Pro Se

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Court Finds Amendment of Parole Statute Requires Parole to Make New Rules

In 2011, the N.Y.S. Legislature amended Executive Law §259-c(4). The amended provision requires that the Board of Parole, in assessing an individual's readiness to be released to parole supervision, measure the inmate's rehabilitation and likelihood of successful reintegration into society. Specifically, the new law requires that the Parole Board ***establish written procedures*** that "incorporate risk and needs principles to measure the rehabilitation of persons appearing before the board, the likelihood of success of such persons upon release and assist members of the State Board of Parole in determining which inmates may be released to parole supervision." The effective date of this law was September 30, 2011.

In Matter of Morris v. N.Y.S. D.O.C.C.S., ___ N.Y.S.2d ___, 2013 WL 1688878 (Sup.Ct. Columbia Co. April 4, 2013), the court considered the issue of whether, in assessing the petitioner's readiness for parole release, the Board of Parole had adopted and applied procedures that incorporate social science research to assess post release and recidivism risks. According to the court, before the 2011 amendment, Executive Law §259-c(4) required Parole to have written ***guidelines*** for use in making parole determinations. The statute did not however, require the respondent to engage in rule making. Thus, the method used by the respondent for assessing readiness, set forth in 9 N.Y.C.R.R. §8001.3(a), including a grid

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Also Inside . . .

New Report Confirms Crisis of Prisoner Rape

A Message from the Executive Director – Karen L. Murtagh

In 2003 the Prison Rape Elimination Act (PREA) was passed. Nine years later, in May 2012, the Department of Justice released binding standards in an effort to put an end to sexual abuse in U.S. correctional facilities and those standards couldn't come a second too soon. The Bureau of Justice Statistics recently released a study of sexual victimization in U.S. prisons and jails and the findings were startling. Reprinted below is an article written by Just Detention International summarizing those findings.*

***Just Detention International (JDI), is a health and human rights organization that seeks to end sexual abuse in all forms of detention.** Incarcerated individuals may communicate with JDI using legal mail, addressing their correspondence to: Cynthia Totten, Esq., CA Attorney Reg. #199266, 3325 Wilshire Blvd., Suite 340, Los Angeles, CA 90010.

Sexual Victimization in Prisons and Jails Reported by Inmates, 2011–12

Sexual violence continues to plague U.S detention facilities, according to a new report from the U.S. Department of Justice (DOJ). Released on May 16, 2013, the study by the Bureau of Justice Statistics (BJS), confirms that lesbian, gay, bisexual, and transgender (LGBT) inmates and those with a history of prior sexual abuse are at exceptionally high risk for victimization, while shedding new light on the extreme vulnerability of inmates with mental illnesses.

The BJS report, *Sexual Victimization in Prisons and Jails Reported by Inmates, 2011–12*, presents the results of its latest nationwide survey of inmates in state and federal prisons and county jails, as well as some special facilities, such as military jails. It found that rates of inmates reporting sexual abuse in prisons and jails – 4 percent and 3.2 percent, respectively – were consistent with the findings of previous BJS studies.

Using a snapshot technique, which examines the inmate population on a single day, the report states that 80,600 inmates held in prisons and jails had been sexually victimized in the preceding 12 months. Accounting for inmate turnover, however, the BJS estimates that roughly 200,000 people were sexually abused in detention in that period – a figure that has remained largely unchanged since 2007, the year the BJS issued its first report of this kind.

Prisoners with mental illnesses were sexually abused at significantly higher rates than other inmates. In federal and state prisons, people with symptoms of serious psychological distress were nine times more likely than those with no symptoms of mental illness to be assaulted by another inmate (6.3 percent versus 0.7 percent). Jail inmates with symptoms of serious mental illness were five times as likely as those with no symptoms to report inmate-on-inmate abuse. Of all jail inmates, those with serious mental illnesses made up more than a quarter of the population – a rate that is well over eight times greater than that of the outside community.

"The fact that so many people with mental illnesses are being locked up is, in itself, profoundly disturbing. It's simply unacceptable that, while behind bars, these inmates are subjected to horrific sexual abuse rather than getting the help they need," said Lovisa Stannow, Just Detention International's Executive Director.

Consistent with previous research, LGBT inmates also reported very high levels of abuse. Among men and women who identify as not being straight, roughly one in eight prisoners (12.2 percent) and one in twelve jail inmates (8.5 percent) were sexually abused by another inmate; 5.4 percent of LGBT prisoners and 4.3 percent of LGBT jail inmates reported being victimized by staff.

Other key findings in the BJS report include:

- In both prisons and jails, staff were at least as likely as inmates to commit sexual abuse. Among state and federal prisoners, 2 percent reported an incident involving another inmate, while 2.4 percent reported being abused by facility staff. Among jail inmates, 1.6 percent reported being victimized by another inmate, compared with 1.8 percent reporting abuse by staff.

- Youth aged 16 to 17 held in adult prisons and jails did not have significantly higher rates of sexual victimization than adult inmates. Roughly 1.8 percent of juveniles housed in prisons and jails were abused by another inmate; 3.2 percent reported staff sexual abuse.

- In both prisons and jails, women faced higher rates of sexual abuse than men. Contrary to popular stereotypes, the rates of inmate-on-inmate abuse were four times higher in women's institutions than in men's institutions (6.9 percent versus 1.7 percent).

- As prior studies have also shown, inmates who had been sexually abused before their incarceration were prime targets for yet more abuse behind bars. Roughly one in eight prisoners (12 percent) and one in twelve jail inmates (8.3 percent) who had experienced abuse earlier in life reported being sexually victimized by another inmate at their current facility. Staff sexual misconduct was reported by 6.7 percent of prisoners and 5.1 percent of jail inmates who have a history of abuse.

As required by the Prison Rape Elimination Act (PREA) of 2003, the BJS report identified facilities with the highest and lowest levels of sexual victimization. Four facilities were found to have high rates of both inmate-on-inmate abuse and staff sexual misconduct: Rose M. Singer Center, a New York City jail; Apalachee Correctional Institution (West/East Unit/River Junction), a Florida prison; Montana State Prison; and Clements Unit, a Texas state prison. Of the 21 facilities found to have high rates of inmate-on-inmate abuse, four were in Texas – more than any other state. New York State and Florida were tied for having the most facilities with high staff sexual misconduct; of the three New York facilities identified, two were New York City jails.

