

Pro Se

Vol. 28 No. 1 February 2018

Published by Prisoners' Legal Services of New York

Condition Imposed by the Division of Parole Was Arbitrary and Capricious

James Telford's application for parole release was granted by the Parole Board. He proposed living with his mother and sister in their family home in Suffolk County. Three parole officers inspected the proposed residence on two different occasions and found it suitable. However, the DOCCS Suffolk County Bureau Chief rejected the proposed residence, citing concerns about the safety of the petitioner and his family, as well as the community and parole officers, posed by unspecified community opposition.

Mr. Telford challenged the Bureau Chief's decision in an Article 78 proceeding. The petition was dismissed by the Supreme Court, Special Term. On appeal, the Appellate Division, in Matter of Telford v. McCartney, 155 A.D.3d 1052 (2d Dep't 2017), citing Executive Law §259-c(2) and 9 N.Y.C.R.R. 8003.3, noted that special conditions of parole may be imposed upon a parolee and such conditions are routinely upheld as long as they are rationally related to the inmate's past conduct and the possibility of recidivism. However, the court continued, speculation about possible community efforts to exclude the petitioner from otherwise suitable housing and about the petitioner's potential response to such efforts is not a rational basis for rejection of otherwise suitable housing. In the absence of any other basis for denying the approval of the proposed residence, the

court found the respondent's refusal to be arbitrary and capricious. The court remitted the matter to DOCCS for a new determination.

Roland Acevedo represented James Telford in this Article 78 proceeding.

Also Inside . . .

	Page
Gov. Cuomo's Proposal to Expand Programs for Veterans Behind Bars . . .	3
Pro Se Victories!	4
Duty of Care Owed to a Prisoner	8
Knowing Your Rights: Unpacking <u>Hassell v. Fischer</u>	8

Subscribe to Pro Se, See Page 11

STATE OF THE STATE MESSAGE INCLUDES SWEEPING CRIMINAL JUSTICE REFORMS

Including Geriatric Parole and Expansion of Programs for Veterans

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

On January 3, 2017, Governor Andrew Cuomo, in his State of the State Message, unveiled 22 proposals: <https://www.ny.gov/2018-state-state-proposals>. The Governor's 22nd Proposal, entitled: *Restoring Fairness in New York's Criminal Justice System* includes sweeping reforms to bail, discovery, speedy trial and asset forfeiture laws and procedures and improvements to the re-entry process to help individuals transition from incarceration to their communities. <https://www.governor.ny.gov/news/governor-cuomo-unveils-22nd-proposal-2018-state-state-restoring-fairness-new-yorks-criminal>. The re-entry initiatives include a proposal to lift statutory bans on certain occupational licenses, remove the mandatory suspension of driver's licenses following a drug conviction, expand eligibility for merit release and limited credit time release, implement "geriatric parole," remove the parole supervision fee and allow for the adjustment of child support orders for those serving over six months in prison.

The Governor also proposed an expansion of programs for incarcerated veterans (see full proposal below). PLS commends the Governor for including this reform in the 2018 Executive Budget as it is a reform that PLS has been working toward over the past two years.

In November 2016, the van Ameringen Foundation generously awarded PLS a two-year grant to support PLS' Mental Health Project (MHP), for work on behalf of youth under 21 years of age and veterans who suffer from mental illness in New York State prisons. The goal of the project with respect to veterans is to assist them in obtaining mental health care, ensure that those with mental illness are not subjected to living conditions that will adversely impact their mental health issues and advocate for systemic changes with respect to mental health treatment, programming, education and housing.

In line with this goal, since November 2016, PLS has worked with incarcerated veterans and numerous other stakeholders to identify and expand the current veterans programs available within DOCCS. We found that while DOCCS has Veteran Residential Therapeutic Programming (VRTP) available at some medium security prisons, the vast majority of DOCCS maximum security facilities do not have veteran-based programming of this nature and none have dedicated housing units for veterans. PLS determined that the successes of the existing VRTP's in medium security facilities indicated that replication of those programs would bring similar successes to incarcerated veterans serving long sentences and/or those currently housed in maximum security facilities.

