Pro Se

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Discretionary Denials of 440 Motions Can Be Reviewed by Court of Appeals

In 1975, the Court of Appeals, in People v. Crimmins, 381 N.Y.S.2d 1 (1975), ruled that "the power to review a discretionary order denying a [Criminal Procedure Law (CPL) §440.10(g)] motion to vacate judgment upon the ground of newly discovered evidence ceases in the Appellate Division." This decision left prisoners without a right to review appellate division decisions affirming lower court dismissals of their CPL Article 440 motions. Recently, finding that the Crimmins rule had needlessly restricted the Court's power to review dismissals of §440.10(g) motions, in People v. Jones, 2014 WL 7069803 (Dec. 16, 2014), the Court overruled the part of the Crimmins decision that held that the Court of Appeals lacked the authority to review denials of §440 motions, held that the Appellate Division had abused its discretion when it **summarily** (without a hearing; on the papers) denied the defendant's motion for an evidentiary hearing and remanded the case to the Supreme Court.

In People v. Jones, on the basis of the testimony of one person − the rape victim − the defendant had been convicted of rape, murder and attempted robbery. The victim had never met the defendant before the day on which the incident occurred, described him as wearing a black hat with netting and picked him out of a lineup several weeks later when she was under the influence of heroin. Twenty-five years later, the defendant moved to have the only remaining evidence from the scene of the crime – eighteen hairs recovered from the hat left at the crime scene − produced for mitochondrial DNA testing. Testing of three of the hairs ruled out the defendant as the contributor. In an affidavit, the Director of the DNA testing laboratory stated that additional testing could further develop a full profile should an alternative donor/suspect be identified. The defendant then filed a motion pursuant to CPL §440.10 and asked for a hearing based on the newly discovered evidence.

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DOCCS ISSUES NEW DISCIPLINARY GUIDELINES

A Message from the Executive Director – Karen L. Murtagh

Pursuant to the Stipulation in Peoples v. Fischer, Docket No. 11-CV-2694 (S.D.N.Y.) (February 19, 2014), the Department of Corrections and Community Supervision (DOCCS) has issued new guidelines for disciplinary dispositions within DOCCS. The new guidelines set forth graduated penalties for disciplinary rule violations and are effective for incidents occurring on or after January 1, 2015. The guidelines are available through the General Library, Law Library and through your I.L.C. and I.G.R.C.

While I applaud DOCCS' efforts to begin addressing the overuse of solitary confinement in our prisons, I cannot condone the implementation of the new guidelines because they fail to recognize the overwhelming evidence of harm caused by solitary confinement.

Under the new guidelines, incarcerated individuals can still be placed in solitary confinement for months and years at a time. For instance, a person found guilty of violating a direct order can be placed in solitary confinement for up to 90 days for the first offense, 120 for the second, and 180 for the third. A person found guilty of committing an unhygienic act, such as spitting, can be sentenced to solitary for 180 days for the first offense, one year for the second, and two years for the third offense.

As we all know, on October 18, 2011, the United Nations Special Rapporteur on torture, Juan E. Méndez, called on all countries to ban the use of solitary confinement of prisoners except in very exceptional circumstances and for as short a time as possible. Noting that such confinement can amount to torture when used as punishment or for an indefinite or prolonged period of time because of the severe mental pain or suffering it may cause, the Special Rapporteur recommended that solitary confinement in excess of 15 days should be completely prohibited. Since then, the New York State Bar House of Delegates adopted a resolution calling upon all governmental officials charged with the operation of prisons and jails throughout New York State to profoundly restrict the use of long-term solitary confinement and urging that the imposition of long-term solitary confinement on persons in custody beyond 15 days be prohibited. In addition, there has been legislation introduced in at least 12 states to reduce or eliminate the use of solitary confinement and public opinion on the issue has become decidedly negative.

Most recently, the Texas Correctional Employees Union has acknowledged a change in its position with respect to the use of solitary confinement. In a February 2014 blog post, the President of the Union, Lance Lowry, cited a study in the American Journal of Public Health that found that New York City jail inmates placed in solitary confinement were nearly seven times as likely to harm themselves as those in the general jail population. Mr. Lowry concluded that, "it is becoming increasingly clear that long term solitary confinement is not only unnecessary, but counterproductive as a means of maintaining institutional protection, discipline and safety in correctional facilities."