Beginning August 20, 2013, all state prisons and local jails must be in compliance with the national PREA standards. Released by the Department of Justice in May 2012, the standards lay out concrete, common sense steps detention facilities must take to protect inmates from sexual abuse. The standards also require facilities to undergo independent audits every three years; the first round of these audits will commence in August.

The BJS also surveyed military detention facilities, jails in Indian Country, and immigration detention facilities. Among the military facilities, which hold service members awaiting court-martial or who have been court-martialed, two were found to have high levels of sexual abuse. Detainees at the Northwest Joint Regional Correctional Facility and the Naval Consolidated Brig, Mirimar were sexually abused at a rate more than twice the national average for jails (6.6 percent versus 3.2 percent). The worst Indian Country jail was the Oglala Sioux Tribal Offenders Facility, where more than one in ten inmates reported staff sexual victimization – a higher rate than any other jail nationwide.

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with timelines for release based on the length of the sentence which an individual was serving, were merely guidelines, and mitigating or aggravating factors could result in decisions above or below the guidelines. The amended version of § 259-c(4), however, the court wrote − by specifying that the respondents establish written procedures − requires the respondents to engage in rule making which "shall incorporate risk and needs principles to measure the rehabilitation of persons appearing before the Board" and "the likelihood of success of such persons upon release."

By its terms, the court held, the 2011 amendments mandated the adoption of new rules or regulations. The court found "inexplicable" the respondents' failure to adopt new procedures and held that the disregard of the legislative mandate was arbitrary and capricious and contrary to the law.

The court then turned its attention to the respondents' consideration of whether the petitioner should be released to parole. The court noted that the petitioner had made full restitution, had lost his license to trade securities and faced automatic disbarment. The Department of Probation had recommended a non-incarcerative sentence. The sentencing judge had said it was unlikely that the petitioner would re-offend. When petitioner met with the Parole Board, he had served 25 months of a 1 1/3 to 4 year sentence. He had no disciplinary history. He had received a certificate of earned eligibility and had submitted a 100 pages of documents detailing, among other things, the high level of support that he would receive if he were to be released, his work plans and his plans for a residence.

The Board's decision denying parole found that release to parole was incompatible with public safety and welfare. The decision stated "Required statutory factors have been considered, including your risk to the community, rehabilitation efforts, and your needs for successful community integration." The remainder of the decision focused on petitioner's crime and concluded, "There is a reasonable probability you would not live and remain at liberty without violating the law."

The court found that the respondents had focused almost completely, if not exclusively, on the crime that the petitioner had committed and had failed to take into account and fairly consider any of the other relevant statutory factors, causing the court to conclude, "Where the Parole Board focuses entirely on the nature of the petitioner's crime, there is a strong indication that the denial of parole is a foregone conclusion that does not comport with statutory requirements." Here, the court found that the Board's passing mention of petitioner's receipt of a certificate of earned eligibility, good behavior, program accomplishments and "document submissions" (as the Board summarized the 100 pages of support for petitioner's release), and its conclusory statement that statutory factors had been considered, "were woefully inadequate in the circumstance of this case to demonstrate that the Board had weighed or fairly considered the required statutory factors."

The court ruled that petitioner's parole denial was not rendered in accordance with the law, overturned the decision and remitted the matter for a new hearing to be held within 10 days of the court's decision.

Petitioner Morris was granted release to parole supervision at the re-hearing.

News

Change in Pain Med Classification

In November 2012, the New York State Department of Health added Ultram to the New York State list of Schedule IV drugs. Schedule IV drugs are considered controlled substances

and cannot be obtained with an ordinary prescription. The use of Schedule IV drugs requires greater monitoring and oversight than does the use of ordinary prescription medications. The following states have also elected to make Ultram a schedule IV controlled drug: Arkansas, Tennessee, Illinois, New Mexico, Ohio, West Virginia, Kentucky, Wyoming, Mississippi, North Dakota and Oklahoma. Many other states are considering the same action.

LETTERS TO THE EDITOR

Dear Sir/Madam,

I just want to say that your ***Pro Se*** volumes have helped me greatly. I never thought a reversal that I received would be in one of them.* I say this because in 2010, I did not even know the definition of the words "Due Process." The correspondence I receive from your office inspired me when I was falsely accused of doing something that I didn't do. Thank you for everything!

Very Truly Yours,

Gilbert Moye

*Mr. Moye's pro se success in Matter of Moye v. Fischer, 940 N.Y.S.2d 356 (3d Dep't 2012), was reported in the June 2012 issues of Pro Se, Vol. 22, No. 3.

Letters to the Editor should be addressed to:

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

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

Letters to the Editor

We read all of the letters that you send to ***Pro Se.*** Due to the number that we receive, we are not able to respond to each letter. If you have a question about how a decision discussed in ***Pro Se*** might affect you, send your question to the regional PLS office which handles requests for assistance from the prison where you are located (see back page of this issue). If you are commenting on an article, know that we have read and considered your comments even though we may not be able to respond.

Pro Se Victories!

Matter of Salvatore Dagnone v. Brian Fisher, Albany County, Supreme Court, Index No. 6326-12. Salvatore Dagnone successfully challenged DOCCS' refusal to expunge an Unusual Incident Report (UIR) after he was found not guilty of the charges arising from the incident described in the UIR.

In five misbehavior reports, Salvatore Dagnone was given four charges of possession of a weapon and one charge of self inflicted injury. He was found not guilty of the charges following five separate Tier III hearings. Thereafter, Mr. Dagnone sought expungment of charges from his disciplinary record and from his UIR record. DOCCS refused to expunge references to the charges from Mr. Dagnone's UIR record. After the superintendent denied his request, pursuant to 7 NYCRR §5.5, Mr. Dagnone appealed the denial to the Inspector General who affirmed the Superintendent's decision. The IG's decision was affirmed by DOCCS Counsel's Office.

