# Pro Se

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## Court Awards $90,000 for 6½ Months of Unlawful Confinement and Parole Supervision

Alvin Torres, a formerly incarcerated individual, filed a claim alleging that as a result of DOCCS' failure to properly credit parole jail time, DOCCS had wrongfully confined him to prison for four months and caused him to be under parole supervision for an additional two and a half months. This error came about when the Department failed to credit as parole jail time the period that Mr. Torres spent in jail serving a one year sentence that was imposed to run concurrently with parole time. Although Mr. Torres informed the Department of the terms of the misdemeanor sentence, DOCCS did not change his legal date computation.

Mr. Torres moved for summary judgment on his claim. A party is entitled to summary judgment when there are no material facts in dispute and application of the law to the undisputed facts results in a verdict in the party's favor. In response to the claimant's motion, the Department argued that Mr. Torres was not entitled to summary judgment because the confinement and parole supervision were privileged. In the context of an unlawful confinement case, privileged means "imposed under color of law or regulation." The basis for the Department's claim of privileged confinement was that the Criminal Procedure Law puts the responsibility on the sentencing court to deliver a sentence and commitment order only to the correctional facility where the defendant will serve the sentence. See, Criminal Procedure Law §380.65. As no part of the misdemeanor sentence was served in state custody, the court had no obligation to deliver, and did not deliver,

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## Also Inside . . .



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# DON'T THROW OUT THE BABY WITH THE BATHWATER: INCENTIVE PROGRAMS WORK

## A Message from the Executive Director – Karen L. Murtagh

Google the phrase "prisoners/inmates and incentive programs" and you will find dozens of scholarly and scientific articles supporting prison incentive programs. Then google the phrase "harsher prisons/reduced incentives" and you will be hard-pressed to find any support from experts in the field for the proposition that we should decrease or eliminate incentive programs for prisoners. From Alaska to Pennsylvania, in almost every state in the country, prisons are increasing, not reducing, prison incentive programs. And the proof is in the programming (so to speak).

In November 2009, Pennsylvania enacted "Recidivism Risk Reduction Incentive" (RRRI) legislation that enables eligible offenders to reduce their minimum sentences by completing recommended programs and adjusting positively to their prison environment. While prisoners may benefit from a reduction in their prison sentences, RRRI was created principally as a public safety initiative to reduce recidivism and victimization. The goal of the program is to provide incarcerated individuals with increased access to "crime-reducing drug treatment programs" in order to enable them to "live productive, law-abiding lives."

As noted on Pennsylvania's Department of Corrections website: "Research demonstrates that public safety is enhanced when . . . offenders complete evidence-based programs . . . and follow the rules during incarceration. Such offenders are less likely to victimize someone else after they are released. Research further tells us that the longer these . . . offenders remain in prison the greater the chance that they will recidivate. The certainty of punishment — not the severity or a lengthy punishment — is the key to success."

In a 2010 effort to curb violence at the Limon Prison, the State of Colorado instituted a new program called Security Threat Administrative Review (STAR) that gives incarcerated individuals rewards for good behavior. The program is showing great promise. "Limon's record of inmate violence made it an unlikely candidate for testing more humane behavior-modification techniques. But the proof of the program's success is in the numbers. In the past 14 months, the 260 inmates in the 'Incentive Unit'' who constitute 27 percent of the prison's total population, committed just 26 rule violations – 2 percent of the 1,253 violations committed by all inmates." Before STAR was implemented, prisoners with disciplinary problems were subjected to progressively more restrictive confinement. With the implementation of the STAR program, however, prisoners are taught "how to better control their emotions" and given a chance to earn their way back into the general population. The program also allows inmates a chance to earn better living conditions such as "padded chairs, early meals, a large flat-screen TV and inmate-purchased DVDs" as rewards for good behavior.

As might be predicted, similar programs (and similar results) are being reported all over the country. The U.S. Department of Justice, in a 2009 report entitled: "Inmate Behavior Management: The Key to a Safe and Secure Jail," noted that: "Productive activities . . . provide a powerful incentive for inmates to maintain positive behavior." The report found that when incarcerated individuals have "access to meaningful activities and continued access is based on the appropriateness of their behavior, they are strongly motivated to behave according to the expectations set by the jail. Providing access to activities gives staff a means of rewarding positive behavior and enforcing consequences for negative behavior, thereby enhancing the staff's ability to supervise and manage inmates."

When disturbing, yet extremely uncommon, events occur, such as the recent escapes from Clinton, the initial response from many is to tighten security and reduce or eliminate any type of program that might appear to be "soft on crime." We know, however, that incentive programs for incarcerated individuals create safer prisons and help reduce recidivism, thus saving the State millions of dollars every year. In light of this, our goal in New York State should be to identify successful behavior-modification techniques and incentive programs and to expand, not reduce, our use of those programs throughout the state prison system.

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a copy of the sentence and commitment order to the Department. Thus, DOCCS had no *official* notice that the misdemeanor sentence was to run concurrent to the time owed on Mr. Torres' felony sentence. Inasmuch as the Department calculated Mr. Torres' sentence in accordance with the information that it had, the Department argued, its calculations were made under color of law and thus were privileged.