As a result, in July 2017, PLS proposed to DOCCS a pilot program beginning in 2018 that would include the establishment of three dedicated veteran-housing units in maximum security facilities, with specialized programming for veterans. We thank DOCCS and the Executive for accepting our proposal and including funding in the budget to expand programming for veterans to maximum security facilities.

Governor Cuomo's Proposal to Expand Programs for Veterans Behind Bars

Governor Cuomo is dedicated to supporting the brave New Yorkers who have served our country. He recognizes that incarcerated veterans represent a unique segment of the imprisoned population who merit particular attention due to the unique circumstances they face returning home from war, which can often make the duration of incarceration and the transition back into the community upon release especially difficult.

Through the Department of Corrections and Community Supervision (DOCCS), the Governor implemented three Veterans Residential Therapeutic Programs at Medium Security Correctional Facilities that identify each veteran's individual needs and provide them with corresponding services.

This year, the Governor will provide resources to expand the programs available and offer the programs in Maximum Security Facilities for the first time. DOCCS will hire additional Licensed Master Social Workers, as well as a coordinator, and purchase a new professionally designed veteran specific curriculum that will broaden the scope of issues addressed, including conflict reduction and post-traumatic stress disorder and other relevant topics. Expanding the program will increase veterans' successful reintegration into society once they leave prison and reduce overall rates of recidivism, aiding our veterans and improving overall public safety.

News and Notes

This issue of *Pro Se* includes an article written by Barbara Zolot on the Second Circuit's decision in Hassell v. Fischer, a recent decision analyzing the plaintiff's entitlement to damages for the administrative imposition of post-release supervision (PRS). Ms. Zolot is a supervising attorney at the Center for Appellate Litigation. She has brought

numerous challenges involving post-release supervision on behalf of the Center's clients. Ms. Zolot has digested the Hassell decision in a way that makes its analysis and holding accessible to all of our readers.

The Hassell decision deals with *an individual's* lawsuit for damages for the wrongful imposition of PRS. Quite a few individuals have sued individually and periodically, the court issues decisions in those cases. An individual suit for damages is one way that a person upon whom DOCCS imposed PRS can seek damages

However, to be entitled to recover damages for the administrative imposition of PRS, it is not necessary for anyone to file an individual suit for damages. There is a class action suit for damages resulting from the illegal imposition of PRS. Known as Betances v. Fischer, 11-cv-3200 (S.D.N.Y.), this case will result in a decision on damages that will apply to everyone in the class. The class is defined as: “all persons who were sentenced to prison in New York State for a fixed [determinate] term that did not include a term of PRS, but who were nevertheless subjected to PRS after the maximum expiration dates of their determinate sentences and after June 9, 2006.”

The law requires that plaintiffs file lawsuits for damages relating to the violation of their rights to due process of law – the theory under which damages are awarded for the administrative imposition of PRS – within three years of when the claims accrue. Many of the people included in the class are beyond the limitations period within which they would have had to file to their lawsuits. Because of how the class is defined, the lawsuit protects the interests of a greater number of people than would be entitled, at this point, to sue for damages individually.

Rumor that Determinate Sentences Are Being Eliminated

Prisoners’ Legal Services has received requests for information regarding a rumor that determinate (“flat”) sentencing and/or post-release supervision will be repealed effective September 1, 2019. According to some versions of the rumor, any person serving a determinate sentence as of that date will have their sentence converted into an indeterminate sentence.

