

Pro Se

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FREEDOM OF INFORMATION LAW REQUIRES DISCLOSURE OF THE NAMES OF OFFICERS MENTIONED IN INCIDENT REPORTS

For decades, in response to Freedom of Information Law (FOIL) requests for records documenting uses of force, unusual incidents and misbehavior, DOCCS gave Prisoners' Legal Services (PLS) copies of the records, including the names of the officers who wrote the reports, the officers who were mentioned in the reports and the Department employees to whom the reports were distributed. In 2015, DOCCS changed this policy and began **redacting** (blacking out) from the reports the names of DOCCS employees. As a result, the person requesting the report was unable to identify the officers who were involved in the incident; the officers who wrote the reports; less consistently, the names of the officers to whom the reports were distributed; and the names of the officers who wrote, endorsed or were mentioned in misbehavior reports.

DOCCS took the position that the reports were exempt from FOIL because they were records that were exempt from disclosure by virtue of state law. See Public Officers Law §87(2). According to DOCCS, the records were confidential personnel records of the employees of a department of corrections and therefore exempt from disclosure under Civil Rights Law §50-a.

In response to this policy, PLS filed an Article 78 action relating to 12 requests for records, asking the court to find that the reports are not personnel records and that the names of the officers were not exempt from disclosure. The Supreme Court, Albany County, dismissed the petition. PLS appealed that decision to the Third Department.

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**New York State Passes Monumental Criminal Justice Reforms and Provides Funding for
PLS to Re-Open Mid-Hudson Office
A Message from the Executive Director, Karen L. Murtagh, Esq.**

On March 31, 2019 the New York State Legislature passed the 2020 fiscal year budget. The budget, which spans thousands of pages, included an unprecedented amount of legislation that focused on a number of public safety and justice related issues including:

- Reforming New York’s bail system and arrest procedures to reduce pretrial incarceration;
- Ensuring the right to a speedy trial;
- Reforming the discovery process;
- Modernizing the civil asset forfeiture process;
- Increasing public trust in law enforcement through use-of-force policies and reporting requirements;
- Funding the transformation of solitary confinement in NYS prisons;
- Enacting a comprehensive re-entry package to improve outcomes for formerly incarcerated individuals;
- Closing additional NYS prisons following record decline in the incarcerated population;
- Fully implementing the landmark “Raise the Age” law; and
- Providing a fairer justice system for New York’s immigrants by reducing the maximum sentence for a misdemeanor to 364 days.

With respect to the funding for the transformation of solitary confinement, while the actual changes to solitary confinement have not yet been agreed upon, the Legislature and the Governor have agreed to set aside \$70 million in funding to help implement whatever changes are ultimately adopted. Currently, the Legislature is considering a number of bills regarding the use of solitary confinement in NYS prisons, two of which would impose significant changes. The first bill was submitted by the Governor in his proposed budget and the other, known as the Humane Alternatives to Isolated Confinement (HALT) bill, is prime sponsored by Assembly Speaker Pro Temp Jeffrion Aubry and Senator Luis Sepulveda, Chair of the Senate Crime, Crime Victims and Corrections Committee (A2500, S1623.)

The Governor’s bill would begin phasing in a reduction in the maximum time a person could be held in solitary confinement beginning in April 2021, from 90 days to 60 days and, by April 2022, to no more than 30 days, unless exceptional circumstances require otherwise. The HALT bill is currently drafted to become effective immediately and would reduce the maximum time a person could be held in solitary confinement to no more than 15 days. While they differ in detail, both bills provide for placement of individuals in residential treatment or step-down units upon their release from solitary confinement, noting that these units would be considered rehabilitative, as opposed to punitive.

The NYS Legislative session is scheduled to end on June 19th and we will be sure to inform you of the adoption of any legislation impacting solitary confinement.

Also included in the 2020 fiscal year budget, was funding for PLS to re-open our mid-Hudson office! As many of our readers know, in the late 1990’s, PLS was forced to close three of our offices – New York City, Poughkeepsie and Watertown – due to lack of funding. With 16 prisons located between Albany and New York City, the opportunity to reopen our mid-Hudson office will certainly help alleviate the tremendous burden placed on our Albany office caused by the office closings. While the office will be a small one, we hope to have it up and running by the fall. In subsequent issues of *Pro Se*, we will be sure to let our readers know what prisons that office will cover and provide contact information for that office.