Mr. Dagnone then filed an Article 78 challenge to the Department's refusal to expunge the Unusual Incident Report. The court noted that in some cases, courts have ordered that UIRs be expunged following the dismissal of disciplinary charges. See, e.g., Matter of Davidson v. Coughlin, 546 N.Y.S.2d 247 (3d Dep't 1989). The court held that since all of the charges in the misbehavior reports were dismissed when the petitioner was found not guilty, "it is arbitrary and capricious and an abuse of discretion not to expunge the Unusual Incident Reports and all references to the subject incident from Petitioner's inmate record."

Matter of Victor Sowell v. Brian Fischer, Albany County, Supreme Court, Index No. 5804-11. Victor Sowell successfully challenged two Tier III hearings based on the Respondent's failure to provide him with employee assistance.

At his first hearing, Petitioner Sowell was charged in connection with an alleged disturbance in a dorm. When interviewed by his employee assistant, he was unable to identify the 30 dorm residents by name and asked his employee assistant to go to the dorm and question the residents as to whether they had witnessed the incident and if so, whether they would be witnesses at the hearing. The employee assistant refused. Department of Corrections and Community Supervision regulations provide that an employee assistant is required to interview witnesses and to report the results of his efforts to the accused. 7 N.Y.C.R.R. 251-4.2. In reaching its decision, the court cited the Third Department, in Matter of Velasco v. Selsky, 621 N.Y.S.2d 725 (3d Dep't 1995), which held that when an inmate is unable to provide the names of potential witnesses but provides sufficient evidence to allow the employee assistant to locate the witnesses without great difficulty, failure to make any effort to do so constitutes a violation of the meaningful assistance requirement. Based on a finding that the respondent had violated its own regulation, the court ordered the hearing reversed and remitted the case for a new hearing.

At the second hearing, Petitioner Sowell was charged with violating the rules of inmate conduct during a pat frisk, a procedure that was videotaped. Caselaw in the Third Department provides that where a videotape of the incident exists and may have significant bearing on the petitioner's defense, the hearing officer should allow the inmate to examine it. See, e.g., Matter of Lewis v. Rivera, 821 N.Y.S.2d 678 (3d Dep't 2006). Failure to do so requires that the matter be remitted for a new hearing. Id. At Petitioner Sowell's hearing, the hearing officer neither viewed the tape nor allowed petitioner to do so, saying, "there is nothing on the video that's going to say anything different from here." The court rejected this conclusion, finding that in the absence of having viewed the tape, it was unsupported and speculative. The court reversed the hearing and remitted the matter for a new hearing.

Matter of Victor Sowell v. Brian Fischer, Albany County, Supreme Court, Index No. 5463-12. Victor Sowell successfully challenged a Tier III hearing based on the Respondent's violations of his right to call witnesses.

Following a rehearing with respect to the incident in the dorm room (described in paragraph 1 of the preceding case summary), Petitioner Sowell filed an Article 78 proceeding alleging that his right to call witnesses was violated by the hearing officer's failure to interview a witness who had agreed to testify but later changed his mind and by the hearing officer's failure to call the IG investigator who had investigated the incident. The court found that petitioner's regulatory right to call witnesses had been violated by the hearing officer's failure to personally question the witness about testifying about why the reason he was no longer willing to testify and that petitioner's constitutional right to call witnesses had been violated by his refusal to call the IG

investigator as a witness. Further, the court found that by refusing to allow petitioner to question witnesses using their prior testimony, the hearing officer wrongfully denied the presentation of relevant evidence and had further violated petitioner's right to call witnesses. The court ordered the hearing reversed and the charges expunged from Petitioner Sowell's records.

Matter of Percy West v. James Esgrols, Albany County, Supreme Court, Index No. 4958-12. Court finds that the hearing officer violated Percy West's right to be present at his Tier III hearing when he excluded Mr. West in the absence of good cause to do so.

When officers packed up Percy West's cell in preparation to move him to another cell, they found what they determined to be gang related materials and issued a misbehavior report. At his hearing, Mr. West testified that he had not received a copy of the misbehavior report, had informed his employee assistant (EA) of this fact and had requested a copy from the EA and from the hearing officer. In response to the hearing officer repeatedly asking Mr. West whether his signature appeared on the employee assistance form, Mr. West replied, "For assistance." After asking the question 13 times and receiving the same answer, the hearing officer warned Mr. West that if he did not answer the question, he would be excluded from the hearing, the hearing officer again asked the question and this time Mr. West replied, "I signed for assistance." The hearing officer removed Mr. West from the hearing. The court held that Mr. West's behavior, while irritating, did not rise to the level of disruption warranting his exclusion from the hearing. Rather, the court commented, the hearing officer could have resolved any issues relating to petitioner's credibility concerning the receipt of the misbehavior report against him as opposed to removing him for failing to answer. Under the circumstances, the court concluded that the petition must be granted and the hearing reversed and the charges expunged.

Pro Se Victories! *features descriptions of successful unreported pro se litigation. In this way, we recognize the contribution of pro se litigants. We hope that this feature will encourage our readers to look to the courts for assistance in resolving their conflicts with DOCCS. The editors choose which unreported decisions to feature from the decisions that our readers send us. Where the number of decisions submitted exceeds the amount of available space, the editors make the difficult decision 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

Court Finds Failure to Record Exculpatory Testimony Warrants Reversal and Remittal

An officer who claimed to have observed petitioner having sex with a visitor charged petitioner with violating the rules that prohibit sex acts and creating a disturbance. On judicial review, in Matter of Tolliver v. Fischer, 962 N.Y.S.2d 828 (3d Dep't 2013), the court found that meaningful review was not possible because the transcript of the hearing was incomplete "in significant respects." Missing was the testimony of a correction officer who was working in the visiting room and had not observed any improper conduct on the part of the petitioner. According to the hearing officer, he had relied upon this testimony in finding the petitioner guilty. Failure to record testimony of this nature and testimony upon which the

hearing officer relied, the court found, requires annulment. The court reversed the hearing and remitted the matter for a new hearing.

Eric Tolliver represented himself in this Article 78 action.