The rumor is false, but it is understandable how it arose. In 1995, when former Governor George Pataki first proposed determinate sentences, he met with resistance from the State Assembly. The proposal was eventually passed as a two year “pilot project” scheduled to expire in 1997. It has been renewed in two year increments every other year since then. Thus, all statutes that reference determinate sentences state that they will expire on

September 1st of the next odd-numbered year, to be replaced by an identically worded statute without the reference to determinate sentences. However, there is no reason to believe that determinate sentencing (and post-release supervision) will not be renewed again in 2019. Indeed, far from eliminating determinate sentencing, since 1995, the Legislature has increased the number of offenses for which a determinate sentence may be imposed. The list of such offenses now includes all drug offenses and sex offenses. Moreover, were the determinate sentencing provision to expire, its expiration would not affect the determinate sentences that were imposed prior to the expiration date.

PRO SE VICTORIES!

People v. Kristofer J. Surdis, Indictment No. 2017-025 (Co. Ct. Otsego Co. Nov. 1, 2017). Kristopher Surdis brought a C.P.L. 30.30 motion with respect to an indictment in Otsego County. His motion was later adopted by his defense counsel and the Assistant District Attorney conceded that the indictment must be dismissed.

Matter of Rennie Henry v. NYS DOCCS, Index No. 3559/2017 (Sup. Ct. Orange Co. July 6, 2017). When Rennie Henry’s FOIL request for the Commissioner’s Worksheets – documents that are generated after an inmate meets with the Parole Board – was denied, he filed an Article 78 proceeding seeking production of the documents. After filing, the respondent produced the requested documents.

Matter of Jeffrey Bernstein v. NYS Board of Parole, Index No. 3804-17 (Sup. Ct. Albany Co. Nov. 1, 2017). Jeffrey Bernstein obtained an Order to Show cause with respect to an Article 78 proceeding challenging his parole denial. The order to show cause required service of the petition by first class mail on the Attorney General and on the Division of Parole. Mr. Bernstein filed an affidavit of service asserting he had served both by first class mail. The Division of Parole contested this assertion, stating that it had received the petition by internal facility mail delivery and moved to dismiss

the petition. In a follow up affidavit, Mr. Bernstein maintained that he had sent both petitions by first class mail and averred that the people in charge of mail at the facility must have diverted his mail to the Division of Parole. The court found that while the Division of Parole was not served in accordance with the order to show cause, it was served a month prior to the court's deadline for service and more than 60 days prior to the return date. The court held that this service was not inadequate and gave the DOP sufficient notice. The court denied the motion to dismiss.

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 and Administrative Segregation

Court Reversed Determination of Guilt Due to Violation of DOCCS Directive

According to a misbehavior report, as Daniel Salinsky was removed from his cell to be pat frisked, an officer saw a suspicious item on his person. When Mr. Salinsky failed to comply with the pat frisk, the officer wrote a misbehavior report for refusing a direct order and failing to comply with frisk procedures. At this point, officers searched Mr. Salinsky's cell and allegedly found drugs, whereupon they charged Mr. Salinsky with

possessing drugs and unauthorized medication. After his appeal was denied, Mr. Salinsky filed an Article 78 challenge to the hearing that related to both misbehavior reports.

In Matter of Salinsky v. Rodriguez, 64 N.Y.S.3d 387 (3d Dep't 2017), unlike the case discussed in the next article, the court found that the failure to allow Mr. Salinsky to observe the search of his cell violated Directive 4910, mandating the reversal of the hearing and expungment of the charges relating to the recovery of the drugs from the petitioner's cell. The court based this decision on the absence from the record of any opinion of a member of the security staff that the inmate's presence during the search would present a danger to the safety and security of the prison.

The court upheld the determination of guilt made with respect to the first misbehavior report charging the petitioner with refusing a direct order and failing to comply with pat frisk procedures.

Daniel Salinsky represented himself in this Article 78 proceeding.

Failure to Follow DOCCS Directive on SHU Cell Searches Is Not a Basis for Reversal

During the search of a SHU cell, the individual who was assigned to the cell was removed and placed in a recreation area. A weapon was found and at the hearing that followed, the prisoner was found guilty. On administrative appeal and in an Article 78 challenge, he asserted that because DOCCS had failed to follow the procedures in Directive 4910, the hearing must be reversed. The lower court agreed and ordered the hearing reversed. The respondent appealed.