Also disturbing is the fact that, although DOCCS has finally set forth suggested maximum periods of time in solitary, under the new guidelines hearing officers have the discretion to depart upward from the established confinement sanction as long as they articulate a reason for the upward modification. Interestingly, Hearing Officers apparently do not have the discretion to depart downward. In addition, the procedure for determining confinement time for a second or third violation of a rule is extremely troubling. If a person has committed a rule violation and has previously been found guilty of the same rule violation within the past five (5) years, then the hearing officer has the authority to treat the rule violation as a second violation and impose an elevated penalty. If a person commits a rule violation and has been previously found guilty of the same rule violation two or more times within the past ten (10) years, the hearing offer again has the authority to treat the rule violation as a third violation and elevate the confinement time. We all know how difficult and incredibly rare it is to spend any time in prison without accumulating at least some disciplinary tickets. A look-back time of five and ten years to support an increased penalty for a current violation makes it all but impossible for the incarcerated to escape the increased penalties set forth in the new guidelines.

Thus, while I do commend DOCCS on taking steps to begin to improve its disciplinary system, DOCCS needs to do much more. We need a culture change in our prisons, a change in the way we label and punish alleged misconduct. Until DOCCS changes its understanding of the effects of solitary confinement on the health and well-being of those subjected to it, and in turn, the safety and security of its prisons, DOCCS is going to continue to fail in fulfilling its stated mission to "[e]nhance public safety by having incarcerated persons return home under supportive supervision less likely to revert to criminal behavior."

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The People responded with an attorney's affirmation, portions of which referenced the opinion of the Director of the New Jersey Office of the Chief Medical Examiner. The Court declined to credit this opinion as it was presented in the form of hearsay. In addition, after the defendant filed his motion, fingernail scrapings from the victim were located and DNA tested, revealing that the material under the victim's fingernails did not come from the defendant.

The Supreme Court denied the motion for a hearing, finding that the absence of the defendant's DNA from the hairs and fingernail scrapings did not exclude the defendant as the perpetrator. The court also relied on the hearsay allegations of the People's expert. On appeal, the Appellate Division affirmed the Supreme Court in a 3-2 decision.

In re-assessing whether the Court of Appeals has jurisdiction to hear appeals from Appellate Division decisions in CPL §440 motions, the Jones court focused on CPL §450.90. This provision permits an appeal to be taken to the Court of Appeals from any adverse order of an intermediate appellate court entered on an appeal taken to the appellate court pursuant to CPL §450.15 (the section permitting appeals from denials of CPL §440 motions). In Crimmins, the Court had held that although §450.90 permits an appeal from the affirmation of a denial of a 440 motion to be taken to the Court of Appeals, the New York State Constitution, which prohibits the Court of Appeals from reviewing questions of fact, prevented the Court from reviewing appeals of the denials of §440 motions.

In Jones, the Court found that in reviewing an appellate affirmation of a dismissal of a §440 motion, the Court was not reviewing a question of fact. Rather, the Court found, the Court was reviewing whether, as a matter of law, the appellate court's affirmation of the lower court's decision was an abuse of discretion. This, the Court said, is not a factual review that is prohibited by the Constitution; it is a legal review.

In finding that the Appellate Division had abused its discretion when it affirmed the lower court decision in the Jones appeal, the Court looked at the issue of whether it was an abuse of discretion to deny the defendant a hearing on his motion to vacate the judgment of conviction based on newly discovered evidence. Criminal Procedure Law §440.10 provides that a motion to set aside a judgment of conviction may be brought when new evidence has been discovered which is of such character as to create a probability that had such evidence been received at trial, the verdict would have been more favorable to the defendant. The Appellate Division, finding that the factual issues raised by the new evidence were not material, had affirmed the Supreme Court's denial of the motion.