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Putting the appeal in context, the Appellate Division first noted that FOIL was enacted to promote open government and public accountability. *Prisoners' Legal Services of New York v. New York State Department of Corrections and Community Supervision (PLS v. DOCCS (2019))*, 98 N.Y.S.3d 677 (3d Dep't 2019). The law requires government agencies to make available for public inspection and copying all governmental records unless the agency can show that the record falls within a statutory exemption. FOIL, the court wrote, provides citizens with sufficient information to make intelligent and informed choices with respect to the direction and scope of governmental activities and with an effective tool for exposing waste, negligence and abuse on the part of government officers. Thus, exemptions to FOIL requirements are to be applied narrowly to provide maximum access to information.

Public Officers Law §87(2)(a) permits an agency to deny access to records, or portions thereof, if they are specifically exempted from disclosure by state or federal statute. New York State Civil Rights Law §50-a(1) provides that “[a]ll personnel records used [by a department of corrections] to evaluate performance toward continued employment or promotion . . . shall be considered confidential and not subject to inspection or review without the [correction officer’s] express written consent . . . except as may be mandated by lawful court order.”

The question before the court in *PLS v. DOCCS (2019)*, was whether the requested records – use of force reports, unusual incident reports and misbehavior reports – **constitute** (qualify as) personnel records within the meaning of Civil Rights Law §50-a(1).

With respect to this issue, the court noted that Civil Rights Law §50-a (CRL §50-a or 50-a) provides no definition of the term ‘personnel records’ except that such records must be under the control of the particular agency or department and be used to evaluate performance toward continued employment or promotion. *See, Matter of*

Prisoners' Legal Servs. of N.Y. v. New York State Dept. of Correctional Services (PLS v. DOCS (1988)), 73 N.Y.2d 26, 31 (1988). In *PLS v. DOCS (1988)*, the Court of Appeals clarified that whether a particular document constitutes a personnel record “depends upon its nature and its use in evaluating an officer’s performance,” not its “physical location or its particular custodian” *PLS v. DOCS (1988)* at 32. Further, to show that a particular document is a personnel record, it is not sufficient for the agency to show that the recorded data **may** be ‘used to evaluate performance toward continued employment or promotion. *See Matter of Daily Gazette Co. v. City of Schenectady*, 93 N.Y.2d 145, 157 (1999).

Twenty years ago, the Court of Appeals held that in determining whether a document fell within CRL §50-a, the agency, and then the courts, should consider the law’s objective: to provide “a safeguard against potential harassment of officers through unlimited access to information contained in personnel files.” *See, Matter of Daily Gazette Co. v. City of Schenectady*, 93 N.Y.2d at 155. Records that have no potential or only a remote potential to be used to degrade, embarrass, harass or impeach the integrity of an officer do not fall within the **purview** (scope) of §50-a. *See, Matter of Daily Gazette Co. v. City of Schenectady*, 93 N.Y.2d at 157-158.

The court applied these principles to the documents at issue: unusual incident reports, use of force reports and misbehavior reports. It found that these documents are written memorialization (record of facts) of events that took place in a prison. Generating such reports is a mandatory part of their authors’ job responsibilities and the reports are authored by staff members with knowledge of the events about which they write. Based on this analysis, the court found that the documents at issue are **akin to** (similar to) arrest reports, stop reports, summonses, accident reports and body camera footage, none of which, the court wrote, is “**quintessentially** [most typically representative of] personnel records.” In support of this conclusion, the court cited to *Matter of Patrolmen’s Benevolent Ass’n of the City of New York, Inc. v. de Blasio*, 171 A.D.3d 636 (1st Dep’t 2019) and *Matter of Green v. Annucci*, 59 Misc.3d 452 (Sup. Ct. Albany Co. 2017).

Turning to the use of the documents at issue, the court found that DOCCS uses Misbehavior Reports to start disciplinary proceedings against prisoners and Unusual Incident Reports and Use of Force Reports to document prison incidents which are then catalogued and analyzed for trends and reviewed for quality control. The reviews may lead to administrative or criminal charges against an officer. However, the court found, the reports are not used solely for evaluating the performance of DOCCS employees. The court found that the documents were “mixed use material.” Based on this analysis, the court held that the fact that the documents *may* be used during performance evaluations did not end the inquiry. If it did, the court noted, any employee work product or record documenting an employee’s on duty action would be classified as a personnel record and the exception – that personnel records are exempt from disclosure – would swallow the rule favoring disclosure.