At the time of the search, DOCCS Directive 4910 required that when officers search a special housing cell, the inmate who is assigned to the cell must be placed in another cell, or if no other cell is available, he or she should be taken to the end of the tier for the duration of the search.

In Matter of Tenney v. Annucci, 2017 WL 6374558 (3d Dep't Dec. 14, 2017), the court reversed the decision of the lower court. The court found that although the placement of the petitioner in the recreation area violated the Directive, "the proper remedy must take into account the purpose of the regulation that was violated." Here, the court found, the plain reading of the directive established that the provision regarding the placement of the inmate during the search was intended to promote institutional security rather than to protect inmate rights. Thus, the court held, there is no reason to suppress the evidence found during the search due to a violation of this provision.

The Albany Office of Prisoners' Legal Services represented Andrew Tenney in this Article 78 proceeding.

Wrongful Denial of Witness Leads to Remittal for a New Hearing

After allegedly having been observed throwing a bottle containing an ice pick weapon into an adjacent empty cell, the petitioner in Matter of Castillo v. Annucci, 63 N.Y.S.3d 619 (3d Dep't 2017) was charged and found guilty of possessing a weapon and of possessing an authorized item that was altered. At his hearing, the petitioner asked that the officer who had searched the empty cell the day before the bottle was found be called as a witness. The hearing office denied the request, stating that such testimony would be irrelevant to the charges.

The court disagreed, finding that the hearing officer had improperly denied the witness. The court ruled that testimony that the bottle was in the cell the day before the officer alleged that he had seen the petitioner throw it there was not irrelevant. The court went on to rule that the appropriate remedy was a remittal for a rehearing.

Pedro Castillo represented himself in this Article 78 proceeding.

Where the Right to Refuse Medical Care Intersects with the Obligation to Obey Orders

After the petitioner in Matter of Johnson v. Eckert, 63 N.Y.S.3d 784 (4th Dep't 2017), refused to attend a mandatory medical call out, he was charged with refusing a direct order and movement violation. The petitioner raised the defense that he had a right to refuse medical treatment. The court agreed that he could refuse treatment, but held that he was obligated to obey orders from corrections staff. Thus, he was required to go to the medical call out where he could refuse treatment. The court dismissed the petition.

Leroy Johnson represented himself in this Article 78 proceeding.

Unexplained Unavailability of Videotape Leads to Reversal

In addition to other charges, Quayshaun Hubbard was accused of engaging in a sexual act and violating visiting room procedures. At his hearing, the videotape that allegedly showed the rule violations was, without explanation, not produced. Nonetheless, Mr. Hubbard was found guilty and the determination of guilt was affirmed on administrative appeal. In Matter of Hubbard v. Annucci, 62 N.Y.S.3d 254 (4th Dep't 2017), the Court held that the unexplained failure to produce the videotape deprived the petitioner of his right to reply to the evidence against him with respect to those charges. For this reason, the court ordered the determination that the petitioner violated these rules to be annulled and directed the respondent to expunge all references to those charges from petitioner's institutional record.

Quayshaun Hubbard represented himself in this Article 78 proceeding.

Court Reverses Hearing Relating to Charges of Possessing Contraband, Controlled Substance and Intoxicants

According to the misbehavior report at issue in Matter of Truman v. Venettozzi, 64 N.Y.S.3d 614 (3d Dep't Dec. 7, 2017), when questioned, the petitioner admitted to possessing synthetic marijuana which was then recovered during a pat frisk. On the basis of drug testing, the petitioner was found guilty of possessing contraband, controlled substance and intoxicants. He then filed an Article 78 challenge to the hearing which was transferred to the Appellate Division because it raised an issue of substantial evidence.

