter of Christopher Baez v. Anthony J. Annucci*, 175 A.D.3d 1703 (3d Dep't 2019)

*Matter of Paul Kairis v. Anthony J. Annucci*, 175 A.D.3d 1714 (3d Dep't 2019)

*Matter of Malik Jackson v. K. Henley*, 175 A.D.3d 1686 (3d Dep't 2019)

*Matter of Corey Ford v. Anthony J. Annucci*, 175 A.D.3d 1712 (3d Dep't 2019)

*Matter of Irron Johnson v. Anthony Annucci*, 175 A.D.3d 1845 (4th Dep't 2019)

*Matter of Andre Burke v. Anthony Annucci*, 177 A.D.3d 1328 (4th Dep't 2019)

*Matter of Sara G. Kielly v. NYS DOCCS*, 177 A.D.3d 1051 (3d Dep't 2019)

*Matter of Arello Barnes v. Donald Venettozzi*, 178 A.D.3d 1232 (3d Dep't Dec. 12, 2019)

*Matter of Robert Cumberland v. Donald Venettozzi*, 178 A.D.3d 1225 (3d Dep't 2019)

*Matter of Ronald Plaza v. Anthony Annucci*, 178 A.D.3d 1432 (4th Dep't Dec. 20, 2019)

***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

## Disciplinary & Administrative Segregation

### Substantial Evidence Did Not Support Charge of Threats

Kevin Mays was found guilty of threats, creating a disturbance and harassment. After the determination was administratively affirmed, he filed an Article 78 petition asserting that the hearing officer and the person who conducted the administrative review were biased and that the determination of guilt was not supported by substantial evidence. In *Matter of Mays v. Early*, 178 A.D.3d 928 (2d Dep't 2019), the court rejected the argument that the hearing officer and the administrative reviewer were biased, finding that 1) the hearing was conducted in a fair and impartial manner and 2) the fact that the administrative reviewer had reversed the determination of guilt made with respect to the charges of creating a disturbance and harassment was evidence that the reviewer was not biased.

The court went on to hold that the charge of threat was not supported by substantial evidence. Substantial evidence, the court wrote, is "such relevant evidence as a reasonable mind may accept as adequate to support a conclusion or ultimate fact." Referencing 7 NYCRR 270.2(B)(3)(i), the court noted that Rule 102.10 provides that "an inmate shall not, under any circumstances, make any threat, spoken, in writing or by gesture." The misbehavior report and testimony showed that petitioner became loud and argumentative when his request to hold an event in his capacity as president of an inmate organization was denied. While the evidence showed only that the petitioner was upset, the Deputy Superintendent of Programs testified that she felt "intimidated" and that "the petitioner stared at her and *in a threatening manner* left the area." The court ruled that this evidence was insufficient to establish that the petitioner had made a threat against her.

Based on this finding, the court ordered the determination of guilt annulled and the penalties vacated.

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Kevin Mays represented himself in this Article 78 proceeding.

## Court of Claims

### Court Reverses Decision Granting Summary Judgment to State

On August 22, 2014, Joshua Gang served a Notice of Intent (NOI) on the NYS Attorney General asserting that on May 28, 2014, as a result of numerous acts of medical malpractice, he had sustained an injury to his left hip while at Collins C.F. In the NOI, Mr. Gang stated that following hip replacement surgery, he developed an infection which required numerous surgical procedures.

When Mr. Gang later filed his Claim, he stated that the injury was to his *right* hip and alleged that the malpractice commenced on or about *May 20* and continued for several weeks.

The defendant moved for summary judgment, arguing that the date of injury set forth in the Claim – May 20 – revealed that the NOI had not been filed within 90 days of the injury. Section 10(3) of the Court of Claims Act requires that a NOI be filed within 90 days of the accrual of the claim. A claim accrues when the conduct causing the injury ends. As a second ground for judgment, the defendant argued that the claim stated the injury was to the right hip while the notice of claim stated it was to the left hip. The defendant also argued that the NOI was jurisdictionally defective because it set forth an incorrect accrual date in violation of the Court of Claims Act §11(b). Section 11(b) requires that a NOI state when the claim arose. These errors, the defendant stated, deprived the court of personal and subject matter jurisdiction.