The Court found that this was abuse of discretion, as the factual issues raised by the new evidence – accurate and reliable scientific evidence − undercut the victim's identification of the defendant as the perpetrator. This was particularly significant, the Court stated, where the victim was a heroin addict at all times relevant to the incident and trial and had taken heroin on the morning of the lineup. Where, as here, the People disputed the reliability of the defendant's new evidence, it had been an abuse of discretion to deny the motion without holding a hearing. This was particularly true where the People submitted only hearsay statements in opposition to the plaintiff's admissible submissions.

The Court stated that it had reached its conclusions not by weighing the facts or the inferences drawn therefrom, but by examining the parties' submissions and concluding that the People had failed to counter the defendant's showing that he was entitled to a hearing.

Clifford Jones was represented by Heather Suchorsky of Cleary, Gottlieb, Steen & Hamilton.

LETTERS TO THE EDITOR

Dear Pro Se:

I want to thank you for issue Volume 24, Number 6. You published an article about successful Article 78 proceedings that inmates have won (***Pro Se Victories!***). That encouraged me to file an Article 78 looking to the courts for assistance in resolving a conflict that I had with DOCCS about a Tier III hearing.

I will not give up the fight thanks to PLS' help. You sent me a memo, "How to File an Article 78 Proceeding on your Own." You made the work so much easier and guided me through it. If it were not for your help, I would have went crazy.

Happy New Year,

R. Bennett

LETTERS TO THE EDITOR

Letters to the editor should be addressed to:

Pro Se
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PRO SE VICTORIES!

Pamela Smart v. State of New York, Claim No. 123178 (Court of Claims Feb. 4, 2014). After the Attorney General acknowledged that the Tier III hearing which Pamela Smart had challenged in an Article 78 proceeding had to be reversed because the hearing had not been recorded, Pamela Smart successfully sued the State for damages caused by her wrongful confinement to SHU.

Ms. Smart's claim that she was entitled to damages for the time that she was wrongfully confined in SHU was based on violations of her right to due process of law that occurred at the hearing. The defendant argued that her claim should be dismissed because in the absence of the tape and the sealing of the hearing record following its reversal and expungement, the claimant could not prove her case. The court rejected this argument, holding that the defendant could not utilize the absence of the hearing tape and the sealing of the hearing records as a defense in this case and contend that the claimant cannot recover because in the absence of records of the proceeding, she cannot prove her case. Based on the defendant's decision to grant Ms. Smart the relief she sought in the Article 78, the Department's failure to comply with its regulatory obligation to make and preserve a copy of the hearing tape and the State's failure to offer anything in opposition to the claimant's allegations, the court found that Ms. Smart had met her burden of proof and was entitled to damages.

Matter of Jesse Barnes v. Bellamy, Index No. 73-14 (Sup. Ct. Albany Co. Sept 23, 2014). After CORC affirmed the denial of a grievance challenging Upstate C.F.'s policy of limiting notary services to five notarizations per request, Jessie Barnes filed an Article 78 contending that the limit was arbitrary, pointing out that for this Article 78 proceeding, he was required to file six notarized documents. The court agreed with Mr. Barnes.

The court found that neither Directive 4483 (Law Libraries, Inmate Legal Assistance and

Notary Public Services), nor the Upstate Facility Operations Manual §381 (Notary Service), set a limit on how many documents can be notarized at any one time. Nor did the CORC determination of Mr. Barnes' grievance set forth a justification for limiting the number to five. Thus, the court found, there was no justification in the record for the limitation. Based on the absence of a limitation in the written policies and the absence of any reason for the limitation imposed on the petitioner, the court found the facility's policy of limiting the number of pages that an inmate can have notarized to be to be arbitrary, capricious and without rational basis.

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.*

TIER III HEARING RIGHTS

When Is DOCCS Authorized to Order a Rehearing?

In New York State, when an inmate is found guilty at a prison disciplinary hearing, he or she has a right to appeal the decision to either the superintendent (Tier I and II hearings) or the Commissioner (Tier III hearings). In the context of a Tier III hearing, DOCCS regulations provide that appeals of determinations of guilt made at Tier III hearings should be sent to the Director of Inmate Discipline, in Albany. 7 N.Y.C.R.R. §254.8. If the appeal is denied and the hearing officer's decision is affirmed, the inmate has exhausted his/her administrative remedies and may file an Article 78 proceeding in the Supreme Court to challenge the final decision. If the appeal is granted, DOCCS will either reverse the hearing, and the charges will be expunged, or DOCCS will order a rehearing. This article addresses the issue of when DOCCS is permitted to order a rehearing.