The Appellate Division found insufficient evidence to support the determination of guilt with respect to the three charges. The respondent agreed that substantial evidence did not support the charge of possessing an intoxicant (and thus the court did not explain the evidentiary insufficiency). It found that without testimony from corrections officials that appropriate testing procedures were followed, "as was necessary to lay a foundation for the test results," the charge of possessing a controlled substance was not supported by substantial evidence. Finally, the court found that the absence of any testimony from correctional officials identifying the substance as synthetic marijuana or attesting to petitioner's alleged admission, there was insufficient evidence that the petitioner possessed contraband.

Joseph Truman represented himself in this Article 78 proceeding.

Court Finds Petitioner's Explanation of His Conduct to be Credible

In Matter of Ballard v. Annucci, 66 N.Y.S.3d 84 (3d Dep't 2017), the petitioner challenged the determination of guilt made a Tier III proceeding relating to two misbehavior reports concerning two different incidents. One of the tickets related to charges that the petitioner had failed to comply with a hearing disposition and was out of place. The

petitioner appealed from a determination that he had used the telephone when he was under a Tier III disposition imposing a loss of phone privileges.

The court found that the petitioner testified that his loss of phone privileges had ended before the day on which he made the calls and produced the disposition sheets from the hearings at which the loss of phone privileges had been imposed. These sheets showed that his phone privileges should have been restored before the day on which he made the calls. The petitioner also denied having received a notice showing an adjustment to the sanction date and nothing in the record indicates that he had received such a notice. Under these circumstances, the court held, the record lacks substantial evidence to show that the petitioner intentionally failed to comply with a hearing disposition or was knowingly out of place.

Because the court upheld the determination of guilt with respect to the second misbehavior report, it remitted the matter for a redetermination of the penalty.

Darnell Ballard represented himself in this Article 78 proceeding.

Testimony of Inmates Who Were On the Scene about Their Misbehavior Reports Is Irrelevant

Corrections staff, alleging that Akil Shabazz was one of approximately 30 inmates who, to protest a new bathroom pass policy in the mattress shop, stopped working and stood in line for a bathroom, charged him with refusing a direct order, violating strip frisk procedures, interfering with an employee, participating in a work stoppage, creating a disturbance and unauthorized assembly. At his hearing, Mr. Shabazz asked to call inmate witnesses to testify about whether other inmates in the mattress shop were subject to similar disciplinary charges. The hearing officer denied these witnesses, finding that their testimony would be immaterial. In Matter of Shabazz v. Annucci, 64 N.Y.S.3d 404 (3d Dep't 2017), the Third Department agreed with the hearing officer, finding that the proposed testimony was immaterial, because, the court wrote, the issue

that the petitioner wished to pursue was **collateral** (incidental, not central) to the issue of his guilt or innocence. Based on this conclusion, the court ordered the petition dismissed.

The Albany Office of Prisoners' Legal Services represented Akil Shabazz in this Article 78 proceeding.

Miscellaneous

Duty of Care Owed to a Prisoner

In Adeleke v. County of Suffolk, 2017 WL 6504785 (2d Dep't Dec. 20, 2017), the plaintiff, an inmate in the Suffolk County Correctional Facility, a local jail, was involved in an altercation with another inmate who was assigned to pass out lunch to inmates. Other inmates joined the fray. At the time of the incident, the inmates were in a dormitory which was overseen by one correction officer.

The plaintiff sued to recover damages for the injuries that he received and the failure to treat those injuries. The court denied the defendant's motion for summary judgment and the defendant's appeal.

The Second Department, finding that the County had failed to satisfy its burden of establishing entitlement to judgment as a matter of law, affirmed the trial court's decision. In reaching this result, the court, citing Sanchez v. State of New York, 754 N.Y.S.2d 621 (2002), first noted that inmates are owed a duty of care to safeguard them from attacks by fellow inmates. This duty, the court wrote, is limited to risks of harm that are reasonably foreseeable. In its motion for summary judgment, the defendant had the burden of establishing that the assault on the plaintiff was not foreseeable. The defendant did not meet this burden, the court found.