Determination of Guilt Not Supported by Substantial Evidence

In Matter of Murray v. Fischer, 960 N.Y.S.2d 562 (3d Dep't 2013), the charges against the petitioner were filed after a correction officer reviewed an audiotape of a Nation of Islam meeting. He charged petitioner with conduct involving the threat of violence and encouraging other inmates to engage in actions which may be detrimental to the order of the facility. Following a Tier III hearing, petitioner was found guilty. Petitioner filed an Article 78 action, arguing that the determination of guilt was not supported by substantial evidence. The court found that neither the audiotape nor the transcript of the tape showed the petitioner had violated the two rules. The court found that while petitioner was agitated because Muslim inmates had been assaulted by officers and while he said that the group had to act together to do something about it, the only specific action he advocated was "starting a paper trail." He did not advocate violent or disorderly action but rather suggested that inmates collectively file complaints about the assaults with correction officials. The court held that the petitioner had not violated the two rules with respect to which he had been cited and ordered the hearing reversed and the charges expunged.

Sir Jules Murray represented himself in this Article 78 action.

Failure to Provide Instructions for the Operation of the Urinalysis Testing Machine Leads to Reversal

Harold Marshall was charged with violating the rule prohibiting the use of a controlled substance. At his hearing, he requested a copy of the rules for the operation of the urinalysis testing machine. The hearing officer denied the request and found Mr. Marshall guilty of the charge. In his Article 78 challenge to the hearing, Matter of Marshall v. Fischer, 958 N.Y.S.2d 800 (2d Dep't 2013), Petitioner Marshall argued that in the absence of adequate justification for the denial, he was entitled to a copy of the instruction manual in order to determine whether the test operator had complied with the regulation requiring that she "precisely follow procedures recommended by the manufacturer for the operation of the testing apparatus." 7 N.Y.C.R.R. §1020.4(f)(1)(iii). The court agreed that the hearing officer's refusal to produce the manual violated the petitioner's right to the production of relevant documents, reversed the hearing and remitted the matter for further proceedings not inconsistent with the decision.

Harold Marshall represented himself in this Article 78 action.

Court Finds That Hearing Officer Violated Prisoner's Right to Be Present At Tier III Hearing

After an officer claimed that he had found three ibuprofen tablets during a cell search, David Brooks was charged with possessing unauthorized medication and altered items. Mr. Brooks attended the first session of his hearing, but when the officer came to escort him to a later session, Mr. Brooks informed him that a foot injury prevented him from putting on one of his shoes. The escort officer then reported to the hearing officer that, "[Brooks] can't put his

shoe on, which doesn't meet the criteria for coming out of his cell in SHU so he's basically refused." The escort officer also gave the hearing officer a signed waiver form upon which Mr. Brooks had explained his injury. The hearing officer found that Mr. Brooks had waived his right to be present and found him guilty of the charges.

In Matter of Brooks v. R. James, 963 N.Y.S.2d 462 (3d Dep't 2013), the court noted that inmates have a fundamental right to be present at their disciplinary hearings. The court then commented that rather than transporting petitioner to the hearing by wheelchair, stretcher or other appropriate conveyance, arranging to have medical personnel examine petitioner or otherwise developing a record on the issue of petitioner's ability to walk – or exploring the possibility of allowing petitioner to leave the SHU wearing only one shoe – the hearing officer summarily accepted the escort officer's characterization of the petitioner's conduct as a blatant refusal to attend the hearing. Under these circumstances, the court held, the record does not support a finding that petitioner willfully refused to attend the hearing, see Matter of Alicea v. Selsky, 819 N.Y.S.2d 202 (3d Dep't 2006), or knowingly, voluntarily and intelligently waived his right to attend the hearing, see Matter of Hakeem v. Coombe, 650 N.Y.S.2d 819 (3d Dep't 1996). This conclusion, the court found, is in no way altered by petitioner's execution of the waiver form. The court finding that the respondent had violated a fundamental right to due process, granted the petition and ordered that all references to the charges be expunged from petitioner's institutional records.

David Brooks represented himself in this Article 78 action.

Inmate Successfully Challenges Charge That He Solicited a Sex Act

A search of Anthony Correnti's outgoing mail revealed that a letter mailed to his father contained a second letter and instructions that the second letter be forwarded to a female friend. The contents of that second letter included explicit descriptions of sexual activity. As a result, Mr. Correnti was charged with a violation of the facility correspondence rule and with a violation of the rule prohibiting inmates from "soliciting another to engage in sexual acts." Mr. Correnti pleaded guilty to the charge alleging a violation of facility correspondence rules, but pleaded not guilty to the solicitation charge. He contended at the hearing that the rule prohibiting solicitation should not apply because his letter constituted a conversation about sex between him and another adult who was not in prison. The hearing officer rejected his argument and he was found guilty of both charges. In his administrative appeal, he specifically argued that the language of the rule should not be interpreted in such a manner as to apply to his female friend, and that such an interpretation violated his constitutional right to free speech. The respondent denied the appeal. The Supreme Court, Albany County agreed with the respondent and dismissed Mr. Correnti's Article 78 petition.

In Matter of Correnti v. Prack, 962 N.Y.S.2d 829 (3d Dep't 2013), the Appellate Division reversed the lower court decision and granted the petition. On appeal, the petitioner argued that the solicitation rule did not encompass his conduct, and that if it did, the rule would run afoul of the First Amendment. The respondent conceded, and the court agreed, that the determination finding petitioner guilty of soliciting a sex act cannot

be sustained. The court remitted the proceeding to modify the penalty.

Anthony Correnti represented himself in this Article 78 action.

Court's Sense of Fairness Not Shocked By Three Year SHU Sanction

Based on information obtained by monitoring telephone calls between the petitioner in Matter of Harrison v. Fischer, 960 N.Y.S.2d 749 (3d Dep't 2013), and another man, prison officials intercepted a package containing close to 5 ounces of marijuana. As a result, petitioner was charged with and found guilty of smuggling and conspiring to introduce drugs into the prison. The hearing officer imposed a penalty of 36 months SHU.

