Pro Se

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3rd Department Rules in Favor of Parole Board on Amendments to Executive Law

In Matter of Montane v. Evans, 981 N.Y.S.2d 866 (3d Dep't 2014), the petitioner challenged the Parole Board's decision denying him parole, arguing that the Parole Board had improperly focused almost exclusively on the seriousness of his crime and had failed to properly consider other relevant factors. The Supreme Court, Albany County, granted the petition, holding that the Board had failed to promulgate written rules regarding risks and needs assessments as mandated by the 2011 amendments to Executive Law §259-c(4) and that in the absence thereof, the Board's determination was unlawful, arbitrary and capricious. Accordingly, the court annulled the determination and ordered that a new hearing be held.

The Board appealed from that decision and the Third Department reversed the lower court's decision, holding that the amendments to the Executive Law did not impose an obligation on the Parole Board to formally adopt regulations. The Court also held that the Board's decision denying parole was issued in compliance with the statutory requirements of Executive Law §259-c(4) and was not irrational. Based on these conclusions, the Court reversed the lower court's decision.

Prior to the 2011 amendments, Executive Law §259-c(4) required the Board to "establish written guidelines" to be used in making parole release decisions. The law ***permitted*** the guidelines to include the use of a risk and needs assessment. The Board then adopted 9 N.YC.R.R §8001.3(a) which included a grid setting forth guidelines to be used in determining the customary total time served before release. In its review of these regulations in 2004, the Third Department held that the regulations were not intended to establish a rigid numerical policy invariably applied across the board to all inmates without regard to individualized circumstances or mitigating factors. Based on this analysis, the Court

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Also Inside . . .

Incarcerating the Aging and Elderly

A Message from the Executive Director - Karen L. Murtagh

Over the past few years there has been growing interest regarding the aging prison population, both from the perspective of the problems the elderly face in prison and from a public policy perspective. In fact, in our April 2013 issue of *Pro Se*, my message to our readers was about a March 28, 2013 panel discussion hosted by Albany Law School on issues associated with America's aging prison population. Since then I have been invited to speak on other panels specifically addressing this issue – the most recent of which was held on March 28, 2014, exactly one year after the Albany Law School panel. The one-day symposium entitled: "Reducing Incarceration: Endless Punishment, Long-Term Sentences, and Aging in Prison — or Release and Reentry," was hosted by Columbia University's Justice Initiative, together with the Correctional Association of New York, the Release Aging People in Prison Campaign, the Osborne Association and the Florence V. Burden Foundation. During this event I focused my remarks on the economic, penological and moral issues associated with incarcerating the elderly. What follows is a summary of my remarks.

Because it has been widely documented that people age physiologically faster in prison, there is, for the most part, a criminological consensus that the age of 50 is when a prisoner becomes elderly. As a country we spend more than $16 billion annually to incarcerate individuals over 50 years of age. In New York State, as of January 2012, the annual cost of incarcerating an individual, as calculated by the Vera Institute, was $60,076.00. As of January 2013, approximately 17% of New York State's prison population, or 9,269 prisoners, were over the age of 50. Using the 2010 Vera figure of $60,000, New York State spends a minimum of $556 million annually to incarcerate its elderly.

In June 2012, the American Civil Liberties Union issued a report entitled "At America's Expense: The Mass Incarceration of the Elderly," finding that by 2030, there will be more than 400,000 elderly prisoners behind bars, a 4,400% increase from 1981 when only 8,853 state and federal prisoners were elderly. Experts agree that this increase is due to disproportionate sentencing policies and 'tough on crime' movements, but the result is not just more people in prison – these policies have also forced our prisons to double as nursing homes. And yet, there is strong evidence that the elderly are far less likely than the rest of the population to commit crimes, such as the fact noted in the ACLU report, that in 2009, "just over two percent of individuals between the ages of 50 and 54 were arrested, and virtually no one 65 or older was arrested."

The decrease in the criminogenic tendency of individuals 50 or over is also borne out inside prison. If incarcerated individuals don't follow prison rules, they are given prison disciplinary hearings. If they are found guilty, they are often punished by being sentenced to solitary confinement. Yet, although 17% of DOCCS' prison population is over 50, only 7% (278) of those in solitary confinement are elderly.

Finally, there is the moral issue of confining an elderly individual in a prison setting which is punitive in nature. Take the example of Willie, born in 1930, now 84 years old. He is serving a 25 – life sentence for murder. Willie uses a wheelchair which he steers with his feet as he cannot grip anything with hands due to severe muscle damage and deterioration. He cannot shave, comb his hair or hold a washcloth in the shower. Willie's medical records total 495 pages. Willie takes 36 pills a day and often has difficulty eating. Due to his medical condition, Willie has fallen several times, the most recent of which occurred while he was using the bathroom. He fell backwards and hit his head on the toilet seat. He attempted to crawl and get up but could not. He lay on the floor for 15 minutes before being discovered.

There are hundreds of others just like Willie – people who are no longer a threat to public safety and need medical care and treatment, not isolation and punishment. It is a drain on our very limited economic resources and incomplete contravention of our criminal justice policies to continue holding such individuals in punitive settings. We must research and adopt best practices regarding the aging prison population which include, among other things, expanding the scope of and easing restrictions on access to medical and/or geriatric parole, developing strategies to allow older individuals to complete their sentences in a community setting, and developing relevant risk and needs assessment instruments.

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concluded that the written guidelines did not constitute rules or regulations such that the Board was required to file them with the Secretary of State. See, Matter of Lue-Shing v. Travis, 784 N.Y.S.2d 259 (3d Dep't 2004).