Specifically, the court found that the defendant failed to show that there were no triable issues of fact as to whether the County knew or should have known of the dangerous propensity of certain

inmates involved in the assault or of other prior assaults that occurred while meals were being distributed by inmates. In fact, the court noted, evidence submitted by the defendant showed that such assaults took place monthly. In addition, the County failed to show that there were no triable issues of fact as to the adequacy of the measures that it took to prevent reasonably foreseeable harm.

The court found similar deficiencies in the proof presented in support of the County's claim that it was entitled to summary judgment on the claim that it had failed to provide adequate medical care to the plaintiff. With respect to this claim, the court, citing Mullally v. State of New York, 734 N.Y.S.2d 864 (2d Dep't 2001), first noted that the state, or in this case, the municipality, owes a duty to its incarcerated citizens to provide them with adequate medical care. Here, the court found, the County's failure to submit an affidavit from an expert that the plaintiff received adequate care was fatal to its motion. Instead, the defendant submitted a copy of the plaintiff's medical records and a conclusory sworn statement from the defendant's attorney stating that the plaintiff received timely, adequate medical care. This, the court held, failed to establish the County's entitlement to judgment as a matter of law.

Vickie Silver and Steven B. Tannenbaum of Horowitz, Tannenbaum & Silver, P.C. represented Abiodun Adeleke in this action.

FEDERAL COURT DECISIONS

Know Your Rights: Unpacking Hassell v. Fischer

For many individuals, fresh challenges accompany a long-awaited release from prison in the form of post-release supervision. Our clients report that PRS entails restrictions and reporting requirements that can limit options and employment opportunities, and that the relationship between a "supervisee" and his or her parole officer can be difficult to negotiate.

It was due to our clients experiences on PRS that we took notice when our office began receiving calls from them about a recent Second Circuit civil case, Hassell v. Fischer, ___ F.3d ___, 2018 WL 265084 (2d Cir. Jan. 3, 2018). Our clients believed this decision said something important about PRS, so we looked into it. Indeed, it is the first case awarding damages for the administrative imposition of PRS to reach the Second Circuit. We've written this article because we believe that individuals who served PRS or are subject to PRS should understand what Hassell does and doesn't stand for. We can certainly see how it can sow confusion.

Below, we briefly summarize the case and its takeaways. In short, it is important to recognize that Hassell is a *damages* case stemming from the administrative imposition of PRS by DOCCS.¹ While Hassell references some of the relevant law in the PRS arena, it does not support a new claim for resentencing, for vacatur of a conviction, or for release from prison. **Further, whether your specific circumstances entitle you to damages, the timeliness of any such claim, and the merits of any such claim, are beyond the scope of this article, which is intended only to summarize Hassell and provide some general takeaways.**

¹ For purposes of understanding Hassell, we will briefly recap the high points in the development of the law in this area: In 2006, the Second Circuit in Earley v. Murray, 451 F.3d 71 (2d Cir.), reh'g denied, 462 F.3d 147 (2d Cir. 2006), ruled that DOCCS officials violated due process by administratively imposing a PRS sentence that could only be imposed judicially. In 2008, the New York State Court of Appeals held the same under New York law in People v. Sparber, 10 N.Y.3d 457 (2008). Following Sparber many individuals who had been subjected to administrative PRS (and even jailed on violations) were returned to court to be judicially resentenced to PRS. Still later, the Court of Appeals held in People v. Williams, 14 N.Y.3d 198 (2010), that a PRS resentencing that took place after the defendant was released from prison violated double jeopardy; after Williams, PRS was removed from a number of sentences. People v. Lingle, 16 N.Y.3d 621 (2011), then clarified that the resentencing only violated double jeopardy if it followed the maximum expiration date of the defendant's sentence. We note that the history of PRS litigation has been an unfortunate trend of retrenchment and restriction, and increasing hostility to such claims.

Nor can the Center for Appellate Litigation advise you on these matters. With those caveats (cautions), we hope you find the information we provide below useful and informative.