In this Article 78 challenge to the hearing, the court rejected the petitioner's arguments that the determination of guilt was not supported by substantial evidence and that his rights to due process of law had been violated. Turning to the issue of whether the penalty imposed was excessive, the Court found that while it was true that petitioner had received a "significant" punishment, the petitioner's lengthy drug-related prison disciplinary history and the amount of drugs that were recovered caused the court to conclude that the penalty was not "so disproportionate to the offense as to be shocking to one's sense of fairness."

Corey Harrison represented himself in this Article 78.

Sentencing

Court of Appeals Rules That Predicate Sentencing Is a Collateral Consequence

In People v. Belliard, 961 N.Y.S.2d 820 (2013), the Court of Appeals considered the argument of a predicate offender that whether a sentence will run concurrently or consecutively to a previously imposed but undischarged sentence is a direct consequence of a conviction. Courts must inform defendants of the direct consequences of the sentences that they impose. The defendant here argued that because he had not been informed prior to pleading guilty that his sentence would run consecutively to a previously imposed and undischarged sentence, his plea was involuntary.

While the defendant was on parole from a sentence for a prior drug related conviction, he was arrested and charged with a drug related felony. During his plea colloquy, the trial court explained that as a second felony offender, defendant would receive a prison sentence of 12 years followed by 5 years of post release supervision. No mention was made by the judge, the prosecutor or the defense attorney as to whether the 12 year sentence would run concurrently with or consecutively to the prior undischarged sentence. At sentencing, the court was silent as to the relationship between the newly imposed 12 year term and the prior undischarged state sentence.

On appeal, the defendant argued that his guilty plea was involuntary because the trial court did not advise him of a consequence of his plea: that the 12 year term would run consecutively to his prior undischarged state sentence. The Fourth Department rejected the claim, as did the Court of Appeals, with one judge dissenting.

Whether or not a defendant must be informed of a consequence of his plea depends on whether the consequence is "direct" or "collateral." Direct consequences have a definite, immediate and largely automatic effect on a defendant's punishment. An example of what the Court has found to be a direct consequence is the period of post release supervision which is a part of every determinate sentence. See People v. Catu, 792 N.Y.S.2d 887 (2008). Mandatory registration under the Sex Offender Registration Act and the terms of probation, on the other hand, are collateral consequences. See, People v. Gravino, 902 N.Y.S.2d 851 (2010) (SORA) and People v. Ellsworth, 902 N.Y.S.2d 851 (2010) (probation).

Penal Law §70.25(2-a) provides that where a defendant who is sentenced as a predicate felony offender receives a sentence, the new sentence will run consecutively to any previously imposed sentence that was not discharged on the date of sentencing. In finding that the provision of this statute is a collateral consequence, the Court noted that it only affects second felony offenders who are subject to undischarged terms. Thus, not every defendant who is sentenced as a second felony offender runs the risk of having a consecutive sentence. Only those who are subject to prior undischarged sentences do. And, the Court pointed out, nothing in the statute requires that the sentencing court be informed of whether a second felony offender is subject to a prior undischarged sentence. Thus, when sentencing a defendant as a predicate felon, the sentencing court may not even know whether the defendant is subject to a prior undischarged sentence. Finally, as noted by the Court, when a defendant who is subject to a prior undischarged sentence is informed by the sentencing court of the term of his new sentence, he has no reason to think that that term would be effectively nullified by having it run simultaneously with other sentences that he had already received.

Defendants Must Address Illegal Sentences By Means of 440 Motions

In 1995, petitioner was sentenced as a persistent felony offender. In 2010, he requested Brian Fischer, Commissioner of the Department of Corrections and Community Supervision, to notify the sentencing court pursuant to Correction Law §601-a that he had been erroneously sentenced as a persistent felony offender. The Commissioner denied the request, based on his conclusion that the sentencing was not erroneous. Petitioner also filed a grievance requesting the same relief, which was also denied. He then brought an Article 78 proceeding asking the court to compel the Commissioner to contact the sentencing court about the erroneous sentence. In Matter of Johnson v. Fischer, 960 N.Y.S.2d 559 (3d Dep't 2013), the court concluded that the petitioner was not entitled to a writ of mandamus and affirmed the lower court's dismissal of the petition.

In reaching its conclusion, the court noted that "the writ of mandamus is an extraordinary remedy that lies only to compel the performance of acts which are mandatory, not discretionary, and only when there is a clear legal right to the relief sought." Correction Law §601-a imposes a duty on the Commissioner "to inform the sentencing court whenever it shall appear, to the satisfaction of the Commissioner based on facts submitted" that a person in DOCCS custody has been erroneously sentenced. The court held that because the initial determination of whether notification is warranted is entrusted to the Commissioner's discretion and judgment – that is, the Commissioner must determine whether an erroneous sentence has been demonstrated – mandamus does not lie. The court noted, however, that claims that an imposed sentence

is illegal, unauthorized or invalid may be brought by means of a Criminal Procedure Law (CPL), Article 440 motion.

Melvin Johnson represented himself in this Article 78 action.

Parole

At Parole Revocation Hearings, Parolees Cannot Rely on ALJs to Determine Legal Dates

In Matter of Ortiz v. LaClair, 2013 WL 968214 (Sup. Co., Franklin Co. Mar. 7, 2013), the petitioner challenged the respondents' failure to implement the plea deal reached at his final parole revocation hearing. In this case, the petitioner was released to post release supervision owing roughly 7 months on his determinate sentence and 2 years of post release supervision (prs). He violated prs at the point that he owed 4 months of prs. At his parole revocation hearing, the ALJ imposed a time assessment of hold to maximum expiration date. Petitioner returned to prison with no delinquent time and with roughly 6 months of parole jail time. This jail time was used to reduce the time owed on his determinate term to roughly 1 month. DOCCS calculated his maximum expiration date based on the time that he owed on his sentence (1 month) and the time that he owed on prs (4 months) and gave him a maximum expiration date that was 5 months from his return to DOCCS' custody.

Petitioner did not dispute this sentence calculation but argued that the ALJ at his parole revocation hearing agreed that the plea bargain would result in a new maximum expiration date that was roughly 2 months earlier than the date calculated by DOCCS. The court acknowledged that petitioner's argument was supported by the transcript of the parole revocation hearing and the parole revocation decision.