The claimant argued that the accrual date in the NOI was the correct date and that the erroneous date set forth in the claim did not retroactively make the NOI jurisdictionally defective. He asked to amend the claim to allege the accrual date of May 28. The court granted the defendant's motion and denied the claimant's request to amend his claim.

On appeal, in *Gang v. State of New York*, 177 A.D.3d 1300 (4th Dep't 2019), the appellate court reversed the lower court's decision. The court first noted that because "suits against the State are allowed only by the State's waiver of sovereign immunity and in derogation of the common law, statutory requirements conditioning suit must be strictly construed." Thus, the court wrote, the failure to comply with either the Court of Claims Act §10(3) – concerning the timing of the NOI or claim – or §11(b) – concerning the essential elements of a NOI or a claim – deprives the court of subject matter jurisdiction and requires dismissal of the claim. Further, the court noted, citing *DeMairo v. State of New York*, 172 A.D.3d 856, 857 (2d Dep't 2019), a jurisdictionally defective NOI or claim may not be cured by amendment.

The court next addressed the timeliness of the NOI, finding that the claimant had timely filed the notice. "Generally," the court wrote, "a medical malpractice claim accrues on the date of the alleged malpractice." "But," the court went on, "the *statute of limitations* [the 90 day period within which a NOI must be served] is *tolled* [stops running] until the end of a continuous course of treatment."

The court found that the record in this case showed that the claimant was receiving ongoing treatment for a left hip replacement through June 12, 2014. Thus, the NOI, filed on August 22, was within the 90 day period that followed the end of the alleged negligent treatment by the State.

With respect to the differences in the alleged dates of injury in the NOI and claim, the court held that the date that the claim arose, that is, the date upon which the malpractice began, is a matter related to the statutory requirements pertaining to the content of NOIs and claims.

The court noted that the purpose of the statutory requirements for the content of the NOI and the claim is to provide the defendant with enough information to enable the defendant to investigate the claim and determine the State's liability. Here, the court found, in spite of the different dates and the slightly different description of the injury (right hip as opposed to left hip) in the NOI and in the claim, the NOI and the claim were sufficient to give the defendant enough information to enable it to investigate the claim and to determine the State's liability. In addition, the court found that in at least one entry, the claimant's medical records referenced his right hip, even though the problem was with his left hip. Thus, the court reasoned, there was a factual basis in the record for the error in the claim.

The appellate court found that the NOI and claim were timely and otherwise in compliance with the statute. Based on this analysis, the court held that the lower court had erred in granting judgment to the defendant.

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Eric Shelton of Brown Chiari LLP represented Joshua Gang in this Court of Claims action.

## Miscellaneous

# Court Issues Preliminary Injunction to the Office of Victim Services

Ralph Rodriguez, now an individual in DOCCS custody, was convicted of robbery in the second degree. In 2019, Mr. Rodriguez settled a lawsuit that he had filed against the City of New York and several correction officers working on Rikers Island. Shortly after agreeing on the terms of settlement, as per the requirements of Executive Law §632-a(2)(a) – also known as the Son of Sam Law – the corporate counsel for New York City notified the NYS Office of Victim Services (OVS) that Mr. Rodriguez was entitled to receive funds of a convicted person. "Funds of a convicted person" is defined in Executive Law §632-a(1)(c) as funds received from any source by a person convicted of certain crimes, including robbery in the second

degree, where the person is serving a sentence with DOCCS and the funds are received while the person is in DOCCS custody.

After receiving notice of the funds to which Mr. Rodriguez was entitled, the OVS brought a proceeding for a preliminary injunction enjoining (stopping) the payment of funds to Mr. Rodriguez to which he was entitled based on the settlement of the lawsuit. The petition was supported by Jonathan Hernandez, the victim of the robbery that Mr. Rodriguez had been convicted of committing.

The petitioner (OVS) brought the proceeding by means of an Order to Show cause. The court, in *Matter of the Application of the NYS Office of Victim Services, o/b/o Jonathan Hernandez v. Ralph Rodriguez*, 2019 WL 7489063 (Sup. Ct. Albany Co. Dec. 11, 2019), issued a temporary restraining order and gave Mr. Rodriguez the opportunity to show why a preliminary injunction should not be issued.