Factual Background: Hassell timely sought damages under 42 U.S.C. §1983 for his service of administratively imposed PRS. He was released from prison at his conditional release date, February 29, 2008, and PRS was administratively imposed upon him. His conditional release period ended on August 31, 2008, the expiration date of his determinate term, and he continued to serve administratively imposed PRS until he was brought back to court and judicially resentenced to a five-year term of PRS on December 3, 2008. He then continued to serve PRS until June 17, 2010, when the PRS was removed because it was found to violate Double Jeopardy under People v. Williams. Reviewing Hassell's claim for damages, the Second Circuit identified the harm as stemming not from the service of administratively imposed PRS, but from the harm resulting from the failure of DOCCS and other state officials to promptly correct his sentence to include judicially imposed PRS, that is, to make it a legal sentence of PRS. The Court found that the federal district court had not abused its discretion in finding that the state acted with unreasonable delay in failing to comply with Earley [which held that PRS must be judicially imposed, *see fn. 2*] within 90 days of that decision.

Holding: The Second Circuit awarded Hassell nominal damages of \$300. The Court limited the period of recovery and the recoverable amount based on its findings that (1) Hassell did not really start serving PRS until after the conditional release period expired, since he would have been on supervision during that period anyway; (2) no damages could be recovered for the period after judicial imposition of PRS, even though its imposition violated double jeopardy; and (3) even though the state unreasonably delayed in correcting Hassell's sentence, he did not suffer any damage from that delay because had it been corrected promptly, he would have been serving PRS anyway. Therefore, the Court awarded nominal damages of \$300 — \$100 for each of the three months between the expiration of his conditional release period on August 31, 2008 and his judicial resentencing on

December 3, 2008. In a footnote, the Court noted that usual nominal damages were just \$1 a month, but that the state was not contesting the higher amount in this case.

General Takeaways from Hassell: If you were administratively sentenced to PRS and meet timeliness-of-filing requirements for bringing a claim for damages:

- No damages can be recovered for any period of PRS service following the judicial imposition of PRS (i.e., the correction of the illegal sentence);
- No damages can be recovered for the service of PRS during the period of conditional release;
- Nominal damages are potentially recoverable if the state unreasonably delayed in correcting your illegal sentence; however, while the Second Circuit did not dispute that any period beyond 90 days from the *Earley* decision was unreasonably long, any damages flowing from such delay would be nominal because it found that no harm stems from the delay (absent the delay, the sentence would otherwise have been corrected to lawfully include PRS);
- Nominal damages begin to accrue on the **later of** (1) 90 days after June 9, 2006, the date *Earley* clearly established an individual's right not to have PRS imposed administratively; or (2) the maximum expiration date of your determinate sentence. Damages stop accruing on the date of any judicial resentencing; and
- While the Court awarded Hassell \$100/month, there is no guarantee of even that amount in other cases: the Court expressly noted that nominal damages are usually just \$1/month.

Plausible Allegation of Substantial Risk of Physical Injury Is Sufficient to State a Claim

In Douglas v. Annucci, 2017 WL 5159194 (W.D.N.Y. Nov. 7, 2017), the plaintiff sought to hold the defendants liable for compensatory and punitive damages for the injuries he suffered as a result of their failure to protect him from the threat of assault by gang members whom, the complaint alleged, the defendants knew presented a threat to the plaintiff. This decision deals with whether the defendants' conduct, which did not result in an assault, stated a claim for damages under the 8th Amendment and whether the claim was prohibited by the provision of the Prison Litigation Reform Act providing that prisoners cannot file actions unless they suffered physical injury. Here, it was undisputed that the plaintiff had been assaulted 5 times previously and that even after he was placed in protective custody, twice a day he was required to walk through the general population portion of the prison to get his medication. The physical injuries claimed by the plaintiff were the fear related physical symptoms that he experienced every day for at least five months, including nervous stomach, sleeplessness and a level of fear so great that he could hear his heart beating.