In Matter of Rahman v. Coughlin, 492 N.Y.S.2d 116 (3d Dep't 1985), after the petitioner had exhausted his administrative remedies and filed an Article 78 challenge to the hearing determination, DOCCS administratively reversed the hearing and ordered a rehearing. Petitioner Rahman argued that the Department did not have the authority to take such an action. The court held where a court has jurisdiction over an Article 78 challenge to the hearing, DOCCS no longer has the authority to correct any errors in the hearing. In reaching this result, the significant fact was that at the time that DOCCS effected the reversal and ordered the rehearing, the inmate had exhausted his administrative remedies and had filed his Article 78. See, Matter of Gonzalez v. Jones, 495 N.Y.S.2d 802 (3d Dep't 1985) (stating that "the cornerstone of our holding in *Rahman* is the principle of finality of administrative determinations). In Rahman, the Department's actions, by seeking to commence anew an administrative process that had been exhausted and to reconsider the merits of a determination that was final, ran afoul of this principle.

In contrast, where DOCCS has yet to issue a decision with respect to an inmate's appeal of a Tier III, it is permissible for the Commissioner to conduct an administrative review of an inmate disciplinary proceeding and order a rehearing. Matter of Brodie v. Selsky, 611 N.Y.S.2d 38, 39 (3d Dep't 1994); see also Matter of Dawes v. Selsky, 649 N.Y.S.2d 522 (3d Dep't 1996). *This is true even where the procedural error to be corrected was a violation of a Constitutional right*. Id. This is a permissible result because under these circumstances, ordering a rehearing does not violate the principle of administrative finality and because at this point, no court has jurisdiction of the matter.

There are a few exceptions to the rule that the Department, in deciding an administrative appeal of a disciplinary hearing, has the authority to order a rehearing. The exceptions to this rule involve errors that cannot be corrected − for example charges based on information obtained from unauthorized

mail watches or contraband recovered from cell searches that inmates were improperly prohibited from observing − or determinations of guilt which are not supported by sufficient evidence. In Matter of Hartje v. Coughlin, 523 N.Y.S.2d 462 (3d Dep't 1987), the court held that where the hearing was not supported by substantial evidence, a rehearing cannot be ordered to present new evidence that should have been presented at the original hearing. And in Matter of Johnson v. Goord, 731 N.Y.S.2d 918 (3d Dep't 2001), where the Department violated the petitioner's right to be present during the search of his cell, the court held that determination of guilt with respect to the contraband found during the search required annulment. See also, Matter of Mena v. Fischer, 981 N.Y.S.2d 842 (3d Dep't 2014) (same result where the regulations for issuing a mail watch were not followed).

Although a final determination by DOCCS generally paves the way for an inmate to seek judicial review of the hearing, if DOCCS chooses to reverse *and expunge* a hearing after an Article 78 is filed, the court will consider the inmate's claims moot because he or she will have obtained all of the relief which the court could have awarded. In Matter of Free v. Coombe, 652 N.Y.S.2d 190 (4th Dep't 1996), the Fourth Department dismissed an Article 78 as moot where DOCCS reversed and expunged the determination after an Article 78 challenge to the hearing had been filed but before it was transferred to the Appellate Division. More recently, the Fourth Department reached this result in Matter of Bennefield v. Annucci, 995 N.Y.S.2d 435 (4th Dep't 2014). This is also the rule in the Third Department. See Matter of Shepherd v. Fischer, 995 N.Y.S.2d 683 (3d Dep't 2014).

This article was written by Elizabeth Watkins Price, a staff attorney in the Ithaca Office of PLS.