The 2011 amendments to §259-c(4) deleted the reference to "guidelines," requiring the Board "to establish written procedures to be used in making parole release decisions." The procedures are to assist Board members in determining which inmates should be released. Exec. Law §259-c(4). The amendments **require** that the procedures incorporate a risk and needs assessment. Id. To comply with the law, the Board issued a memo to Board members addressing the amendments and providing guidance with respect to the statutory amendments. Matter of Montane v. Evans, above.

In analyzing whether the amendments required the Board to engage in formal rulemaking (filing the rules with the Secretary of State), the Court first looked at the statutory language, finding that there was no express language requiring formal rulemaking. This was, the Court noted, in contrast to other provisions of the Executive Law. Executive Law §259-j, for example, provides that the chair of the Board "shall make rules and regulations" governing the issuance of discharges from community supervision.

Next, the Court noted, only "a fixed, general principle to be applied by an administrative agency without regard to other facts and circumstances relevant to the regulatory scheme of the statue it administers constitutes a rule or regulation." When the Court applied this standard to the prior requirement that the Board adopt written guidelines, it found that because decisions of the Board require flexibility and discretion, the guidelines used to reach those decisions were not meant to establish a rigid policy invariably applied across the board to all inmates without regard to individualized circumstances. See, Matter of Lue-Shing v. Travis, above. Similarly, the Court wrote, "the written procedures required by the 2011 amendments were intended only to assist" Board members in determining whether an inmate should be released to parole supervision. Where §259-c(4) requires the Board to consider the statutory factors listed in §259-j in determining whether to release an inmate, the written procedures required by §259-c(4) cannot be construed to be intended to determine whether an inmate can be released. Based on the above analysis, the Court concluded that the 2011 amendments to Executive Law §259-c(4) do not require the promulgation of formal rules or regulations and thus the Parole Board's failure to file the written procedures does not render the parole decision at issue in Montane in violation of lawful procedures.

The Court also held that the 2011 memo sufficiently established the procedures for incorporating risk and needs principles into the decision making process. According to the Court, the memo sets out the statutory factors found in Executive Law §259-i(2)(c)(A) that the Board is required to consider, and emphasizes that the statutory criteria must be considered in light of the statute's strong rehabilitative component. To do this, the memo directs Board members to use a transition accountability plan (TAP) [for prisoners coming into DOCCS custody after October 2011)] and a COMPAS Risk and Needs Assessment instrument. The memo, the Court found, satisfied the Board's obligations under the 2011 amendment.

Finally, the Court disagreed with the lower court's decision that the Board had relied exclusively on the seriousness of petitioner's crime in denying parole. According to the Court, the Board considered the petitioner's clean disciplinary record, positive release plans and his COMPAS assessment. As the Board's decision did not show "irrationality bordering on impropriety," the Court concluded that the decision denying release must be upheld.

Justice Garry concurred with the majority's decision, but wrote that she thought the 2011 amendments require the Board to consider the prisoner's rehabilitation. Without an explanation of how the Board reached its decision, she wrote, there can be no meaningful judicial review. In summary Judge Garry wrote, "Our exceptionally deferential precedent allows too much mystery and too little analysis." In Montane, Judge Garry agreed with the majority that the Board had complied with the 2011 amendments by expressly assessing petitioner's rehabilitative efforts and risks and needs and determined that these were **outweighed by** (were less significant than) other factors.

News and Notes

DOCCS Revises Witness Refusal Forms Used at Tier II and Tier III Hearings

In 1982, New York State's highest court, the Court of Appeals, held that if a requested witness refuses to testify at a prisoner's disciplinary hearing, the hearing record must reflect a reason for that witness's refusal. Matter of Barnes v. LeFevre, 69 N.Y.2d 649 (1986). After Barnes, DOCCS began using Form 2176A, "Requested Inmate Witness Refusal to Testify in Tier II/Tier III Disciplinary Hearing," to help ensure that the reasons for a witness's refusal to testify were placed into the hearing record. Form 2176A allowed refusing witnesses to choose from among three general reasons already printed on the form. Space was also provided for witnesses to write down their specific reasons for refusing to testify.

Recently, some responses to FOIL requests for the administrative records of Tier III hearings have omitted Form 2176A. And, when Form 2176A was produced, the reasons given by prisoners for refusing to testify were sometimes **redacted** (blacked out) or no reason was provided, other than a circle around one of the three preprinted choices. Last year PLS filed an Article 78, Matter of PLS v. Annucci, Index No. 13-3686, Supreme Court, Albany County, challenging DOCCS' failure to provide the reasons for witness refusals as required by Barnes. Recently the parties reached a settlement, which includes an agreement that DOCCS will revise the witness refusal form.

Effective January 13, 2014, pre-printed reasons for refusing to testify are no longer provided on Form 2176A. Instead, the form provides a space where a witness can write his or her reason for refusing to testify. The revised form also alerts refusing witnesses that if the hearing officer is not satisfied with the reason given, he or she may ask the witness to clarify the reason for the refusal.

Hearing Officers are now provided space to indicate when they have met with a refusing witness.

Form 2176A is to be shared with the charged prisoner at the hearing as well with as individuals requesting the hearing record under the Freedom of Information Law (FOIL). Where the hearing officer thinks that disclosing the reason for a witness's refusal to testify could jeopardize institutional safety and security, **all** 2176A forms for that hearing will be considered confidential and **withheld** (kept) from disclosure. The accused prisoner will still be informed that a requested witness refused to testify through Form 2176, "Witness Interview Notice." Without exception, the hearing officer should provide Form 2176 to anyone who requests witnesses at a Tier III (or Tier II) hearing.