In 2013, in Torres v. State of NY, 981 N.Y.S.2d 639 (Ct. Clm. 2013), the court rejected the Department's arguments and granted summary judgment to Mr. Torres, finding that he had been wrongfully imprisoned for 4 months and wrongfully required to be under parole supervision for 2½ months. The court conducted a trial on the issue of damages in September 2014 and found Mr. Torres was entitled to $90,000.00 in damages for the injuries that he suffered as a result of the Department's unlawful conduct. See, Torres v. State of NY, 47 Misc.3d 1220(A) (Ct. Clm. April 2, 2015).

In determining the amount of damages to which Mr. Torres might be entitled, the court noted that the measure of damages for wrongful confinement is "such a sum as will fairly and reasonably compensate the injured person for injuries caused by the defendant's wrongful act." Such damages may include, in addition to lost wages, damages for mental anguish and loss of liberty. The mental pain suffered by an inmate while he is in prison includes his discomfort, fear, lack of privacy and degradation. The damages for loss of liberty include damages for the loss of the fundamental right to be free, lost opportunities to engage in everyday activities while confined, and for the mental anguish (pain) that accompanies loss of liberty.

In reaching the conclusion that Mr. Torres was entitled to $90,000.00, the court did not assign a per-day rate of damage. That is, **the judge did not say, e.g.**, "for each day of confinement, I award $200.00 and for each day of unlawful parole supervision, I award $150.00." The court noted that a per-day assessment of damages was generally inappropriate given the variations in and between each individual's circumstances and course of imprisonment. Finally, the court noted, a claimant's criminal history and previous experience with being in prison – as compared to a claimant with an **unblemished** (clean) record – is properly considered on the issue of claimed mental anguish.

To determine the proper amount of damages, the court compared the conditions of Mr. Torres' confinement while he was at Rikers Island and at Queensboro C.F. to the conditions of Mr. Torres' life when he was under parole supervision. While he was in prison and jail, Mr. Torres suffered mental anguish from the lack of privacy, the disgusting and unhygienic conditions, threats from aggressive inmates, and a bully who focused on Mr. Torres. Mr. Torres was visibly moved, the court wrote, by the hardship that his imprisonment imposed on his mother. (It was for the emotional pain that Mr. Torres felt when he saw how his mother was suffering that the court awarded damages; he was not awarded damages for his mother's pain). Mr. Torres was particularly persuasive in describing the effects of his loss of liberty, the court found.

To determine the amount of damages to which Mr. Torres was entitled, the court compared his life in prison and under parole supervision to the conditions of his life when he is at home and working. The court also took into account the additional stress and frustration that Mr. Torres felt as a result of knowing that during those 6½ months, he was not subject to a

sentence. After reviewing similar cases awarding damages for wrongful confinement, e.g., Miller v. State of NY, 9 N.Y.S.3d 594 (Ct. Clm. 2013); Sanabria v. State of NY, 908 N.Y.S.2d 527 (Ct. Clm. 2010), the court concluded that an appropriate amount of damages was $90,000.00.

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Albert Torres was represented by Robert Dembia, P.C.

## News and Notes

## Chief Judge Lippman Asks for Felony Sentence Reform

In May 2015, the Chief Judge of the Court of Appeals, Jonathan Lippmann, announced that he planned to submit legislation which would complete the process of replacing indeterminate sentencing with determinate sentencing. Indeterminate sentences have a maximum and a minimum term. Determinate sentences have a maximum term only and in New York State, also have a term of post release supervision that is served under parole supervision.

In 1995, the State legislature began replacing indeterminate sentences with determinate terms. As of 2015, determinate sentences are imposed for first and second violent felony offenses, felony drug offenses and non-violent sexual offenses. There are 200 felony offenses for which the law now requires indeterminate sentences.

Replacing indeterminate sentences with determinate sentences will eliminate the role that the Parole Board now has in determining when a prisoner will be released to parole supervision. Prisoners with determinate sentences are eligible for release on their conditional release dates. DOCCS, not the Parole Board, decides whether a prisoner will be released on his or her conditional release date. The Parole Board will continue to decide whether prisoners with indeterminate sentences will be released prior to their conditional release dates and the length of time prisoners who violate parole must serve before they are released from prison. If this legislation passes, it will not affect anyone who has already been sentenced to an indeterminate term.

While this legislation was not adopted this year, we will keep you posted with respect to future developments in sentencing reform.

## PRO SE VICTORIES!

**James Lewis v. Anthony Annucci, Index No. 5289-14 (Sup. Ct. Albany Co. April 3, 2015). James Lewis successfully challenged a determination of guilt made at a Tier III hearing where it was not shown that he was properly denied his right to observe a search of his cell.**

During a search of an envelope that James Lewis was carrying, officers found tax forms relating to Carlos Figueroa, whom the officers believed to be an inmate. At his hearing on the charges of possession of contraband and providing legal assistance to another inmate without authorization, Mr. Lewis testified that the Carlos Figueroa to whom the forms related was not an inmate.