Finally, the court found that the Department had not shown that the documents at issue have a substantial and realistic potential to be used against the officers in a harassing or abusive manner.

For the reasons discussed above, the court concluded that because the documents at issue do not qualify as personnel records within the meaning of CRL §50-a, the documents should have been provided to the petitioner without redaction of the officers’ names.

Sean Heikkila of Debevoise & Plimpton LLP represented Prisoners’ Legal Services of New York in this Article 78 action.

News and Notes

CALL FOR SUBMISSIONS

Dear Authors,

The *Cornell Law Review Online* is seeking submissions for a special segment addressing life in

correctional institutions. Submissions are welcome from incarcerated and formerly incarcerated individuals.

Cornell Law Review is a student-run and student-edited journal that strives to publish novel scholarship that will have an immediate and lasting impact on the legal community. The *Cornell Law Review* publishes articles, essays, and student notes. Cornell Law School supports many programs for the justice involved, including work addressing women’s decarceration, capital punishment, juvenile life without parole, prison education, and local indigent defense. We hope to continue this work by elevating incarcerated voices in our publication.

The requirements for submitting a piece are the following:

- Writing: The piece may be a work of fiction or nonfiction. We require that the piece’s subject-matter relates to the criminal justice system, with either a personal or general perspective. Submissions may be typed or hand-written.
- Author: The author must be part of, or impacted by, the criminal justice system.
- Address: *Cornell Law Review Online*, Myron Taylor Hall, Ithaca, NY 14853.
- Deadline: **August 31, 2019**. By submitting, the author consents to consideration for publication in the *Cornell Law Review Online* in 2019 or 2020.

We plan to select 3-4 pieces and expect to publish them by mid-Spring 2020. We will respond to authors whose pieces are selected for publication.

Thank you for considering submitting your work. Please do not hesitate to write with any questions or concerns. We look forward to your submission!

Sincerely,

Cornell Law Review

Address to Use When Appealing a Superintendent’s Hearing Decision

Appeals of Superintendent’s Hearing decisions must be sent to the DOCCS Director of Special Housing. The address of the Director of Special Housing is:

Director of Special Housing
NYS DOCCS
State Office Campus
1220 Washington Avenue
Albany, NY 12226

Recently, some people have sent their Superintendent’s Hearing appeals to the Albany Office of Prisoners’ Legal Services. This is not the correct address for the submission of appeals of determinations of guilt made at Superintendent’s Hearings.

In order to be sure that your appeal is timely – reaches the Director of Special Housing within 30 days of date upon which the determination of guilt was made – please send your appeals to the address above.

LETTERS TO THE EDITOR

Letters to the editor should be addressed to:

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

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

PRO SE VICTORIES!

Markus King v. Correction Officers Tillinghast, Kelly and Belz, Index No. 6491G (WDNY Jan. 31, 2019). Following a trial, the jury found that Officer Tillinghast had used excessive force against the plaintiff, Markus King, and that Officer Belz failed to intervene to protect Markus King from Officer Tillinghast’s violation of Mr. King’s 8th Amendment rights. The jury found that Officer Kelly did not violate Mr. King’s 8th Amendment rights.

William Edwards v. Anthony Annucci, 2019 WL 1284295 (SDNY Mar. 20, 2019). The court denied the defendants’ motion to dismiss with respect to the following claims:

1. the excessive use of force claim against one correction officer;
2. the failure to intervene claim against four correction officers;
3. the conspiracy claim against seven members of the security staff and a nurse; and
4. the state law claim for intentional infliction of emotional distress against seven members of the security staff and a nurse.

Mr. Edwards’ complaint alleges that after corrections staff found out that he was planning to file a grievance against an officer whom Mr. Edwards believed had lied to him about the law library policy, the other defendants conspired to use, used and then covered up their use of excessive force to retaliate against the plaintiff.

Matter of Jessie J. Barnes v. Michelle L. Liberty, Index No. 2018-698 (Sup. Ct. Franklin Co. Feb. 8, 2018). The court suggests that under the circumstances of this case, the defendant’s failure to preserve videotapes should result in adverse inference in any lawsuit relating to the subject matter that was depicted on the destroyed videotapes. This Article 78 action

relating to the denial of several FOIL requests asked the court to impose sanctions on a lawyer in DOCCS counsel's office who reviewed the appeals of the responses to the petitioner's FOIL request and the lawyer representing her in the Article 78 action. The court found that while sanctions against the lawyers were not appropriate because they were not responsible for the destruction of the tapes, the judge thought that in any lawsuit relating to the subject matter depicted on the videotapes – cell extractions – an adverse inference could be appropriate. A court gives an adverse inference instruction to the jury when a party has intentionally destroyed evidence. In a case like this, the adverse inference would advise the jurors that they can infer from the destruction of the evidence that the evidence would have been favorable to the other party.