"TIER III HEARING RIGHTS" *appears periodically in Pro Se. The column summarizes the law with respect to a particular right that prisoners have at Tier III hearings.*

STATE COURT DECISIONS

Disciplinary and Administrative Segregation

Court Finds Expungement Is the Appropriate Remedy for Violation of Right to Assistance

In Matter of Rivera v. Prack, 995 N.Y.S.2d 862 (3d Dep't 2014), the petitioner was charged with conspiring with his girlfriend and another person to bring drugs into prison through the visiting room. His girlfriend and the other individual were said to have given written statements implicating him. Petitioner gave his Employee Assistant a list of questions to ask his girlfriend and the other alleged accomplice; however, the EA failed to do so. At the hearing, the Hearing Officer did not remedy the EA's failure. The Respondent conceded that the petitioner was not provided with meaningful assistance and as a result, his defense was prejudiced.

The parties differed as to what remedy was required. The petitioner argued that he was entitled to reversal and expungement. The Respondent argued that because the violation was of a regulation and not a constitutional right, remitting the case for a new hearing was the proper remedy.

The court found that the right to assistance at a Tier III hearing is constitutional. See, Matter of Krall v. Selsky, 766 N.Y.S.2d 153 (3d Dep't 2003). While the Third Department has not consistently found that the failure to provide employee assistance to an inmate at a prison disciplinary hearing warrants reversal and expungement, the court wrote, it has consistently found that violations of an inmate's constitutional right to call witnesses must be remedied by reversal and expungement. Here, the court found that the failure to provide assistance was absolute − the Employee Assistant made no effort to interview the requested witnesses and gave no reason for failing to do so − and the failure prejudiced the petitioner's ability to assert a defense. This, the court found, is comparable to

cases where the Third Department has found a constitutional violation relative to the outright denial of a witness. Using this analysis, the court found the denial of meaningful assistance to be a violation of the petitioner's constitutional right to employee assistance requiring expungement of all references to the matter from the petitioner's record.

Edwin Rivera represented himself in this Article 78 proceeding.

Court Holds Conduct Alleged Did Not Violate Rule

When a search of petitioner's cell resulted in the recovery of two altered hot plates, three books of matches, a frying pan and a list of ingredients used to make crystal meth, the petitioner was charged with possessing drugs or drug paraphernalia and possessing an altered item. The petitioner admitted to possessing the items recovered and was found guilty of all of the charges. In Matter of Nylander v. Prack, 996 N.Y.S.2d 802 (3d Dep't 2014), the petitioner argued that the conduct that he was found guilty of was not a violation of the rule prohibiting possession of drugs or drug paraphernalia. First, no drugs were found in his cell. Second, none of the items recovered were implements of drug use. In view of this, the court found, there was no support for the determination that the petitioner had violated the rule against possessing drugs or drug paraphernalia. The court affirmed the determination of guilt with respect to the charge of possessing an altered item. Although petitioner had completed service of the SHU sanction imposed at the hearing, because the hearing officer had recommended that he lose good time, the court remanded the hearing for a redetermination of the penalty on the remaining charge.

Samson Nylander represented himself in this Article 78 proceeding.

Failure to Follow Directive Results in Reversal of Tier III

After two pills used to dull pain were recovered from petitioner, she was charged with possessing unauthorized medication and smuggling. At her hearing, she requested the chain of custody documenting who had possession of the pills between their recovery and the testing process. Seven N.Y.C.R.R. §1010.4(b) sets forth the procedure which must be followed when officers recover what they believe to be contraband drugs: the officers must prepare a request for testing the substance and each person handling the substance must make a notation on the form to document the chain of custody. In Matter of Sanabria v. Annucci, 996 N.Y.S.2d 800 (3d Dep't 2014), the petitioner requested a copy of the request form with proof of chain of custody. When the document was not produced, she asked that the charge of unauthorized medication be dismissed. The hearing officer made no effort to obtain either the request form or any other proof to establish the chain of custody. Although the pharmacist's visual identification of the pills rendered testing unnecessary, the court found, foundational evidence regarding the chain of custody of the pills was still required. In the absence of evidence of the chain of custody, the court ruled that substantial evidence did not support the determination that the petitioner possessed unauthorized medication. For this reason the court reversed the determination of guilt as to the charge of possessing unauthorized medication and ordered the respondent to expunge all references to that charge from the petitioner's institutional records.

Christina Sanabria represented herself in this Article 78 proceeding.