Between the first and second sessions of the hearing, Mr. Lewis was given a second misbehavior report charging him with violating phone procedures, counterfeiting, soliciting, possessing contraband and false statements. The charges were based on the discovery of forged and counterfeit W-2 tax forms and a Power of Attorney form in Mr. Lewis's cell. When the hearing **reconvened** (began again), the hearing officer stated that both misbehavior reports would be

handled in the same hearing. An IG investigator testified about the investigation that led to the recovery of the contraband in Mr. Lewis' cell. Mr. Lewis objected to the introduction and consideration of the items allegedly found in his cell because he had not been permitted to watch the cell search. Mr. Lewis was found guilty and given a SHU sanction of 11 months and three years loss of good time.

The court noted that Directive 4910 requires that if an inmate is removed from his cell prior to the search, he shall be placed outside of the immediate area and allowed to watch the search unless in the opinion of a supervisory security staff member, the inmate presents a danger to the safety and security of the facility, in which case he shall be removed from the area and not allowed to watch the search. Here, the court found, there was no indication that a supervisory staff person determined that Mr. Lewis posed a danger to the security of the facility when he was removed from his cell. Thus, the court concluded, DOCCS had failed to comply with its own regulations. The appropriate remedy, the court held, was to annul the determination of guilt and expunge all references from the petitioner's disciplinary records. Because the court could not determine which documents in the record supported which of the various charges, and because the record did not show which documents were confiscated during the first incident and which were recovered from the cell, the court ruled that the determinations of guilt as to both misbehavior reports had to be annulled.

**Daniel F. Kenefick v. Thomas Sticht, Index No. 2015-00059 (Sup. Ct. Erie Co. June 2, 2015). When the Parole Board denied Daniel Kenefick's application for parole release, Mr. Kenefick filed an Article 78 challenge to the determination, arguing that the Board's decision was arbitrary and capricious. The court agreed.**

The court held that record showed that the denial of petitioner's application was the result of the Board's failure to weigh all of the relevant considerations and that there was a strong indication that "denial . . . was a forgone conclusion." The court ordered that the Board conduct a new hearing before a different panel of Board members.

**Frank J. Povoski, Jr. v. Lisa Beth Elovich, Index No. 7391-14 (Sup. Ct. Columbia Co. May 18, 2015). Court reversed denial of parole based on Board of Parole's reliance on erroneous information.**

Following his parole denial, Frank J. Povoski, Jr., filed an Article 78 proceeding asserting that the Board had relied on erroneous information when it repeatedly stated that he had been convicted of two Class D felonies. In fact, he had been convicted of two Class E felonies. Where the Board relied primarily on petitioner's crimes of incarceration in denying parole, the court wrote, the inclusion of this particular piece of erroneous information carried with it the potential to meaningfully affect the petitioner's chances of parole and the overall fairness of the hearing. The court reversed the hearing and ordered the Board to conduct a new hearing.

**Synthia China Blast v. Albert Prack, Index No. 4316-14 (Sup. Ct. Albany County April 17, 2015). Synthia China Blast successfully challenged a determination that she should be placed in involuntary protective custody.**

When Synthia China Blast arrived at Sullivan C.F., the security staff recommended that based on the number of inmates from whom she must be separated – 47 – she needed to be placed in involuntary protective custody while the facility staff determined whether any of the 47 inmates on the list were at Sullivan C.F. At the hearing, Ms. Blast requested 9 inmate witnesses and the hearing officer said that he would call two. Both of the inmates Ms. Blast chose reportedly refused to testify. When no reasons for the refusals were provided, Ms. Blast asked the hearing officer to determine the reasons. The hearing officer did not respond.

The respondents conceded that the petitioner had been denied her right to call witnesses in that there were no reasons given on the record for the refusals of the two inmate witnesses to testify. The court ruled that under the circumstances, the appropriate remedy was reversal and remittal for a re-hearing.

**Arthur Hines v. State of New York, Motion No. M-85579 (Ct. Clm. Dec. 11, 2014). Court grants motion to file a late claim relating to failure to timely release claimant from SHU.**

In response to an administrative appeal, DOCCS reversed a Tier III hearing with respect to which Arthur Hines was in SHU. He was not released from SHU for 7 days. Mr. Hines served the AAG with a notice of intention relating to the excessive SHU confinement. However, the notice was rejected because it was not verified. Mr. Hines then filed a motion to file a late claim.

In deciding such a motion, the court looks at several factors:

1. Whether the defendant had notice of the essential facts;
2. Whether the defendant had the opportunity to investigate the incident which is the subject of the claim;
3. Whether the claimant had a good excuse for his failure to timely file;
4. Whether the claim appears to have merit; and
5. Whether the claimant has another remedy.

Here, while the court found that the notice of intention was unverified, it did give the defendant notice of the essential facts and an opportunity to investigate the claim. Timely notice, in the form of the unverified claim, also prevented the state from suffering substantial prejudice from the late filing and service of the claim. Thus, while the movant did not have a good excuse for failing to timely file, the factors of notice, opportunity to investigate and the absence of the risk of substantial prejudice to the State weighed in the movant's favor.