The court however rejected the petitioner's argument because, the court concluded, the authority to calculate sentence dates lies with DOCCS and not the ALJ. While DOCCS is bound by the delinquency date and by the time assessment imposed by the ALJ, it is not bound by any agreement with respect to the re-calculated maximum expiration date of the underlying judicially imposed determinate sentence, including the period of prs. In short, the court concluded that the parties at a final parole revocation hearing together with the ALJ, have no authority to enter into an agreement altering the statute based calculation of the maximum expiration of a parole violator's judicially imposed sentence.

For this reason, the court declined to issue an Order to Show Cause "inasmuch as the petition, as it is currently drafted, is patently without merit."

Jose Ortiz represented himself in this Article 78 action.

Family Court

Court of Appeals Affirms Order Awarding Incarcerated Father Visits With Child

In Matter of Granger v. Misercola, 2013 WL 1798581 (April 30, 2013), the Court of Appeals reviewed an Appellate Division decision affirming a family court order granting an incarcerated father's petition for visitation. In this case, the incarcerated father, who had acknowledged paternity before going to prison, sought visitation. After a fact finding hearing, the court granted the petition, ordering periodic four hour visits at the prison with the child who was then 3 years old. In reaching this result, the Family Court noted that the law in New York presumes that visitation

with the non-custodial parent is in the child's best interest and the fact that such parent is incarcerated is not an automatic reason for blocking visitation. Here, the court found, the father was involved in a meaningful way in the child's life prior to his incarceration and was seeking to maintain a relationship. The court also found that the child was old enough to travel to and from the prison and would benefit from visitation with his father. Finally, the court found that given the length of petitioner's sentence, losing contact for such a long time would be detrimental to an established relationship. For these reasons, the court found that visitation with his incarcerated father would be in the best interests of the child.

The appellate court affirmed the Family Court decision. In doing so, it did not comment on the fact that petitioner father had been moved to a prison more distant from the child. That fact, the court stated, would best be addressed in a petition to modify the visitation order.

On appeal to the Court of Appeals, the mother argued that the Family Court and the appellate division had employed an incorrect legal standard in deciding that visitation was in the best interests of the child. Appellate courts have held that there is a rebuttable presumption that in initial custodial arrangements, a noncustodial parent will be granted visitation. See, In re Matter of Nathaniel T., 468 N.Y.S.2d 768 (4th Dep't 1983). This presumption can be rebutted by proof that visitation will be harmful or that the non-custodial parent has forfeited the right to visitation. Id. This was the standard applied by the Family Court and the Appellate Court in Granger.

The mother argued that the proper standard was set forth by the Court of Appeals in Tropea v. Tropea, 642 N.Y.S.2d 575 1996), wherein the Court wrote, "Where a custodial parent seeks judicial approval of a relocation plan that would hinder visitation by the non-custodial parent, "presumptions and threshold tests that artificially skew the analysis in favor of one outcome or another must be rejected."

Rejecting the standard proposed by the mother, the Court used the following analysis. First, the Court said, in Tropea, it did not reject an initial presumption in favor of visitation, but rather rejected "a mechanical tiered analysis that prevents or interferes with a simultaneous weighing and comparative analysis of all of the relevant facts and circumstances involved in deciding a **relocation** case." The court went on to say of its holding in Tropea, "Our holding was not that presumptions can never be relied upon, but that each relocation case request must be considered on its own merits . . . and with predominant emphasis being placed on what outcome is most likely to serve the best interests of the child." The court concluded that, "a rebuttable presumption that a noncustodial parent will be granted visitation is an appropriate starting point in any initial determination regarding custody and/or visitation."

Turning to the issue of the applicability of that presumption to cases where the non-custodial parent is incarcerated, the court held that the presumption in favor of visitation applies there as well. A parent who is in prison does not forfeit his or her visitation rights by being incarcerated, the Court wrote. Only proof that such visitation would be harmful to the child, or that the incarcerated parent had forfeited his right to visitation, would justify denying the petition of an incarcerated parent for visitation with his child.

The Court went on to consider the amount of proof which must be introduced before an incarcerated parent's right to visit with his or her child might be denied. The Court held that there must be substantial evidence: visitation will only be denied when there is sworn testimony or documentary evidence that visitation will be harmful to the child. Where the incarcerated parent introduces expert testimony favoring visitation, the custodial parent's arguments to the contrary, when not supported by opposing evidence, cannot

constitute substantial evidence. See, Hughes, v. Wiegman, 541 N.Y.S.2d 57 (2d Dep't 1989). Similarly, where a record is devoid of sworn testimony or documentary evidence, it cannot be said that the court's decision to deny the visitation petition of an incarcerated parent is supported by substantial evidence. See, Folsom v. Folsom, 692 N.Y.S.2d 529 (3d Dep't 1999).

In Granger, the Court found that the lower courts had applied the appropriate legal standard, "applying the presumption in favor of visitation and considering whether the respondent had rebutted the presumption through showing, by a preponderance of the evidence, that visitation would be harmful to the child." For this reason, the Court affirmed the lower courts' decisions granting the incarcerated father's petition.

The Court agreed with the Appellate Division that with respect to the fact that the father had been transferred to a prison which was located at a greater distance from the child than had been the case when the court decided the petition was a matter that would be more appropriately addressed in a petition to modify visitation.

Court Erroneously Concludes That Visitation With Child Is Not In Child's Best Interest

In Matter of Brown v. Divelbliss, 2013 WL 1777482 (4th Dep't, Apr. 26, 2013), the court considered whether the family court finding that visitation by a child with her incarcerated father was not in the child's best interest had been reached improperly. The father in this case is serving a 15 year sentence. He sought visitation with his daughter for the first time when she was 9 years old. Initially, the mother agreed to bring the daughter to prison while the father's visitation action was pending. After one visit, however, the attorney for the child (AFC) informed the family court that the child did not want to have any more contact with her father. The AFC also said that the child's school counselor had said contact between the two was not "preferable." The mother's attorney said that the mother had encouraged visits but that the child said that she did not want to go again. On the mother's and the AFC's motion, the court dismissed the father's petition.