Letters to the Editor

Editor:

I have, thanks to ***Pro Se***, Prisoners' Legal Services and a little work, been rather successful in a number of different actions against the State of New York and DOCCS. So far, I have been granted a writ of habeas corpus and won two Article 78 proceedings and an action in the Court of Claim. The decisions in the Article 78 proceedings resulted in the restoration of lost good time. [Editor's Note: As a result of the Article 78 victories, Mr. Moulton was released from prison on 1/28/14]. I was recently granted summary judgment on the issue of liability for the post-Garner enforcement of administratively imposed post-release supervision. I am writing this in hope that you will print my expression of gratitude and because perhaps

hearing about victories may help someone else, just as the ones that came before mine helped me.

Sincerely,

Francis Moulton

Dear Editors:

PLS Executive Director Murtagh's piece on the huge cost of operating prisons that seem to do more harm than good to prisoners and their families and communities was very informative. Another possible way to affect positive reform might be to have a legislative hearing in Albany where European officials could explain their freer, more just and very effective drug and crime laws that could greatly reduce violent crime while saving New York State taxpayers millions of dollars. Such a hearing would not be unduly expensive and would show how counter-productive our system is. All who truly care should request just one hearing. What harm could it do?

Fiat Justia Ruat Caelum,
(Let there be justice though the heavens fall)

Henry D. Halm

Letters to the editor should be addressed to:

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

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

Pro Se Victories!

Matter of Robert Ellis v. Carl Keoingsmann, Index No. 4765-2013 (Sup. Ct. Albany Co. April 9, 2014). Robert Ellis successfully challenged DOCCS' denial of his request to donate a kidney to his sister.

Based on "security concerns," DOCCS denied Mr. Ellis' request that he be permitted to donate a kidney to his sister. Directive 4330 sets forth the steps that DOCCS must take to assess the security issues present in each request to be an organ donor. The affirmation submitted in support of the respondent's position was not made by a person with first-hand knowledge and no one who actually participated in the risk assessment process submitted an affidavit or documents reflecting any consideration of petitioner's institutional record, including his past record of outside visits for medical treatment and therapy. The court found that because the record failed to provide a meaningful basis upon which to review the agency's exercise of judgment and discretion, the challenged determination had to be reversed and the matter remitted for reconsideration. Following the reversal, the Chief Medical Officer granted Mr. Ellis's request to be an organ donor.

Matter of Kevin Fitzpatrick v. Annucci, Index No. 4852-13, (Supreme Court, Albany County Jan. 17, 2014). Court orders TAC to reconsider its decision.

Seven N.Y.C.R.R. §216.3 states that any prisoner who has a recommended loss of good time from a superintendent's hearing shall appear before the Time Allowance Committee. Although Kevin Fitzpatrick had lost more than 8 years of good time, the TAC failed to meet with him before deciding that it would restore none of the lost time. In the Article 78 challenge to the TAC decision, the court ruled that because the TAC had not followed the regulations, the petition should be granted and the matter remitted for a new hearing. At the new hearing, the TAC restored all of the good time Mr. Fitzpatrick had lost.

Matter of Salvatore Dagnone v. Annucci, Index No. 3634-13 (Sup. Ct. Albany Co. Nov. 8, 2013). Court Orders Tier III hearing reversed and references to charges expunged.

A letter without a postmark, addressed to Cell 14, was delivered to Salvatore Dagnone in Cell 41. When he returned it to the officer, explaining that it had been delivered to the wrong cell, he was charged with interference with an employee, smuggling and false statement. At his hearing, he asked that an employee of the NYS Library – Prisoner Service Project (PSP) – the program from which the letter had been sent – be called as a witness. Mr. Dagnone explained that that the witness would explain how prisoners receive un-postmarked mail from PSP. The hearing officer refused, saying the testimony was irrelevant. The Supreme Court, Albany County, disagreed. Finding that the hearing officer had refused to call a witness with relevant testimony and had done so without a stated good faith basis, the court ordered the hearing vacated and all references to the charges expunged from Mr. Dagnone's institutional records.

Matter of Sean Varone v. NYS BOP, Index No. 13-2486 (Sup. Ct. Ulster Co. Jan. 9, 2014). Court finds Parole Board Decision to be arbitrary and capricious; orders re-hearing.

Since Sean Varone's conviction in 1994, he had been before the Parole Board three times. At the third hearing, Mr. Varone had not had a Tier III hearing in the previous five years, had a COMPAS assessment finding him to be of low overall risk for a violent felony or arrest, had completed all recommended programming, had been granted outside clearance and was guaranteed employment. Nonetheless, the Board concluded that there was a reasonable probability that he would not live and remain at liberty without violating the law. The court found that the Board's decision was "entirely perfunctory and patently inadequate to permit judicial review." The Court held that because it could not tell whether the Board had considered the factors which the Executive Law requires it to consider – such as the recommendation of the sentencing judge and the COMPAS evaluation − its decision was arbitrary and capricious. The court ordered that the Board conduct a new hearing. Less than three months after the court issued its decision, Mr. Varone was released to parole supervision.

Matter of Wilfredo Polanco v. Evans, Index No. 2013-1308 (Sup. Ct. Cayuga Co. Feb. 26, 2014). Court reverses denial of parole; orders new hearing.