The next factor – whether the claim appears to have merit – is often the most important factor to the court. In this case, the court found that the movant made a strong showing that his excessive confinement claim had merit. The movant was confined, the defendant intended to confine him and the movant did not consent to be confined. The only contested issue was whether the confinement was privileged. In the absence of an opposing affidavit contesting the movant's assertions that the confinement was not privileged because the hearing did not comport with due process, the court wrote, the court found that it appeared the claim had merit.

The final factor considered by the court was whether the movant had another remedy. The court ruled that he did not and granted the motion to file a late claim.

**Matter of Derrick Omaro v. Anthony Annucci, Index No. 21,443-13 (Sup.Ct. Wyoming Co. June 25, 2014). Court agrees with Petitioner that SHU sanctions were to run concurrently.**

Derrick Omaro received two un-related Misbehavior Reports. The first was disposed of on July 17, and a penalty of 4 months keeplock was imposed. The hearing disposition rendered form stated that the penalty was to run from July 10, 2013 to November 10, 2013. A different hearing officer found Mr. Omaro guilty of the charges in the second misbehavior report, and a penalty of 4 months keeplock was imposed. The hearing disposition rendered form stated that the penalty was to run July 25, 2013 through November 25, 2013. When Mr. Omaro was not released from SHU until March 10, 2014, he brought an Article 78 challenge to the Department's decision to run the penalties consecutively.

Seven N.Y.C.R.R. § 254.7(a)(2) provides that a disciplinary penalty shall run consecutively to any other penalty previously imposed, "unless the hearing officer advised the inmate that the penalty shall run concurrently." Here, the court found, the respondent had not produced any evidence that the hearing officer at the second hearing did not intend to run the penalty that he imposed concurrently with the previously imposed period of keeplock. Further, the court wrote, by specifying the release date of the SHU sanction imposed at the second hearing as 11/25/13, the hearing officer had advised the petitioner that the keeplock period would in fact run concurrently to the penalty imposed at the first hearing. Finding that the determination changing the keeplock release date to March 10, 2014 violated the Department's regulations and was arbitrary and capricious, and that the petitioner had served out the improperly imposed extension of the penalty, the court ruled that equitable considerations favored the expungement of the second hearing.

**Matter of William Grant v. Anthony Annucci, Index No. 6959-13 (Sup. Ct. Albany Co. Oct. 10, 2014). Court reverses hearing after finding violation of petitioner's right to employee assistance and right to call witnesses.**

Petitioner Grant received two misbehavior reports. The first accused him of smuggling, altering state property and possessing authorized items in an unauthorized area. The charges resulted from the recovery of a sewing needle from the waistband of petitioner's pants. The second charged him with fighting, violent conduct, unhygienic act and assault on staff based on allegations that while being escorted to SHU, he struck another inmate and an officer.

Prior to the hearing, the petitioner requested his employee assistant to produce the unusual incident reports, to-from reports, and use of force reports. The EA did not produce any of these documents. At the hearing, he was provided with a stack of documents and given between 10 and 20 minutes to review them, at which point, over the petitioner's objection that he had not had enough time to review the documents, the hearing officer removed the documents. Petitioner requested that the Inspector General be called as a witness. The IG, he said, had investigated the incident involving the fight. The hearing officer denied the IG, saying that his testimony would be irrelevant. The hearing officer found the petitioner guilty and following affirmation of the decision, the petitioner filed an Article 78.

The court found that the petitioner's right to assistance was violated by the EA's failure to provide him with the requested reports before the hearing began. The petitioner's defense to the allegations in the second misbehavior report was that the officers permitted or encouraged the fight as an excuse to use excessive force on him. The court found that in light of this defense, it could not say that the inability to review the documents before the hearing began had not prejudiced the petitioner's defense. That the hearing officer belatedly gave the petitioner the documents for a brief period did not remedy the violation. As the right to assistance is a constitutional right, the court annulled the determination of guilt and ordered all references to the charges be expunged from petitioner's records.

The court also found that the hearing officer had violated the petitioner's right to call witnesses when he refused to call the Inspector General. The court found the hearing officer's reason for not calling the IG – irrelevant testimony – was **disingenuous** (dishonest). With respect to the denial, the court wrote that the petitioner's defense was that the officers set him up to fight so that they could have an excuse to use force on him. The IG investigated this claim. The stated basis for the denial of this witness, the court found, was unbelievable as an investigation into whether excessive force was used would be relevant to the charges of fighting, violent conduct, creating a disturbance and assault on staff. Having failed to state a good faith basis for denying the witness, the court found that the hearing officer had violated the petitioner's fundamental right to call witnesses.

***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

## HO's Failure to Properly Review Confidential Information Leads to Reversal

In Matter of Cooper v. Annucci, 10 N.Y.S.3d 758 (3d Dep't 2015), based on confidential

information, an officer charged the petitioner with having been one of several prisoners who assaulted another prisoner. The petitioner was found guilty, and filed an Article 78 challenge to the determination of guilt. He argued that because the hearing officer had failed to independently assess the confidential information, the determination of guilt was not supported by substantial evidence. The court agreed.