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Friend

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Determination that Petitioner Was Guilty of Possessing Drugs Supported by Evidence of Conspiracy

In Matter of Maletta v. Amoia, 995 N.Y.S.2d 818 (3d Dep't 2014), the petitioner was found guilty of drug possession, smuggling and violating phone and visiting room privileges after his visitor was found in possession of Suboxone and heroin. The court rejected the petitioner's defense that he should not have been found guilty because the visitor left the majority of the drugs in a locker outside of the prison. The court found that the petitioner had violated the rules when he solicited and conspired with the visitor on the prison telephone to smuggle drugs into the facility.

Peter Maletta represented himself in this Article 78 proceeding.

Sentencing

Court Clarifies Term "Violent Felony Override"

In People v. Lynch, 993 N.Y.S.2d 163 (2d Dep't 2014), the defendant challenged the sentencing court's failure to grant his motion for a "violent felony override." Although the Second Department affirmed the sentencing court's denial of the motion, it ordered that an amended sentence and commitment order be issued clarifying which subsection of Penal Law §120.10 the defendant had been convicted of violating.

The court also explained the meaning and use of the term "violent felony override." The term is not found in any statute or regulation. It is used in relation to eligibility for temporary release programs. Generally, inmates who have been convicted of one of the violent felony offenses listed in 7 N.Y.C.R.R. §1900.4(c)(1)(ii) are not eligible for temporary release. However, subsection (iii) provides that inmates convicted of the listed crimes are eligible for temporary release if they provide the TRC chairperson with a court-generated document or document generated by the Office of the District Attorney which establishes that their current commitment is for a subdivision of one of the listed crimes which did not involve either the use or threatened use of a deadly weapon or a dangerous instrument or the infliction of a serious physical injury. Generally speaking, the document that is used to prove that an inmate was convicted of a subdivision of a listed offense which does not involve the use or threatened use of a deadly weapon or dangerous instrument or the infliction of serious physical injury is the defendant's sentence and commitment order.

With respect to the denial of the defendant's motion that the court issue a "violent felony override," the court noted that pursuant to Criminal Procedure Law §380.65, a certified copy of a sentence and commitment order which specifies the section and, to the extent applicable, the subdivision, paragraph and subparagraph of the penal law under which the defendant was convicted must be delivered to the correctional facility to which the defendant is committed at the time that he is delivered there. In the defendant's case, the sentence and commitment order stated that the defendant was convicted of violating Penal Law §120.10(00); it did not provide the subsection of the offense that the defendant was convicted of having violated. In fact, the defendant had been convicted of Penal Law §120.10(1). Accordingly, the court modified the judgment to specify the subdivision under which the defendant was convicted and remitted the matter to the Supreme Court for the issuance of an amended sentence and commitment order.

Eugene Lynch was represented by Steven Feldman of Uniondale, NY

Court of Claims

Court Credits Inmate's Testimony

In Kilpatrick v. State of New York, Claim No. 119006 (Ct. Clms. Nov. 26, 2014), the plaintiff alleged that she was injured as a result of reckless driving by a correction officer who was driving a van in which the plaintiff was a passenger. The plaintiff, who was shackled to another inmate during the drive, testified that throughout the trip, the officer was driving too fast and that when he made the final turn, he gained speed as he was going down a hill, failed to completely stop before turning, and took the turn at an excessive rate of speed, causing her to fall from her seat to the floor. The plaintiff was able to provide other specifics about the trip that day. The driver and the escort officer, on the other hand, remembered little about the trip, with the exception of the fact that the driver had not been driving over the speed limit. They also failed to write reports about the accident for three months, when a supervising officer asked them why no reports had been filed. In addition, the driver changed his testimony. He had originally said that he had come to a full stop before making the turn. Later, he acknowledged that he had not stopped.

In deciding which of the witnesses he believed, the judge noted that "[b]elievable testimony must have the ring and flavor of credibility and the latter involves more than demeanor. It apprehends the overall evaluation of testimony in light of its rationality or internal consistency and the manner in which it hangs together with other evidence." Based on his observations of the witnesses the court found that the plaintiff's version of the events was credible and consistent while the officers, who "clearly had limited recall, seemed to offer self-serving explanations for their conduct." Noteworthy to the court was the following: both officers, without testifying as to the speed limit, testified that the driver was traveling the speed limit, always traveled the speed limit, and always slowed down or stopped where appropriate; the change in the driver's testimony; the officers' testimony that there was no oncoming traffic when they had no memory of the traffic conditions generally; and the officers' failure to write memoranda about the incident until they were instructed by supervisors to do so.