At Wilfredo Polanco's 2013 parole hearing, the Board relied on erroneous evidence regarding his criminal history, failure while on parole and disciplinary history. The court concluded that it was impossible to determine whether the Board would have reached the same determination had it not considered the erroneous information. As a result, the determination was annulled and the matter remitted to the Board for a new hearing.

Matter of Howard Eddy v. NYS DOP, Index No. 2392-13, (Sup. Ct. Sullivan Co. Jan. 9, 2014). Court reverses denial of Parole; orders new hearing.

Howard Eddy, serving a four to twelve year sentence, appealed from the denial of his first Board appearance. Mr. Eddy went to the Board with a Certificate of Earned Eligibility (EEC). Nine NYCRR §8002.1(b) provides that a prisoner with an EEC ***shall*** (means must) be granted parole release when his/her minimum term expires ***unless*** the Parole Board determines that there is a reasonable probability that he/she will violate the law and that release is not compatible with the welfare of society. If the prisoner is not released, the Board must give a reason. In analyzing whether the Board's reason for not releasing Mr. Eddy was sufficient, the court wrote, "[d]iscussion and questioning of the statutory factors, if not supported by evidence in the record is merely perfunctory and grounds for reversal." Further, the court noted, the reasons for denying parole must be given in detail and not in conclusory terms. Here, the court found that the Board based its decision solely on the serious nature of the crime, did not consider all of the guidelines or factors, failed to consider the EEC and wrote a decision in conclusory terms. Mr. Eddy had a perfect disciplinary record, had outside clearance, had completed every program, demonstrated remorse and has a substantial support system on the outside. Because the Board failed to follow its obligations under the Executive Law and the Corrections Law, failed to articulate any basis for its denial, relied on erroneous information and used the usual and predictable language in denying

parole, the court granted the petition and ordered a new hearing.

Frederick Diaz v. State of New York, Claim No. 119164 (Court of Claims Oct. 1, 2013). Prisoner wins trial in Court of Claims; court awards damages for lost property.

After observing the contents of his cell packed into plastic bags, his cell was locked and Frederick Diaz was taken to SHU. When he next saw his property a few days later, his TV, Walkman, bag gloves and food items were missing. When his administrative claim was denied, he filed an action in the Court of Claims. The case went to trial, at the conclusion of which the judge awarded Mr. Diaz the value of his lost property and ordered that the filing fee be returned to him.

Dana Gibson v. State of New York, Claim No. 119915 (Court of Claims July 23, 2013). Prisoner wins trial in Court of Claims; court awards damages for lost property.

When Mr. Gibson was transferred to SHU, he was not allowed to pack his own property. When his property was returned, his TV, headphones, a Walkman, and 25 cassette tapes were missing. At the close of trial, the court awarded Mr. Gibson damages for these items and ordered the return of the filing fee.

Matter of James Lewis v. Evans, Index No. 3065-2012 (Sup. Ct. Albany Co. Jan. 14, 2013). Court agrees with petitioner that regulations and case law require the Division of Parole to set the delinquency date as the date of arrest and not the date of conviction.

Matter of Guillermo Torres v. Fischer, Index No. 2013-1560 (Sup. Ct. Chemung Co. Jan. 31, 2014). Court orders Tier III hearing reversed due to hearing officer's failure to determine the reason that a witness refused to testify.

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 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 Reverses Tier III Hearing: Mail Watch Not Properly Authorized

As a result of an authorized mail watch, correction officers intercepted three letters written by petitioner, allegedly requesting their recipients to bring him drugs. Following a Tier III hearing, petitioner was found guilty of conspiracy to introduce drugs into the prison. In his Article 78 challenge, petitioner argued that the hearing should be reversed because corrections officials had not followed their own policies for instituting a mail watch. The Third Department, in Matter of Mena v. Fischer, 981 N.Y.S.2d 842 (3d Dep't 2014), noted that a superintendent may authorize a mail watch only where "there is reason to believe that the provisions of any department directive, rule or regulation have been violated, or that such mail threatens the safety, security, or good order of a facility or the safety or well-being of any person. 7 N.Y.C.R.R. §720.3(e)(1)." In this case, the Court found, the superintendent's authorization failed to set forth any facts upon which its issuance was based, stating only that it was based upon a request of a deputy superintendent "to investigate activity that may jeopardize the safety and security of the facility." This, the Court found, did not comply with the applicable regulation and was therefore invalid and the mail watch was not properly authorized. In reaching this result, the Court cited Matter of Santana v. Fischer, 910 N.Y.S.2d 386 (3d Dep't 2010) and Matter of Lozada v. Fischer, 890 N.Y.S.2d 710 (3d Dep't 2009). The Court held that

a determination of guilt that is premised on mail intercepted pursuant to an invalid authorization must be annulled. Because the error cannot be remedied by a re-hearing, the Court ordered the expungement of the hearing.

Emilio Mena represented himself in this Article 78 proceeding.

Court Rules Determination of Guilt is Not Supported by Substantial Evidence

In Matter of Elder v. Fischer, 982 N.Y.S.2d 237 (4th Dep't 2014), the petitioner argued that the determination that he had forged another prisoner's name on certain disbursement forms was not supported by substantial evidence. Acknowledging that a misbehavior report alone can constitute substantial evidence of guilt, the Court noted that in this case, the report was based on the reporting officer's belief that the petitioner had forged another inmate's signature. However, the misbehavior report did not establish that the charging officer had shown the disbursement forms to the other inmate or that the other inmate claimed that the signature was not his, nor was such evidence presented at the hearing. Due to these deficiencies of proof, the Court ordered the hearing reversed and directed that all references to the charges be expunged from the petitioner's record.