In this case, the author of the misbehavior report did not testify and thus the facts alleged in the misbehavior report were the primary evidence against the petitioner. The officer who wrote the report did so based on confidential memoranda that the officer prepared based on information that she obtained from a confidential source. The memoranda, the court found, did not contain additional information or corroborating details that would have enabled the hearing officer (and the court) to verify the reliability of the confidential informant. In addition, the hearing officer neither interviewed the confidential source nor took testimony from the officer who wrote the report to determine whether facts might support a finding that the informant was reliable. Based on the hearing officer's failure to take either of these steps, the court found that there was no foundation for accepting the hearsay information and ruled that the determination must be annulled and all references thereto expunged from the petitioner's institutional records.

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Matthew Cooper was represented by the Plattsburgh Office of Prisoners' Legal Services in this Article 78 proceeding.

## Failure to Honor Right to Call Witnesses Results in Reversal of Hearing

In connection with an incident involving a prison librarian, the petitioner in Matter of Gross v. Prack, 6 N.Y.S.3d 329 (3d Dep't 2015), was charged with lewd behavior, stalking and refusing a direct order. Prior to his hearing, the petitioner asked his employee assistant (EA) to interview three inmate witnesses who worked in the law library. The record did not show that the EA interviewed any of the witnesses. When the petitioner requested the inmate witnesses at his hearing, the hearing officer adjourned the hearing to allow the EA to determine whether the witnesses were willing to testify, following which, when the witnesses refused, the hearing officer denied the witnesses. The hearing officer did not make an inquiry as to the reasons for the refusals and there was nothing else in the record showing the reasons. The hearing officer's failure to attempt to determine the reasons for the refusals, the court ruled, violated the petitioner's right to call witnesses. The court annulled the hearing and ordered that all references to the charges be expunged from the petitioner's prison records.

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Larry Gross represented himself in this Article 78 proceeding.

## DOCCS Violation of Its Directives Is Not a Basis for Refusing a Direct Order

Because Rashad Hudyih is a Muslim, he declined to work on Sunday after he was ordered to do so by an officer. Given a misbehavior report for refusing a direct order, at his hearing, Mr. Hudyih defended himself by citing Corrections Law §171 which provides that prison work will be done by volunteers on Sunday. While the clear language of the statute supports Mr. Hudyih's position, the court in Matter of Hudyih v. Smith, 2015 WL 3886987 (3d Dep't June 25, 2015) wrote, "[I]t is also well established that, for the preservation of institutional safety and security, inmates are required to obey orders and cannot choose those which they will obey or disregard." For that reason, the court found itself **constrained** (forced) to rule that the lower court had

properly dismissed the petition. Even under the circumstances presented by this case, the court held, the proper means of challenging this legality of the order is through the prison grievance procedure.

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Rashad Hudyih was represented by the Albany Office of Prisoners' Legal Services in this Article 78 proceeding.

## Inadequate Notice Can Be Remedied by Hearing Officer

Richard Rosario was found guilty of organizing a demonstration. The misbehavior report alleged that he had encouraged others to participate in a three day demonstration. It was not until the hearing that Mr. Ramirez was informed that the alleged misconduct of meeting with other participants had occurred on the evening of the day before the date of the incident. He learned of the actual date of the meeting during the hearing when the hearing officer showed him a memo referring to the date.

In his Article 78 challenge, Mr. Rosario argued that the misbehavior report was vague and that he was not informed of the actual date and time of the misconduct until after the hearing had started. In Matter of Rosario v. Annucci, 6 N.Y.S.3d 325 (3d Dep't 2015), the court rejected Mr. Rosario's argument. The court held that because, after the petitioner was informed of the correct date of the incident, the hearing officer offered to adjourn the hearing so that the petitioner would have time to prepare a defense, the petitioner had not demonstrated any prejudice from the alleged vagueness in the misbehavior report, nor was he precluded from preparing a defense.

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Richard Rosario was represented in this Article 78 proceeding by Morrison and Foerster, LLP.

# Parole

## Court Holds Board of Parole in Contempt

In July 2014, in an Article 78 proceeding brought by Michael Cassidy, the Supreme Court, Orange County, reversed a 2013 denial of parole and ordered a new hearing before a different panel of Parole Board Members. In reaching this result, the court found that the Board had focused almost exclusively on the petitioner's crime, while failing to take into account other relevant statutory factors, or merely giving them passing mention. After the Board conducted the new hearing and again denied Mr. Cassidy's parole application, Mr. Cassidy sought an order holding the Parole Board in contempt of court for failing to comply with the court's 2014 Decision and Order (2014 Court). As relief, Mr. Cassidy requested a new parole hearing in full compliance with the 2014 Decision, a daily fine to be paid by the Parole Board to Mr. Cassidy, and the payment of legal fees. See, Matter of Michael Cassidy v. NYS Board of Parole, Index No. 2255/2014 (Sup. Ct. Orange Co. May 27, 2015) (unpublished decision).