Based on the court's assessment that the plaintiff was believable, the court found that the state of New York was 100% responsible for the accident.

Anna Kilpatrick was represented by Brian Dratch of Franzblau Dratch, P.C. in this Court of Claims action.

Miscellaneous

For Article 10 Purposes, the Diagnosis of ASPD Is Not a Mental Abnormality

Article 10 of the Mental Hygiene Law governs the proceedings that must be followed before an individual can be required to submit to either strict and intensive supervision and treatment (SIST) or civil confinement. At an Article 10 trial, a sex offender may be found to be in need of SIST or civil confinement if he or she suffers from a mental abnormality. The statute defines mental abnormality (Article 10 mental abnormality) as a condition, disease or disorder that affects the emotional cognitive or volitional capacity of a person in a manner that predisposes him or her to engage in the commission of conduct that constitutes a sex offense and that results in that person having serious difficulty in controlling such conduct. Where the State is successful in proving by clear and convincing evidence that an inmate is a sex offender who suffers from an Article 10 mental abnormality, the court must decide whether he is a dangerous sex offender for whom civil confinement is necessary or a sex offender requiring strict and intensive supervision and treatment.

In Matter of State v. Donald DD, 996 N.Y.S.2d 610 (2014), the Court addressed the issue of whether a diagnosis of anti-social personality disorder (ASPD) can provide the basis for a finding

of mental abnormality as defined by Article 10. The respondent (Donald DD), was found to be a sex offender with an Article 10 mental abnormality. He had two convictions for sex offenses and his parole had been revoked for sexual misconduct with his wife and children. At his Article 10 trial, the State's expert testified that although Donald DD was not diagnosed with a sexual disorder, he suffered from ASPD, which, the expert opined, could be an Article 10 mental abnormality if the individual shows a pattern of continually acting out by violating the law and those violations are sexual because the individual has shown that he or she is predisposed, as a result of ASPD, to commit sex crimes.

The Court however, disagreed with the State's position. First, it noted, the State's expert had testified that up to 80% of the prison population suffered from ASPD and the U.S. Supreme Court had similarly concluded that up to 70% of the prison population may suffer from ASPD. These statistics, the Court wrote, show that a diagnosis of ASPD which is not accompanied by a diagnosis of any other condition, disease or disorder alleged to constitute an Article 10 mental abnormality simply does not distinguish the sex offender whose mental abnormality subjects him to civil confinement from the typical recidivist convicted in an ordinary criminal case. ASPD, the Court concluded, means little more than a deep-seated tendency to commit crimes and its use in civil confinement proceedings as the only diagnosis underlying a finding of an Article 10 mental abnormality is not sufficient proof of a sexual abnormality.

Based on this conclusion, the Court reversed the order of the Appellate Division and dismissed the petition.

Documents Underlying Authorization for Mail Watch Cannot Be FOIL'ed

In 2007, DOCCS issued an order permitting the monitoring of Carlos Ward's incoming and outgoing mail for two months. Mr. Ward then made a FOIL (Freedom of Information Law) request for all information relating to the mail watch order. In response, he received only the mail watch order itself. The administrative appeal of the response was denied on the basis that the other records were exempt from disclosure by Public Officers Law §87(2)(f) and (g). Pursuant to subsection (f), records, the disclosure of which could endanger the life or safety of any person, are exempt from disclosure. In Matter of Ward v. Gonzalez, 2014 WL 7288056 (3d Dep't Dec. 24, 2014), the court rejected the respondent's argument that the records were exempt under subsection (f) because the respondent had not submitted any proof showing why the investigators thought that the mail watch was necessary and the court was unable to see how its disclosure could pose a risk of harm to anyone.

The court, however, found that the records were exempt from disclosure under subsection (g). Subsection (g) provides that inter- or intra-agency deliberative materials are exempt from disclosure. Such materials include communications exchanged for discussion purposes which do not constitute final policy decisions. The court found that the withheld document – a mail watch request – consists of pre-decisional evaluations, recommendations and conclusions which are exempt from disclosure under §87(2)(g). Based on this conclusion, the court upheld the lower court's dismissal of the petition.