Jarvis Elder was represented in this Article 78 action by Wyoming County – Attica Legal Aid Bureau.

Failure to Comply with Directive 4910A Results in Reversal of Charge of Unhygienic Act

After a search of petitioner's cell resulted in the recovery of a finger of a latex glove containing a substance that appeared to be urine, the petitioner in Matter of Clark v. Fischer, 981 N.Y.S.2d 187 (3d Dep't 2014), was charged with unhygienic act (among other charges). He challenged the determination that he was guilty of committing an unhygienic act based on the failure to follow the procedures in Directive 4910A(VII)(c). This section of the Directive provides that "general" contraband pertinent to a disciplinary proceeding shall be disposed of as recommended by the hearing officer at the conclusion of the disciplinary proceedings. Here, the liquid in the glove had been disposed of before the conclusion of the hearing. As a result of disposing of the contraband before the hearing was concluded, prison officials were unable to test the liquid in the glove to establish that it was in fact urine. The Court reversed the determination of guilt made with respect to the charge of unhygienic act and ordered all references to the charge dismissed.

Jahmel Clark represented himself in this Article 78 proceeding.

Court Reverses Hearing: HO Failed to Seek Reason for Witness's Refusal to Testify

In Matter of Saez v. Fischer, 978 N.Y.S.2d 473 (3d Dep't 2014), the Court reversed a Tier III hearing due to the hearing officer's failure to attempt to verify the basis for an inmate witness's purported refusal to testify. In this case, the petitioner's employee assistance informed him that an inmate witness had refused to testify but gave no explanation for the refusal. Despite petitioner's repeated requests for the witness, the hearing officer made no attempt to verify the basis for the refusal. Under these circumstances, the Court held, the hearing officer had violated the petitioner's regulatory right to call witnesses. The Court reversed the hearing and remitted the matter for a new hearing.

Damon Saez represented himself in this Article 78 proceeding.

In Two Cases, the Third Department Rules that the Proper Remedy is Remittal for a Re-Hearing

In Matter of Texeira v. Fischer, the Supreme Court, Clinton County, held that the hearing officer had not made reasonable efforts to determine the basis for an inmate witness's refusal to testify. The court annulled the hearing but refused to grant expungement, holding instead that remittal for rehearing was the appropriate remedy. Petitioner's counsel appealed, challenging only the ruling denying the request for expungement.

Underlying the refusal was the witness's mistaken belief, communicated to the hearing officer, that the incident with respect to which his testimony was requested had occurred at Upstate C.F. where the accused prisoners was living at the time of the hearing. In fact, the incident had occurred at Attica C.F. when both the accused and the witness were there. In response to the request that he testify, the witness responded that he had never been at Upstate C.F.

The Third Department, in Matter of Texeira v. Fischer, 982 N.Y.S.2d 795 (3d Dep't 2014), found that "under the circumstances of this case," remittal for a new hearing was the proper remedy. The Court explained that while constitutional violations of a prisoner's right to call witnesses warrant reversal and expungement, here the hearing officer's attempt to call the witness, albeit insufficient, was not an outright denial without a stated good faith basis of the requested witness. Accordingly, the Court held, the error constituted a violation of the petitioner's regulatory right set forth in 7 N.Y.C.RR. § 254.5, thus requiring annulment of the determination, but not mandating expungement.

In Matter of Hand v. Gutwein, 978 N.Y.S.2d 913 (3d Dep't 2014), the Supreme Court, Ulster County, granted an Article 78 petition challenging a hearing determination that petitioner had been convicted of a felony. The basis for the reversal was that the hearing officer denied the petitioner's request that his attorney and the inspector general be called as witnesses, stating that the attorney's testimony would be irrelevant and the IG was prohibited from testifying at Tier III hearings. However, as the lower court did in Texeira, the court remitted the case for a new hearing.

On appeal, the Third Department affirmed the lower court determination that remittal for a re-hearing was the appropriate remedy. In its decision, the Court noted that the proper remedy for a violation of a prisoner's constitutional right to call witnesses is reversal and expungement; however, the remedy for a regulatory violation of the right to call witnesses is remittal for a new hearing. "While the outright denial of a witness without a stated good-faith reason, or lack of any effort to obtain a requested witness's testimony, constitutes a clear and constitutional violation requiring expungement," the Court wrote, "most other situations constitute regulatory violations requiring a new hearing." In Hand, the Court found that because the hearing officer had stated a good faith basis for denying the witnesses, the error was not of constitutional dimension. The Court went one step further than it had in Texeira, stating, "Moreover, remittal for a re-hearing rather than expungement is generally permissible where, as here, substantial evidence otherwise supports the determination."

Aaron Hand represented himself in the Article 78 proceeding Matter of Hand v. Gutwein, 978 N.Y.S.2d 913 (3d Dep't 2014). Prisoners' Legal Services of NY represented the petitioner in Matter of Texeira v. Fischer, 982 N.Y.S.2d 795 (3d Dep't 2014).