The petitioner was sentenced to 25 years to life after he pled guilty to murder in the second degree. In 2013, he had been in prison for 30 years. His 2013 COMPAS assessment was favorable, showing low risk for violence, re-arrest, absconding or criminal involvement. At the 2013 hearing, he was questioned extensively about his crime. His achievements in prison were noted: ART, ASAT, Veterans' programs, physical education and legal research. He had been given one Tier II ticket in 2008; otherwise he had no disciplinary history since 1999. He accepted responsibility for his offense and

expressed remorse. He planned on living with his father and working in a paper factory.

At the 2013 hearing, the Parole Board denied parole, finding a reasonable probability that Mr. Cassidy would not live and remain at liberty without again violating the law and that his release would be incompatible with the welfare of society and would so deprecate the serious nature of the crime as to undermine respect for the law.

Ultimately, the petitioner challenged this decision in an Article 78 proceeding, arguing that the Parole Board's 2013 denial was arbitrary and capricious and failed to consider the factors required by Executive Law §259-i(2)(c)(A) and instead focused solely on the seriousness of his crime. The court reversed the hearing, finding that the 2011 amendments to the Executive Law did not maintain the status quo with respect to parole determinations but rather replaced past focused "guidelines" with dynamic present and future-focused risk assessment procedures. Further, the court held, a denial that focused almost exclusively on the inmate's crime, while failing to take into account other relevant statutory factors, or merely giving them passing mention, is inadequate, arbitrary and capricious. Thus, the court ordered the Parole Board to conduct a new hearing before a new panel.

The new hearing was conducted in April 2015. The Board again denied parole, noting Mr. Cassidy's achievements, but concluding that none of them diminish the serious and senseless loss of life caused by his actions and stating, "[I]t appears that your actions were motivated by anger and frustration over your deteriorated relationship with [the victim] and the violence you displayed in this offense remains a concern to this panel."

Following the 2015 denial of parole, and without exhausting his administrative remedies, the petitioner filed an Article 78 proceeding seeking to have the Board held in contempt for failing to follow the court's 2014 Decision. In this action, the petitioner argued that once again the Board's decision was based solely on the nature of the offense and did not provide the detailed, rational and non-conclusory explanation required by the law. To the contrary, he stated, the decision paid lip service to the positive factors and described as "more compelling" the underlying facts of the petitioner's crime. He argued that the decision was pre-determined and failed to explain why the Board believed that based on his crime, the petitioner's release after 30 years would endanger the public welfare or undermine respect for the law.

Further, the petitioner asserted, the Board had before it a lawful order of the court. The record of the hearing reveals that the Board knew of the order, and in repeating the same errors for which the prior decision was vacated, the Board disobeyed the order to the petitioner's detriment.

The respondent (Parole Board) acknowledged that it had denied release solely on the basis of the seriousness of the crime, arguing that it had considered all the required factors and legitimately placed more weight on the nature of the offense. The Board also argued that the court proceeding was premature in that the petitioner had not exhausted his administrative remedies and that the petitioner had failed to show that he is entitled to sanctions as there has been no showing that the action of the Board was frivolous or completely without merit in law or fact.

The court rejected the argument that the petition should be dismissed for failure to exhaust administrative remedies. The court found that petitioner was not seeking to set aside the Board's denial, but rather had filed an application for contempt. To sustain civil contempt, the court must find that the **contemnor** (person who is alleged to have violated the court order) violated a lawful order

which clearly expressed an **unequivocal** (plain) mandate and that as a result, a right or remedy of the petitioner was prejudiced. The moving party must establish the violation by clear and convincing evidence. The violation must be willful.

Here, the court found there was a clear and unequivocal order which the Board had notice of. The 2014 Decision found that the conclusory statements that statutory factors were considered were "woefully inadequate" and that the Board's 2013 denial accorded no weight to any factor apart from the seriousness of the crime.

In its 2015 Decision and Order (2015 Decision), the court found that the Board's 2015 parole denial "utterly fail[ed] to comport with the standards required by the Court in its July 2014 Decision and Order." In reaching this result, the court emphasized the following frequently quoted principles:

1. The court cannot and should not **usurp** (take over) the discretion of the Parole Board in making parole decisions;

2. If the Board's decision follows statutory standards, it will not be disturbed by the court, absent a showing that the decision is irrational bordering on impropriety; and

3. Parole is not granted merely as a reward for good conduct and the Board need not list every factor it considered or give equal weight to each one.

That said, the court went on, the 2014 Decision specifically mandated that the Board meet the standards of Executive Law §259-1(c)(A). These standards provide that release to parole will be made after considering whether there is a reasonable probability that the inmate will not violate the law and that his release is not **incompatible with** (contrary to) society's welfare and will not **deprecate** (diminish, belittle) the seriousness of the crime to the point that release undermines respect for the law. Thus, the 2014 Decision provided, the Board must consider every statutory factor.