Mr. Rodriguez made several arguments in support of his position that the injunction should not be issued. First, he noted that he had pleaded not guilty and although convicted, his appeal was still pending. Second, he argued, there was no evidence that the victim had suffered any damages or loss that might lead to an award of damages.

In response, OVS argued that Executive Law §632-a presumes that the victims of certain crimes specified in the statute, including the crime of robbery in the second degree, suffer compensable damages. That is, the law presumes that a person who was the victim of robbery in the second degree would suffer injuries for which the perpetrator of the crime should pay. Further, OVS argued, at this point in the proceedings, the victim is not required to prove his or her injuries; rather, that is an issue that will be decided if the victim files a lawsuit seeking damages from the person convicted of having robbed him. OVS also disagreed that the victim would not suffer irreparable harm (harm that cannot be undone) if the court does not grant a preliminary injunction to prevent Mr. Rodriguez from spending the settlement money. Without the injunction, OVS argued, Mr. Rodriguez could spend the money before the victim was able to sue for damages.

In deciding this motion, the court first reviewed the Son of Sam Law, noting that it is intended to "provide an opportunity for crime victims and their families to obtain full and just compensation from the convicted person who caused their injuries, losses and suffering, and to ensure that when a convicted perpetrator gains assets with which to pay [the victim], he is held financially accountable to the victims." The court then noted that a victim of one of the crimes specified in Executive Law §632-a has 10 years to sue the person who was convicted of the crime. After the 10 years has passed, the Son of Sam Law provides a new 3 year statute of limitations. The 3 year statute of limitations is triggered when the crime victim learns that the convicted individual has "funds of a convicted person." When "funds of a convicted person" exceeds $10,000, the law requires certain individuals who have knowledge of this fact to report the amount to the OVS. The Son of Sam Law then requires OVS to notify the crime victim of the existence of the money and advise him or her of the 3 year statute of limitation. If the victim informs OVS that he or she intends to sue the convicted individual, OVS will take such actions as are available to prevent the convicted person from spending the money.

In this case, 10 years had not passed since Mr. Rodriguez's conviction so when Jonathan Hernandez learned of the funds, he was within the original 10 year statute of limitations for filing a suit for damages caused by the Mr. Rodriguez.

In considering whether it had the authority to issue a preliminary injunction when the matter is still within the 10 year statute of limitations, the court found that Article 63 of the Civil Practice Law and Rules provides that "when the party seeking [a preliminary injunction] demonstrates 'a probability of success on the merits, danger of irreparable injury in the absence of the injunction and a balance of equities in its favor," the court may grant the injunction.

Here the court found that the probability of success on the merits was shown by Mr. Rodriguez's conviction for the crime with respect to which Jonathan Hernandez was the victim. This principle is referenced in *S. T. Grand, Inc. v. City of New York*, 32 N.Y.2d 300, 303 (1973) where the

Court wrote, "A criminal conviction is prima facie evidence of the underlying facts in a subsequent civil action." The fact that Mr. Rodriguez's conviction is still on appeal, the court held, does not give rise to an exemption from the provisions of the Son of Sam Law. To accept this argument would permit convicted individuals to spend the funds from which the victim could otherwise potentially recover.

The court found that not issuing a preliminary injunction would cause irreparable harm because Mr. Rodriguez could spend the funds before a court is able to determine whether he is required to pay those funds to Mr. Hernandez, leaving nothing for the victim.

Finally, the court found that the balance of the equities weighed in favor of the crime victim.

Based on this analysis, the court granted a preliminary injunction enjoining and restraining Mr. Rodriguez from disbursing, with the exception of 10% of the settlement amount, the funds that he obtained from his federal lawsuit.

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Ralph Rodriguez represented himself in this Article 78 proceeding.