In considering the family court's decision, the Fourth Department first reviewed the principles that guide a court's determination of matters involving child visitation:

1. An award of visitation is always conditioned upon a consideration of the best interests of the child. Matter of Mills v. Sweeting, 718 N.Y.S.2d 558 (4th Dep't 2000);

2. It is generally presumed to be in a child's best interest to have visitation with his or her non-custodial parent and the fact that the parent is incarcerated will not, by itself, render visitation inappropriate. Matter of Cierra L.B. v. Richard L.R., 842 N.Y.S.2d 664 (4th Dep't 2007);

3. Unless there is compelling reason or substantial evidence that visitation with an incarcerated parent is detrimental to a child's welfare, such visitation should not be denied. Matter of Thomas v. Thomas, 715 N.Y.S.2d 818 (4th Dep't 2000);

4. A determination of the child's best interests should only be made after a full evidentiary hearing unless there is sufficient information before the court to enable it to make an independent comprehensive review of the child's best interests. Matter of Mills v. Sweeting, 718 N.Y.S.2d 558.

Applying these principles to the record before it, the Fourth Department found that the record was not sufficiently developed to

determine whether visitation with her father would be detrimental to the child's welfare. Further, the court found, neither the mother nor the AFC had presented any evidence rebutting the presumption that visitation with her father was in the child's best interest nor was there any other evidence in the record rebutting the presumption. And, the court noted, although the mother and the AFC both testified that after one visit, the child had said that she did not want to visit her father again, "the opposition of the mother and the AFC, unsupported by any testimony regarding the psychological health of the child and whether she would be harmed by the visits is insufficient to support a determination that visitation with the father would be detrimental to the welfare of the child." Finally, no sworn testimony was presented nor did the court interview the child.

Due to the lack of evidence in the record supporting the court's decision and its failure to consider the applicable presumptions, the Fourth Department reversed the order of the Family Court dismissing the father's petition for visitation.

Petitioner Mounts Successful Challenge to the Denial of Her Application to the Bedford Nursery Program

In Matter of Green v. New York State Department of Corrections and Community Supervision, et al., Westchester County Index No. 5228-12 (Cacace, J.), Cassidy Green filed an Article 78 petition under New York Correction Law §611. This section of the Correction Law grants a mother who gives birth while incarcerated the right to remain with her newborn child for up to one year unless the chief medical officer of the correctional institution shall certify that the mother is physically unfit to care for the child. Ms. Green's application for admission to the Nursery Program at Bedford Hills Correctional Facility ("BHCF") was denied. In her petition, Ms. Green alleged that the respondents – The Department of Corrections and Community Supervision (DOCCS), BHCF Superintendent Sabina Kaplan and Commissioner Brian Fischer − unlawfully denied her entry to the Nursery Program solely because she was convicted of a violent offense. She alleged that this *per se* bar from the Nursery Program violated her rights under Correction Law §611. Ms. Green sought temporary injunctive relief and an order directing the respondents to admit her to the Nursery Program.

Ms. Green was convicted of first degree manslaughter and has been incarcerated since April 2005. While incarcerated she had been guilty of few disciplinary charges, none of which were for violent conduct. For the three years immediately preceding the denial of her Nursery Program application, she had participated in the Puppies Behind Bars Program, during which time she lived in an honor housing unit. In her petition, Ms. Green stressed her "exceptional institutional record" and her efforts to improve herself while in prison.

Ms. Green conceived her baby during a Family Reunion Program visit with her husband. She is the mother of one other child, for whom she made an adoption plan when she was fifteen.

Ms. Green applied to the Nursery Program in June 2012. On August 17, 2012, the BHCF Assistant Deputy Superintendent of Programs denied her application "based on the violent nature of [her] Instant Offense." On August 22, 2012, Ms. Green appealed this decision to Superintendent Kaplan. The following day, Superintendent Kaplan affirmed the denial, stating that Ms. Green's offense made her "not eligible for Nursery placement."

On December 20, 2012, Ms. Green filed her Article 78 petition in Westchester County, alleging that respondents' decision was arbitrary, capricious, and an abuse of discretion. Ms. Green alleged that the respondents' *per se* bar from the Nursery Program for those convicted of violent crimes is improper under

the "best interests of the child" analysis required by Correction Law § 611. She further alleged that in denying her application solely on the basis of her crime, the respondents had not followed their own Nursery Manual Guidelines, which require consideration of multiple factors, including an applicant's disciplinary record, past parenting history, and criminal history. All of these factors, Ms. Green argued, weighed in favor of her being admitted to the Nursery Program. Finally, Ms. Green alleged that the respondents' denial was inconsistent with their own past practice, which included admitting women with violent convictions to the Nursery Program both as participants and as Nursery Aides.

On December 21, 2012, the court found that Ms. Green was likely to succeed on the merits of her claim, that she would suffer irreparable and imminent injury absent injunctive relief, and that the balance of the equities tipped in her favor. Pending its final decision, the court issued a temporary restraining order enjoining the respondents from excluding Ms. Green from the Nursery Program or otherwise depriving her of access to her newborn child. Ms. Green gave birth to a daughter shortly thereafter, and under the court's temporary restraining order, was able to enter the Nursery Program.

On February 5, 2013, the respondents submitted their answer and denied much of Ms. Green's petition. However, after all papers were submitted to the court, they offered to settle Ms. Green's claim and give her the relief that she was asking rather than having the case be decided by the judge. In settling the case, the respondents did not admit to having violated Ms. Green's rights. However, they did agree to place Ms. Green in the Nursery Program. On March 15, 2013, the court ordered the stipulation of settlement into effect.

This article was written by Jeremy Benjamin, Associate, Paul, Weiss, Rifkind Wharton and Garrison, LLP. Mr. Benjamin represented Cassidy Green in her Article 78 action.