Here, the court found, the 2015 parole denial did not correct the errors that led the court to reverse the first hearing. In fact, the 2015 denial actually **increased the magnitude of** (worsened) the errors identified in the 2014 Decision, by examining the crime in even greater detail and by failing to explain how petitioner's release would place the public at risk or undermine respect for law. More importantly, the court wrote, the 2015 denial failed to show the connection between the facts of crime and the risk to public welfare or respect for the law. There must be a reasoned explanation for this determination, the court wrote, and there was none in the 2015 denial.

The court also found that the petitioner had been prejudiced by the Board's decision, not only because he remains in prison, but also because it denies him the opportunity to understand and better prepare himself for future hearings.

Based on these findings, the court found the Board to be in contempt, ordered a new hearing and required the State to pay $3,000.00 in legal fees and costs.

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Michael Cassidy was represented by Carter, Ledyard and Milburn, LLP.

## Parole Denial Reversed; Board Focused Exclusively on Seriousness of Crime

In a decision that focused on whether the Parole Board had considered all of the factors which the Executive Law requires it consider when it reviews an application for parole, the court in Matter of Elizabeth Gonzalez v. NYS DOCCS, Index No. 401130/14 (Sup. Ct. N.Y. Co. April 20, 2015), held that by focusing exclusively on the nature of crime, the Board failed to comply with its statutory duty, imposed on the Board as a result of the 2011 amendments to Executive Law §259-i(2)(c)(A), to evaluate rehabilitation and the likelihood of success upon release.

In 1997, when she was 17, Ms. Gonzalez was a heroin addict and along with her 33-year-old boyfriend, also an addict, engaged in a series of robberies of older women. During one of the robberies, an elderly victim fell, broke her neck and died. Ms. Gonzales pled guilty to felony murder and robbery and was sentenced to 18 years to life.

While Ms. Gonzalez's initial adjustment to prison was poor, after ten years, the court wrote, Ms. Gonzalez began to transform herself. She got her GED and an Associate in Arts Degree. She is working on a Bachelor's degree. She is a peer educator and a certified counselor for HIV/AIDS, a teacher's aide for pre-GED classes, a facilitator for ART, and has been a grievance representative for 3½ years. In addition she had raised 4 puppies through the Puppies Behind Bars program and developed a relationship with Sister Elaine Roulet which helped her to gain insight into her behavior.

When Ms. Gonzalez was approaching her parole eligibility date, she contacted the judge who had sentenced her, informed the judge of the efforts she had made to rehabilitate herself and asked the judge to write a letter in support of her release. The judge wrote such a letter, as did Sister Roulet and Robert Dennison, former chairman of the Board of Parole. A staff person from St. Luke's Hospital informed the Board that Ms. Gonzalez would be provided with full and comprehensive care there.

In addition, the COMPAS report gave Ms. Gonzalez a low score for risk of felony violence, arrest risk and risk of absconding. Her only negative scores related to her history of violence and substance abuse. With respect to these two scores, the court noted, history cannot be changed; Ms. Gonzalez committed violent crimes and was a drug addict. However, in the last 8 years Ms. Gonzalez had not engaged in any violent conduct and had addressed her anger issues through ART. With respect to the substance abuse, while the Board stated this was an issue that Ms. Gonzalez needed to work on, the court noted that it has been 18 years since Ms. Gonzalez last used drugs.

At the hearing, which fully transcribed filled only five pages, the Board devoted most of its questions and comments to the petitioner's crimes and the age of her victims. A Board member mentioned letters of support, but did not mention the letter from the sentencing judge or Sister Roulet. With respect to the COMPAS assessment, as noted above, the Board focused on an unsupported assertion that while Ms. Rodriguez has been drug free for 18 years, she has an issue with drugs.

In spite of her achievements and the support for her release, the Board of Parole concluded that there was a reasonable probability that if released Ms. Gonzalez would not live and remain at liberty without violating the law and that her release would be incompatible with the welfare and safety of the community. For this reason, the Board denied the release.

After reviewing the hearing and decision, the court concluded that the decision denying parole was deficient, arbitrary and capricious and failed to apply the law, and that these failures contributed to what appeared to be a pre-determined denial that violated Ms. Gonzalez's rights. In particular, the court held that the Board focused exclusively on the nature of the crime and Ms. Gonzalez's non-existent drug problem and only gave lip service to the other factors. The Board asked no questions regarding Ms. Gonzalez's significant achievements, lacked important documents and took no action to obtain them, i.e., the letters from Sister Elaine Roulet, the staff person from St. Luke's Hospital and, most significantly, the letter from the sentencing judge. Further, while Executive Law § 259-i(2)(a) requires that the Board set forth the reasons for its denial "in detail," the decision detailed the violent crime committed by Ms. Gonzalez, concluded that the crimes displayed a propensity to violence and mentioned numerous disciplinary violations (but did not mention that there had been no disciplinary violations for 8 years).

Based on the court's reading of the Board's decision, the court concluded that relevant statutory factors were not considered and that everything except for the felony murder was ignored. If rehabilitation is the key to release and the opportunity for a new life, the court wrote in its decision annulling the hearing, it appears that Ms. Gonzalez has earned that key and that the Board should have at least seriously considered her transformation. The court ordered a new hearing before different commissioners and directed that at that hearing, care be taken to ensure that all documents of support, from whatever source, be considered. That review must be a serious one, with no concentration on the status of the victims and a true analysis of the petitioner's COMPAS.