## Administrative Remedies Are Not Exhausted Until CORC Decides the Appeal

When Andrew Hendricks was removed from his job at the Clinton tailor shop, he filed a grievance claiming that the removal was retaliatory. The Inmate Grievance Resolution Committee (IGRC) denied the grievance. The Superintendent agreed with the IGRC's decision. Mr. Hendricks then appealed to the Central Office Review Committee (CORC). Not having received a decision from CORC for more than sixty days after he filed the appeal, Mr. Hendricks filed an Article 78 challenge to the denial of his grievance. The respondents moved to dismiss the petition, arguing that Mr. Hendricks had not exhausted his administrative remedies and therefore the court did not have **jurisdiction** (authority) to decide the petition. In response, Mr. Hendricks filed an amended petition. The Supreme Court, Albany County declined to consider the amended petition because the Mr. Hendricks had not asked the court's permission to file an amended petition and granted the respondents' motion to dismiss the petition.

In *Matter of Hendricks v. Annucci*, 2020 WL 97044 (3d Dep't Jan. 9, 2020), the appellate court found that the dismissal was proper. Seven NYCRR 701.5(d)(3)(ii), the court noted, provides that "CORC shall review each appeal, render a decision on the grievance, and transmit its decision to the facility . . . and any direct parties within 30 calendar days from the time that the appeal was received." While it was true that CORC had not decided the petitioner's appeal within 30 days, the court wrote, "the time limitations in the regulation are directory, not mandatory." As such, unless the petitioner could show that he had been "substantially prejudiced" by the delay, his petition was pre-mature. Here, the court found, the petitioner had made no claims that he had been substantially prejudiced by CORC's delay in deciding his appeal. Thus, the court ruled, the lower court had not erred in dismissing the petition for pre-maturity.

The court also found that Section 7804(d) of the Civil Practice Law and Rules (CPLR) provides for the filing and service only of a verified petition, verified answer and a reply to a counterclaim or new matter in the answer. The Rule goes on to state that the court may permit any other pleading – such as an amended petition – upon such terms as the court may specify. Thus, the court found, in the absence of the court's permission, the court was not bound to consider the amended petition.

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Andrew Hendricks represented himself in this Article 78 proceeding.

## Federal Decisions

## Law Library Runners Meet the Requirements of the ADA

Armando Torres, an individual residing in the Wende Regional Medical Unit (RMU), brought a lawsuit seeking reasonable accommodation under the Americans With Disabilities Act (ADA) so that he can access the law library. Mr. Torres is unable

to walk to the law library due to his medical condition. In *Torres v. Artus,* 2014 WL 12907799 (W.D.N.Y. Oct. 31, 2014), Mr. Torres sought a preliminary injunction ordering either that he be brought to the law library or that DOCCS use staff to bring him materials from the law library. He alleges that DOCCS has used staff in the past to bring residents of the RMU materials from the law library.

In support of its decision not to allow RMU residents to travel from the RMU to the law library, DOCCS advised the court that:

1. The law library is not in the same building as the RMU;

2. DOCCS has incarcerated individuals known as law library runners bring materials from the law library to people in the RMU;

3. Law library runners give the plaintiff adequate access to the law library;

4. The law library runner system is adequate accommodation under the ADA; and

5. The plaintiff has not shown that he will experience irreparable harm if the court does not order that he be brought to the law library.

The court found that the plaintiff has reasonable access to the law library by means of the law library runners. For reasons relating to his physical condition, the court found, the plaintiff cannot be housed nearer to the law library. The court found that it was not legally significant whether the people who bring the RMU residents legal materials are staff or incarcerated individuals. Finally, the court found that the plaintiff did not produce enough evidence to show that he is likely to prevail on the merits. Not having met the requirements for a preliminary injunction, the court denied the plaintiff's motion.

_____

Armando Torres represented himself in this action under the Americans with Disabilities Act.

## DVSJA Information for Upstate Defendants

*To incarcerated people seeking information or assistance with resentencing applications under the Domestic Violence Survivors Justice Act:*

**If the county of your conviction was *NOT* one of the five NYC boroughs,** please see the list below of Public Defenders and other criminal defense providers who may be able to provide information about the DVSJA and assistance with a request for permission to make a motion for resentencing and for assignment of counsel. Where information is not available from such providers, you may write to Cynthia Feathers, NYS Office of Indigent Legal Services, 80 South Swan St., Albany, NY 12210, for a copy of the NYS Office of Court Administration DVSJA pro se form and other information.

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