Carlos Ward represented himself in this Article 78 proceeding.

FEDERAL COURT DECISIONS

Court Finds Commissioner in Contempt

In 2009, in Blast v. Fischer, Index No. 07 CV 0567, 2014 WL 7351171 (W.D.N.Y. Dec. 23, 2014), the court ordered the dismissal of the action based on the parties' settlement agreement. In that agreement, in exchange for providing plaintiff Blast with the religious items that she asserted were necessary for the practice of her religion, Santeria, the plaintiff agreed to the dismissal of the law suit. Among the items which the defendant agreed that he would provide the plaintiff was a permit for up to six one ounce bottles of ritual and prayer oil which

the permit stated could be stored in glass bottles in the plaintiff's cell. The permit also permitted the plaintiff to maintain a shrine in her cell and stated that the shrine may have normally allowable items such as tobacco (loose and cigars). The permit stated the plaintiff was not entitled to any special privileges beyond those afforded to other offenders should plaintiff be sent to SHU or on a court or medical trip.

In 2013, the plaintiff was transferred to Auburn C.F. and placed in administrative segregation for her own protection. There she was informed that she could not possess the items listed in her permit while she was in administrative segregation. The plaintiff objected to this restriction as the permit allows the denial of the religious items only if she is placed in disciplinary SHU. She pointed out that she may remain in administrative segregation for years and thereby be denied her right to practice her religion.

Nine months after her transfer to Auburn C.F., the plaintiff was transferred to involuntary protective custody (IPC) at Shawangunk C.F. There, the prison staff refused to allow her to possess the glass bottles, loose tobacco and cigars which were specifically authorized in her permit. Following a transfer to Sullivan C.F. and placement in IPC, the same restrictions were imposed. The superintendent defended his decision in a declaration in which he stated that inmates at Sullivan C.F. are not permitted glass bottles because glass can be used as a weapon. He was willing to allow the plaintiff to store the oils in plastic bottles which she could have in her cell.

In a responsive affidavit, the plaintiff pointed out that 1) there is a DOCCS directive permitting inmates to possess glass bottles, 2) the glass bottles in which her oils are sent do not allow for decanting of the oils into plastic bottles, and 3) it was DOCCS who originally required her to purchase the oils from a vendor of DOCCS's choosing − a vendor which only provides oil in glass bottles. Further, she was permitted to have the oils in glass bottles and did so without incident at Wende C.F., Auburn C.F. and Mid-State C.F., and her permit expressly provides that it is applicable at all DOCCS facilities. Finally, the plaintiff noted that Native Americans are permitted to burn sage and are given lighters to do so even when they are in disciplinary SHU.

Plaintiff asked the court to find the defendants in contempt beginning on October 24, 2013.

A party may be held in civil contempt for failing to comply with a court order if 1) the order is clear; the proof of non-compliance is clear and convincing; and the non-performing party has not diligently tried to comply in a reasonable manner. Here, the court found that the permit for religious items clearly allows the plaintiff to possess glass bottles of prayer oil and tobacco not only at Wende C.F., but also at other prisons. The Court found that despite the clarity of the language of the permit for religious items, and the absence of any evidence of problems in regard thereto at other prisons where the plaintiff had been housed, DOCCS has transferred the plaintiff to prisons at which she had been denied possession these items without any evidence of any effort to comply with the terms of the permit. The Court was unwilling to allow the decision to house the plaintiff in SHU, absent any evidence of disciplinary reasons for doing so, to unilaterally alter the terms of the settlement. Based on these findings, on December 23, 2014, the court granted the plaintiff's motion for civil contempt and directed the DOCCS defendants to provide the plaintiff with the items permitted by the settlement within 30 days.

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Cynthia China Blast represented herself in this Section 1983 action.

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PLS Offices and the Facilities Served

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

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

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

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ITHACA, 114 Prospect Street, Ithaca, NY 14850

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PLATTSBURGH, 121 Bridge Street, Suite 202, Plattsburgh, NY 12901

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

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