Miscellaneous

Native American Prevails in Article 78 Relating to Religious Practices

Roman Santiago is a practitioner of a Native American faith. During his incarceration, until he was transferred to Green Haven C.F., he was permitted to possess religious items used in the practice of his faith. At Green Haven, Mr. Santiago was not permitted to practice his faith or to possess his religious items without showing proof of Native American ancestry. His grievances relating to these decisions were denied. After exhausting the administrative remedies provided by the Inmate Grievance Program, Mr. Santiago filed an Article 78 challenge to the Central Office Review Committee (CORC) decision that proof of Native American ancestry was required in order for him to be reinstated to the Native American religious program and for the return of his religious items.

In Matter of Santiago v. Fischer, 963 N.Y.S.2d 460 (3d Dep't 2013), the Appellate Division of the Third Department reviewed a lower court order dismissing the petition. The court first commented, citing Jackson v. Mann, 196 F.3d 316 (2d Cir. 1999), that correction officials may impose restrictions on the religious practices of inmates provided that the restrictions are reasonably related to valid penological interests. (Security is an example of a valid penological interest). However, the court found, respondents conceded that CORC did not identify any penological interest served by the requirement that an individual produce proof of Native American ancestry. Therefore, the court concluded, the CORC decision was arbitrary and capricious. The court granted the

petition and remitted the matter to CORC to set forth the penological interests justifying the documentation requirement.

Roman Santiago represented himself in this Article 78 action.

Court Dismisses Indictment For Prison Related Offense

The defendant in People v. Nathaniel Jay, Wyoming County Indictment No. 6756, argued that because he was required to wear shackles when he testified before the grand jury and the district attorney had not placed any reasonable basis for this requirement in the record, the indictment must be dismissed. In People v. Felder, 607 N.Y.S.2d 793 (4th Dep't 1994), the court reversed the defendant's conviction where the defendant had been required to testify in handcuffs before the grand jury. There the court held, "It is well settled that a criminal defendant may not be physically restrained in the presence of a jury unless there is a rational basis, articulated on the record, for the restraint or it is clear that the jury was not prejudiced thereby." Applying this standard to the facts before it, the County Court, Wyoming County, found that the record in People v. Jay contained no reasonable basis in the record for requiring the defendant to testify before the grand jury while in shackles. Based on this finding, the court dismissed the indictment.

Statements Made to the Case Review Team Are Admissible at Civil Commitment Trials

Recently the New York State Court of Appeals issued its decision in Matter of State of New York v John P., 958 N.Y.S.2d 667 (2012). The decision affirms the opinion of the Appellate Division, Second Department. Matter of John P., 925 N.Y.S.2d 893 (2011). In this case, Mental Hygiene Legal Service ("MHLS") argued that John P.'s right to a fundamentally fair trial was violated when the State was permitted to call a pre-petition Case Review Team ("CRT") examiner as its expert witness at a Mental Hygiene Law ("MHL") Article 10 trial.

Article 10 of the MHL is part of the Sex Offender Management and Treatment Act ("SOMTA"). This article governs the civil commitment of previously convicted sex offenders. John P. argued that un-counseled statements alleged to have been made to the CRT examiner prior to the filing of the petition, about sexual contact with three children, which were not included in his criminal and correctional records, should have been precluded at his Article 10 trial.

A civil management proceeding begins when DOCCS or OMH asks the SOMTA case review team (CRT) to review the case of a detained sex offender who is approaching his or her release date. The CRT reviews the inmate's records and conducts a psychiatric exam. The CRT determines whether the inmate suffers from a mental abnormality and is, therefore, either a dangerous sex offender requiring confinement or a sex offender requiring strict and intensive supervision. If the CRT decides that the inmate is a sex offender requiring civil management of either type, the CRT notifies the inmate and the Attorney General (AG) of its finding. If the AG agrees with the CRT's decision, the statute requires that the AG start a legal proceeding by filing a sex offender civil management petition.

The Court held that such statements made to the CRT were "obviously relevant, and no statute prohibit[ed] [their] use." The Court explained that because the CRT examination took place prior to the filing of the petition, and before the case had been referred to the attorney general, "appellant had no statutory right to counsel at the examination."

The Court also rejected appellant's constitutional argument, finding that "even under the rules applicable to criminal cases, appellant's rights were not violated." The Court noted that the Federal Constitutional right to counsel "attaches only at or after the time that adversary judicial proceedings have initiated." See, Kirby v. Illinois, 406 US 682, 688 (1977). Citing to People v. Lopez, 923 N.Y.S.2d 377 (2011), the Court also found that under the New York Constitution the right to counsel attaches only when "(1) a person in custody requests the assistance of an attorney or a lawyer enters the case or (2) a criminal proceeding is commenced against the defendant by the filing of an accusatory instrument." Consequently, at the time of the CRT examination, "appellant's right [to counsel] had not attached under either the federal or state test."

While the Court acknowledged that a pre-commencement interrogation may be "much more significant" than a pre-commencement lineup (see, People v. Hawkins, 450 N.Y.S.2d 159 (1982), it found that neither the Federal nor State Constitution forbids questioning a person who is un-counseled "against whom a proceeding may later be brought."

The Court reasoned that the CRT examination "preceded the commencement of a formal adversarial proceeding" and nothing suggested it "was a sham - - a mere cover for an effort to gather evidence against [appellant]." The Court thus opined that the CRT examination process "was not fundamentally an adversarial procedure . . . in which counsel was necessary to protect the appellant against the coercive power of the State and its agents." Hawkins, 450 N.Y.S.2d at 164.

As a practical matter, the Court's decision permits the State to use CRT examiners as expert witnesses at Article 10 trials and dispositional hearings. Furthermore, it allows CRT examiners to testify to any relevant inculpatory statements which were alleged to have been made by the respondent [the inmate against whom the proceeding was brought], absent the right to counsel, during the CRT exam, notwithstanding that this may undermine counsel for respondent's ability to mount an effective cross-examination, impeach the examiner's version of the statements, and set forth the circumstances under which they were assertedly made.

This article was written by Dennis Feld, Deputy Director of Special Litigation and Appeals, Mental Hygiene Legal Services. Individuals interested in obtaining additional information and advice about appearances before the CRT can contact: Arthur Baer, Principal Attorney, Mental Hygiene Legal Service, Second Judicial Department, 170 Old Country Road, Suite 500, Mineola, New York 11501.

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