HO Wrongfully Denied Prisoner the Opportunity to Consult with Counsel

Following a cube search, the petitioner in Matter of Jeckel v. NYS DOCCS, 975 N.Y.S.2d 697 (3d Dep't 2013), was charged with, among other charges, possessing unauthorized medication. While the charges were pending, DOCCS officials refused to allow petitioner to have personal and telephonic contact with his lawyer. Noting that prisoners are entitled to a reasonable opportunity to seek and receive the assistance of attorneys, the Court found that the petitioner had been deprived of that opportunity and that, under the circumstances, the refusal to allow him to have contact with his attorney amounted to an unjustifiable interference

with his right to "marshal the facts and prepare a defense." Finding that a constitutional right had been violated, the Court ordered the charge dismissed and expunged from his prison records.

No Transcript of Phone Calls Required Where, at the Hearing, Petitioner Reviewed Tapes of Calls

As part of an investigation of a conspiracy to bring drugs into the prison, petitioner's phone calls were monitored. After being found guilty of drug related charges, in Matter of Davila v. Prack, 979 N.Y.S.2d 195 (3d Dep't 2014), the petitioner asserted that he had been prejudiced by the failure to transcribe the tapes of the phone calls that were used as evidence against him. The Court found that the failure to produce transcripts of the calls did not violate his right to respond to the evidence against him because the tapes had been played at the hearing and were produced as part of the record in the Article 78. As such, the Court held, the exclusion of a transcript did not preclude meaningful review of the hearing.

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Paul Davila represented himself in this Article 78 proceeding.

Loss of Evidence Does Not Lead to Reversal of Charges

In Matter of Collins v. Fischer, 979 N.Y.S.2d 193 (3d Dep't 2014), the petitioner was charged with having handed a female correction officer a note stating his attraction to her, and his desire to have a romantic relationship with her. He was also charged with having later followed up on the note with a personal appeal, to which the officer responded that she was not interested. Following a Tier III hearing, the petitioner was found guilty of harassing an employee.

The evidence at the hearing consisted of the misbehavior report and the testimony of the female officer and the captain to whom she had reported the note and conduct. The note was not introduced into evidence, because, the captain testified, it had been lost sometime after he placed it in the officer's mailbox with instructions to prepare a misbehavior report. Following the loss of the note, the captain prepared a memo confirming its contents. The Court rejected petitioner's claim that the loss of the note had violated his right to the production of evidence and to present a defense, finding that because there was nothing in the record to indicate that the failure to produce the note was done in bad faith, there was no due process violation.

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Jeffrey Collins represented himself in this Article 78 proceeding.

Justification Is Not a Valid Defense to Charge of Refusing an Order

In Matter of Ortiz v. Kelly, 974 N.Y.S.2d 863 (4th Dep't 2013), the Fourth Department held that the hearing officer did not err in refusing to permit the petitioner to present evidence concerning his allegedly valid excuse for failing to obey the officer's order. "The reason for the order," the Court wrote, "is irrelevant to the issue of his guilt or innocence." Because the risks involved in the refusal of a prisoner to carry out even an illegal order are high, compliance is required at the time that the order is given. For this and other reasons, the Court affirmed the determination of guilt.

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Eddie Ortiz represented himself in this Article 78 proceeding.

Sentencing

Third Dep't Cuts Through "Primary Jurisdiction"Analysis and Requires DOCCS to Calculate Sentence as Imposed

In Matter of Hall v. LaValley, 982 N.Y.S.2d 598 (3d Dep't 2014), the petitioner asserted that where the federal and state courts had each imposed its sentence to run concurrent to the other's

sentence, DOCCS is required to effectuate the courts' intent. DOCCS responded by arguing that under the primary jurisdiction doctrine as applied to the sentences imposed by dual sovereigns, the petitioner was not entitled to have the sentences run concurrently in spite of the intention of the courts which imposed the sentences. Had DOCCS calculated the sentences as running concurrently, petitioner's maximum expiration date would have been one year and eight months earlier.

The Court decided that it did not need to engage in a discussion of the intricacies of primary jurisdiction and sentencing and dual sovereigns, commenting, "just as the dual sovereignty doctrine acknowledges and protects the rights of each sovereign to exact as much punishment for a crime as that sovereign desires, so the doctrine also acknowledges and protects the rights of each sovereign to exact as little punishment for the crime as that sovereign desires." Here, the Court found, it was clear that both sovereigns intended the state and federal sentences to run concurrently. Citing Matter of Garner v. DOCS, 859 N.Y.S.2d 590 (2008), the Court held that to run the sentences **sequentially** (consecutively) essentially because of the manner in which they were administered despite express intent otherwise by both sovereigns is analogous to a governmental entity other than the court lengthening a sentence, which this state does not permit.

Following the issuance of the decision, DOCCS adjusted the petitioner's sentence calculation. His maximum expiration date is now 20 months earlier than it had been when he filed his Article 78 action.

Peter Hall represented himself in this Article 78 proceeding.

Parole

Court Annuls Denial of Parole; Orders New Hearing

In Matter of Pulinario v. NYS DOCCS, 2014 WL 886955 (Sup. Ct. N.Y. Co. Feb. 11, 2014), the petitioner, who had been convicted of murder and had been sentenced to 25 years to life, was, ten years later, re-sentenced to 15 years to life. At the petitioner's re-sentencing, the assistant district attorney (ADA) noted that the petitioner had accepted responsibility for her crime, had made great strides in the rehabilitation process and was not the same person that she had been when she committed the crime. When Ms. Pulinario's second application for parole was denied, she filed an Article 78 challenge to the denial.

At the challenged hearing, petitioner's COMPAS report concluded that she was at low risk of danger to society. There was a reference from the supervisor of the STEPS to End Family Violence program recommending that petitioner was ready to return to society and a letter from the former superintendent of Bedford Hills C.F., containing a description of the petitioner's positive evolution.