The defendants moved to dismiss the complaint, arguing that the plaintiff had failed to state a claim for relief – that is, even if everything he alleged in the complaint is true, because he was not attacked, the defendants had not violated his 8th Amendment rights – and that because he did not suffer physical injury, the Prison Litigation Reform Act (PLRA) requires that his complaint be dismissed.

Decisions discussing 8th Amendment claims of failure to protect have held that to state a claim for deliberate indifference to an inmate's safety, the plaintiff must show that he or she was subjected to conditions posing a substantial risk of serious harm and that the defendants knew that he or she faced such a risk and failed to take reasonable steps to lessen the harm. See, e.g., Hayes v. NYC DOC, 84 F.3d 614 (2d Cir. 1996). In Douglas, the court found that the plaintiff had plausibly pleaded that he

This article was written by Barbara Zolot. Ms. Zolot is a supervising attorney at the Center for Appellate Litigation and has brought numerous challenges involving post-release supervision on behalf of the Center's clients.

faced a substantial risk of harm in his allegations that 1) there was an active contract on his life by gang members, 2) that he had already been slashed by gang members five times, and 3) that twice a day, for at least a period of 5 months, he was required to walk through the general population portions of the prison.

Section 1997e(e) of the PLRA provides that unless a prisoner can show physical injury, he or she cannot bring a federal civil action for mental or emotional injury suffered while in custody. The Second Circuit has interpreted this as placing a limitation on the recovery of damages in the absence of physical injury; prisoners may however, recovery compensatory damages for actual injury, nominal or punitive damages, or injunctive and declaratory relief. With respect to this provision, the Douglas Court first noted that the plaintiff sought compensatory and punitive damages. Because this section of the PLRA does not prohibit recovery of *punitive* damages where there was no physical injury, the Court denied the defendants' motion with respect to the claim for punitive damages. The Court dismissed the claim for compensatory damages, finding that the plaintiff had not alleged physical injury.

Tracey Douglas represented himself in this Section 1983 action.

☪ DONORS ☪

PLS would like to thank those who were able to send donations to help defray the costs of publishing *Pro Se*. Your contributions are very much appreciated.

Sponsor \$200.00
David Leven, Esq.

Subscribe to *Pro Se*!

Pro Se is published six times a year. *Pro Se* accepts individual subscription requests. With a subscription, a copy of *Pro Se* will be delivered, free of charge, directly to you via the facility correspondence program. To subscribe send a subscription request with your name, DIN number, and facility to *Pro Se*, 114 Prospect Street, Ithaca, NY 14850.

***Pro Se* Wants to Hear From You!**

Send your comments, questions or suggestions about the contents of *Pro Se* to: *Pro Se*, 114 Prospect Street, Ithaca, NY 14850.

Please **DO NOT** send requests for legal representation to *Pro Se*. Send requests for legal representation to the PLS office noted on the list of PLS offices and facilities served which is printed in each issue of *Pro Se*.

***Pro Se* On-Line**

Inmates who have been released, and/or families of inmates, can read *Pro Se* on the PLS website at www.plsny.org.

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

PLS Offices and the Facilities Served

Requests for legal representation and all other problems should be sent to the local office that covers the prison in which you are incarcerated. Below is a list identifying the prisons each PLS office serves:

ALBANY, 41 State Street, Suite M112, Albany, NY 12207

Prisons served: Bedford Hills, CNYPC, Coxsackie, Downstate, Eastern, Edgecombe, Fishkill, Great Meadow, Greene, Green Haven, Hale Creek, Hudson, Lincoln, Marcy, Mid-State, Mohawk, Otisville, Queensboro, Shawangunk, Sing Sing, Sullivan, Taconic, Ulster, Wallkill, Walsh, Washington, Woodbourne.

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

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

ITHACA, 114 Prospect Street, Ithaca, NY 14850

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

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

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

Pro Se Staff

EDITORS: BETSY HUTCHINGS, ESQ., KAREN L. MURTAGH, ESQ.

COPY EDITING AND PRODUCTION: ALETA ALBERT