Finally, the court wrote that in conducting the new hearing, the Commissioners should follow the rationale behind the 2011 amendments to the Executive Law which is to prevent the Parole Board from re-sentencing an inmate to a longer term than the sentence imposed by the judge and to promote the evaluation of factors such as the inmate's achievements in prison, her risk assessments, outside and family support and whether she has become a different person, one who has rehabilitated herself many years after a crime committed in her youth.

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Elizabeth Gonzalez was represented by Lincoln Square Legal Services, Fordham University School of Law, in this Article 78 action.

***Practice Tip:*** *Matter of Platten v. NYS Board of Parole, 5 N.Y.S.3d 702 (Sup. Ct. Sullivan Co. 2015) is a reported decision using an analysis similar to that applied in Matter of Gonzalez v. NYS DOCCS.*

## Court of Claims

### Court Finds Condition Not Dangerous and Thus, No Duty to Warn Existed

In Guzman v. State, 10 N.Y.S.3d 598 (2d Dep't 2015), the claimant was injured when the glass in a window at Taconic C.F. broke and caused her hand to go through the window. At trial, the parties agreed that the window was not defective. Thus, the issue before the court was whether DOCCS had a duty to warn inmates not to touch the windows. The trial court found that there was no duty to warn, as the window did not constitute a dangerous condition.

On appeal, the Third Department agreed with the trial court. It noted that the State is a landowner, and as such, has a duty to maintain its property in reasonably safe condition. It also has a duty to warn of a latent, dangerous condition on its property. But, a landowner has no duty to warn of conditions that are 1) not inherently dangerous or 2) readily observable.

The court found that the trial court's determination that the State did not have a duty to warn the claimant and other inmates not to touch the window was warranted by the facts and that the claimant had failed to establish that the concededly non-defective window was a latent dangerous condition.

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Judy Guzman was represented by John Corcos Levy in this Court of Claims action.

## Sentencing

## Delay in Indictment Relating to Prison Conduct Was Not Excessive

In People v. Alexander, 8 N.Y.S.3d 674 (3d Dep't 2015), the defendant was found guilty of assault in the second degree as a result of charges relating to a fight with another inmate while in prison. On appeal, the defendant argued that he was deprived of due process by the delay of approximately 7 months between when the incident occurred and when he was indicted. In analyzing the claim, the court noted that an unreasonable and unjustified indictment delay violates a defendant's right to due process and may result in dismissal of the indictment even where the defendant was not **prejudiced** (harmed) by the delay. The factors to be considered in deciding whether there has been an unreasonable and unjustified delay are:

1. The extent of the delay;
2. The reason for the delay;
3. The nature of the underlying charges;
4. Whether there was any extended pretrial incarceration; and
5. Whether there are any indications of prejudice or impairment to the defense as a result of the delay.

Here, comparing the delay in the defendant's case to the delays found not to have violated a defendant's right to due process of law, the court found that the 7 month delay was not **egregiously** (strikingly) long. The charges were serious, the court found, and as the defendant was already in prison, the delay did not impose a further burden on his liberty. Finally, the court found that there was nothing in the record to suggest that the defendant was **prejudiced** (hurt) by the delay. Based on these findings, the court concluded that the defendant was not deprived of his due process rights as a result of the 7-month passage of time between the incident and the indictment.

## Miscellaneous

## Court Denies Father's Request for Modification of Visiting Order

Between 2010 and 2012, pursuant to a court order, Everett McIntosh, an incarcerated father, had telephone contact with his four children. In 2012, after a hearing, the Family Court, Tompkins County, found that telephone contact between Mr. McIntosh and his children was emotionally distressing to the children and granted the mother's petition to modify the father's contact with the two older children from telephone calls to monitored monthly letters. Ten months after the order went into effect, Mr. McIntosh moved to modify the 2012

order, alleging a change in circumstances. The Family Court denied his motion.

On appeal, the Third Department agreed with the Family Court. See McIntosh v. Clary, 2015 WL 3890457 (3d Dep't June 25, 2015). The court noted that a party seeking to modify a recent existing visitation order must show that there has been a change of circumstances showing a real need for change to advance the children's best interests. Here, the court found, the only change in circumstance was that Mr. McIntosh had been given a certificate acknowledging that he had attended substance abuse meetings, had received positive inmate progress reports and had completed vocational training. In addition, his request that the children participate in a prison program was denied. These facts do not, the court held, set forth a change in circumstances that would merit modification of the visitation order. Further, the court found, that Mr. McIntosh had taken advantage of prison services did not require a re-examination of the children's best interests, because the changes do not address the children's emotional reactions to the phone calls with their father. And, the court wrote, the father, having been allowed monthly communication, had only written twice in a 10 month period. Under these circumstances, the Family Court did not err in dismissing the petition without an evidentiary hearing.

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