At the hearing, almost all the Board's questions and comments concerned the crime. There were no questions about Ms. Pulinario's detailed release plans, vocational work or her successful self-improvement. The Parole Board did not mention the COMPAS assessment or the ADA's comments at resentencing.

The Board concluded that there was a reasonable probability that Ms. Pulinario would, if released, violate the law. This decision was based on the fact that Ms. Pulinario was serving time for murder and the circumstances of that crime.

The Board stated that it had considered Ms. Pulinario's many accomplishments, her good conduct, the letters of support, the risk assessment and "all factors required by law." However, the Board found that the facts underlying the criminal conviction "are concerning" and "describe a deviated and dangerous person who could impose a threat to the community."

The court began its decision by laying out the framework for deciding and reviewing parole denials. It is the duty of the Board to consider each factor specified in the statute. The Board has discretion to determine how much weight to give each of the factors. To demonstrate that it has properly considered and weighed the applicable statutory factors, the Board must do more than make a passing reference to such factors. The discretion of the Board is great and its determinations will only be reversed where they are irrational and border on impropriety.

Analyzing the facts of this case, the court found that the Board's "overwhelming emphasis" was on the offense and that at the hearing, there was only passing reference to the substance of petitioner's achievements, references and COMPAS assessment. The decision made only perfunctory mention of the statutory factors that weighed in the petitioner's favor.

Further, the court wrote, neither at the hearing or in the decision was there a substantive discussion of other factors relevant to the determination, including the petitioner's acceptance of responsibility, her prison vocational work, her employment plans and her self-improvement efforts. There was nothing in the record to show that the Board had weighed the ADA's statement about rehabilitation, although Executive Law §259-i(c)(A)(viii) requires consideration of statements made at sentencing.

There was no substantive discussion at the hearing or in the decision of the COMPAS assessment which measures risks arising from a grant of parole, although according to the Third Department in Matter of Garfield v. Evans, 968 N.Y.S.2d 262 (3d Dep't 2013), the COMPAS assessment is integral to any parole decision.

Based on this analysis, the court found that the Board gave great weight to the seriousness of the petitioner's crime without any explanation of why a crime committed 17 years ago outweighed the voluminous evidence indicating that the petitioner would presently be able to live a quiet and crime-free life. Accordingly, the court held that the petitioner was entitled to a new hearing.

Miscellaneous

Third Dept. Holds in Criminal Case that Cell Phone is Dangerous Contraband

In People v. Green, 2014 WL 1809616 (3d Dep't May 8, 2014), the Third Department reviewed the criminal conviction of a defendant convicted of promoting prison contraband in the first degree (Penal Law §205.25). The facts giving rise to the prosecution were that a correction officer observed a towel covering the window of the defendant's cell and overheard the defendant in what the officer testified was a one-sided business-like conversation. Using this conduct as the basis for a search, the officers recovered a cell phone, cell phone charger, a collection of phone numbers and a password. The defendant said that he had purchased the phone to speak to his wife. The defendant was convicted and sentenced to three to six years.

On appeal, the defendant argued that there was legally insufficient evidence to support his conviction. The basis for this contention was that the People had failed to prove that the cell phone was dangerous contraband.

Penal Law §205.25(2) provides that a person is guilty of promoting prison contraband in the first degree when "being a person confined in a detention facility, he knowingly and unlawfully . . . obtains or possesses any dangerous contraband." Penal Law §205.00 defines dangerous contraband as "contraband which is capable of such use as may endanger the safety or security of a detention facility or any person therein."

In People v. Finley, 862 N.Y.S.2d 1, (2008), the Court of Appeals wrote that the test for determining whether an item is dangerous contraband is "whether its particular characteristics are such that there is a substantial probability that the item will be used in a manner that is likely to cause death or other serious injury, to facilitate an escape, or to bring about other major threats to a detention facility's institutional safety or security." Thus, the difference between dangerous contraband and non-dangerous contraband is not whether the item is legal or illegal outside of prison. The Court of Appeals noted that a razor blade, which is legal outside of prison, would be dangerous contraband in prison, which is an "unpredictable environment." Nor, the Third Department wrote in People v. Green, does an item have to be inherently dangerous in order to be dangerous contraband in prison: "Indeed, although weapons are perhaps the most commonly recognized source of dangerous contraband in a prison setting . . . courts have – applying the Finley test – reached the very same conclusion with respect to other items made, obtained or possessed by prison inmates including quantities of drugs, a disposable Bic lighter, and hand-drawn maps or

knotted links of wire that could be used to facilitate an escape." The Court concluded that where the item at issue is not an inherently dangerous item, the court must decide whether there is sufficient proof to establish its potential to be used in such a **pernicious** (harmful) manner as to elevate it to the level of dangerous contraband.

At trial, the Supervising Superintendent of the Sullivan Hub who had 33 years of experience in DOCCS, testified about the DOCCS Phone Home program, including the monitoring and limiting of phone calls, and stressed that no one, not even correction officers, can bring cell phones into the prison because of the concern that they might "fall into the hands of an inmate." An inmate with a cell phone could make phone calls that were not monitored, thereby posing a significant security risk. For instance, the inmate could use the phone to develop or execute an escape plan, plan a hit inside or outside the prison, and generally to carry on criminal activity from inside the prison. The potential for such activities presents a significant risk to the public and to a prison and that is the reason that cell phones, are in considered dangerous contraband.

Based upon the Court's review of the record, and in particular the detailed and specific testimony offered by the supervising superintendent, as well as the specific threats posed when inmates possess cell phones, the Court held that the People had met their burden of showing that the cell phone seized from the defendant was dangerous contraband under the Finley test.

Inheritance Frozen Due to Son of Sam Laws

Robert Mims was the heir of his mother's estate. Before the funds of the estate were deposited into his inmate trust account, the NYS Office of Victim Services filed a lawsuit seeking damages for the victims of Mr. Mims's crimes and asking that the court **enjoin** (forbid) distribution of the funds in the estate. Mr. Mims opposed the motion. The victim of the crime that Mr. Mims was found guilty of committing claimed a financial loss of $600.00 and disputed Mr. Mims's claim that the victim had only financial injuries.

In determining whether the injunction should be granted, a court must consider the likelihood of success on the merits, **irreparable harm** (harm that cannot be fixed) in the absence of the injunction, and whether a balancing of the equities was in the moving party's favor. A criminal conviction is prima facie evidence of its underlying facts in a subsequent civil action.

In NYS OVS v. Mims, Index No, 5009-13, (Sup. Ct., Sullivan County Jan. 10, 2014), the court found that based on Mr. Mims' criminal convictions, the NYS OVS had established a likelihood of success on the merits. It further found that if the funds were given to Mr. Mims, he would be able to spend them before the lawsuit was resolved and that he had no other funds from which a judgment might be paid. Thus, the court found if the injunction were not granted, the victims could be irreparably harmed. Finally, the court found that the **equities** (fairness) also favored issuing the injunction because Executive Law §632-a (the statute extending the period within which victims of certain crimes may bring civil actions for damages against the perpetrators of those crimes), was specifically drafted to provide an avenue for crime victims to be compensated for their losses.

For these reasons, the court granted the motion for a preliminary injunction freezing the proceeds of the estate.

The court also found that after balancing the equities, Mr. Mims was entitled to use a portion of the funds to hire an attorney to defend him in the civil actions that the crime victims plan to bring. This finding was made after the court balanced the amount of the funds against the value of the claims for damages and found that the value of the claims was relatively low.

Robert Mims represented himself in this Supreme Court proceeding.

Court Refuses to Release Frozen Funds

Freeman Burley was convicted of a crime that brought him within the reach of the Son of Sam laws. These laws extend the time within which the victims of certain crimes can sue the perpetrators of the crimes for damages. In 2011, the NYS Office of

Victims' Services (OVS) advised the executor of the victim's estate that there were funds available in Mr. Burley's inmate account and successfully moved to freeze Mr. Burley's inmate account. A year later, when the executor had not filed a lawsuit, Mr. Burley moved to dismiss the action. The court denied his motion and Mr. Burley appealed.

In Matter of NYS OVS o/b/o Ruby Arnold v. Burley, 979 N.Y.S.2d 547 (3d Dep't 2014), the Third Department affirmed the lower court's decision, holding that here, where Mr. Burley conceded that he was actually seeking a complaint in the action for money damages which the executor of the victim's estate was contemplating bringing, the motion to dismiss was properly denied as he has no right to demand the complaint prior to the date upon which it is filed.

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Freeman Burley represented himself in this Supreme Court proceeding.

Court Rejects Prisoner's Challenge to Denial of FRP Application

The DOCCS Inspector General's Office (IG) designated William Rodriguez as a Central Monitoring Case (CMC) because 10 years prior to his admission to DOCCS, he had been a fugitive from justice and because he had attempted to escape during his most recent arrest by getting out of his handcuffs and leading police on a high speed chase. Recently, Mr. Rodriguez applied to participate in the Family Reunion Program (FRP). After his application was denied, Mr. Rodriguez filed an Article 78 challenge to the denial, asserting that it was arbitrary and capricious. The Supreme Court, Albany County, dismissed the petition and Mr. Rodriguez appealed.

In Matter of Rodriguez v. Morris, 979 N.Y.S.2d 546 (3d Dep't 2014), the Third Department affirmed the lower court's decision, finding that denial of the petitioner's application for the FRP based on his escape history was neither arbitrary nor capricious even though the petitioner had not been convicted of escape. Participation in the FRP is a privilege, not a right, the Court wrote, and the decision as to whether an inmate may participate is "heavily discretionary" and will be upheld if it has a rational basis. Further, the Court noted, 7 NYCRR §220.2(c), permits the consideration of a prisoner's entire case record. Accordingly, the Court found, DOCCS properly considered petitioner's escape history and security concerns presented by that history. As that history and those concerns presented a rational reason for the denial of petitioner's application, the Appellate Division refused to overturn the lower court's determination.

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William Rodriguez represented himself in this Article 78 action.

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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.

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Submissions should be no more than 10 pages and should address your experience as a juvenile or immigrant in prison, your experience in the SHU or how incarceration has affected your relationship with your children. Thank you!

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PLS pays for the majority of these costs from its operating funds; funds which also must cover the costs of providing legal assistance to the over 10,000 prisoners who write to us annually. It is very difficult for us to continue providing *Pro Se* to incarcerated individuals free of charge and maintain the level of legal services that we provide to inmates. **However, we continue to be committed to doing so.**

In light of this, we are urging our readers who are able to to make a donation to *Pro Se*. **Your donation will help offset the costs associated with the increase in distribution of *Pro Se* and allow PLS to continue to provide *Pro Se*, free of charge, to incarcerated individuals throughout New York State. And it doesn't take much! If each of our readers sent us $10.00, it would fully fund 9 issues of *Pro Se* and *Essentials of Life!***

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