DOCCS Agrees to Reverse 30 Tier III Hearings Challenged in Article 78s

DOCCS agreed to the reversal of the Tier III hearings challenged in following Article 78 proceedings between May 8, 2018 and May 8, 2019:

Matter of Julian Silva v. Donald Venettozzi, 162 A.D.3d 1437 (3d Dep't 2018)

Matter of Betsy Ramos v. Anthony J. Annucci, 162 A.D.3d 1439 (3d Dep't 2018)

Matter of Barry Manuel v. Donald Venettozzi, 161 A.D.3d 1440 (3d Dep't 2018)

Matter of Junior Collins v. Anthony Annucci, 162 A.D.3d 1750 (4th Dep't 2018)

Matter of Marquis Stanley v. Anthony Annucci, 162 A.D.3d 1756 (4th Dep't 2018)

Matter of John Hogan v. Anthony J. Annucci, 162 A.D.3d 1418 (3d Dep't 2018)

Matter of Jerome Anderson v. Christopher Miller, 163 A.D.3d 1375 (3d Dep't 2018)

Matter of Elvin Muniz v. Dir. of Special Housing, 163 A.D.3d 1391 (3d Dep't 2018)

Matter of Anthony Adams v. Donald Venettozzi, 163 A.D.3d 1392 (3d Dep't 2018)

Matter of Stacy Liggan v. A. Rodriguez, 163 A.D.3d 1386 (3d Dep't 2018)

Matter of Jessie Barnes v. A. Rodriguez, 163 A.D.3d 1367 (3d Dep't 2018)

Matter of Jawwad Abdul-Halim v. Donald Venettozzi, 164 A.D.3d 1554 (3d Dep't 2018)

Matter of Lamarr Little v. William A. Lee, 164 A.D.3d 1559 (3d Dep't 2018)

Matter of Terrance Anderson v. Anthony J. Annucci, 164 A.D.3d 1551 (3d Dep't 2018)

Matter of Burnell McLeod v. Stewart Eckert, 164 A.D.3d 1656 (4th Dep't. 2018)

Matter of Joseph McGowan v. Nunzio Doldo, 164 A.D.3d 1615 (4th Dep't. 2018)

Matter of Robert Brown v. Donald Venettozzi, 164 A.D.3d 1582 (3d Dep't 2018)

Matter of Michael Cunningham v. Anthony J. Annucci, 166 A.D.3d 1198 (3d Dep't 2018)

Matter of Joeme Madura v. Donald Venettozzi, 166 A.D.3d 1193 (3d Dep't 2018)

Matter of Blake Wingate v. Donald Venettozzi, 166 A.D.3d 1174 (3d Dep't 2018)

Matter of Carol Boeck v. Anthony J. Annucci, 165 A.D.3d 1334 (3d Dep't 2018)

Matter of Anthony Medina v. NYS DOCCS, 165 A.D.3d 1336 (3d Dep't 2018)

Matter of Chris Sawyer Fewell v. Stewart Eckert, 167 A.D.3d 1568 (4th Dep't 2018)

Matter of Kenyatta Williams v. William F. Keyser, 167 A.D.3d 1202 (3d Dep't 2018)

Matter of Angelo Ortiz v. Donald Venettozzi, 167 A.D.3d 1200 (3d Dep't 2018)

Matter of Marquis Adams v. Anthony J. Annucci, 167 A.D.3d 1125 (3d Dep't 2018)

Matter of Leo Duchnowski v. Anthony J. Annucci, 168 A.D.3d 1301 (3d Dep't 2019)

Matter of Michael E. Cunningham v. Anthony J. Annucci, 168 A.D.3d 1340 (3d Dep't 2019)

Matter of Ivan Chavez v. Anthony J. Annucci, 168 A.D.3d 1332 (3d Dep't 2019)

Matter of Latiff Dudley v. Anthony J. Annucci, 168 A.D.3d 1333 (3d Dep't 2019)

Matter of Maurice Burgess v. Anthony Annucci, 169 A.D.3d 1373 (4th Dep't 2019)

Matter of Willie Davis v. Anthony Annucci, 169 A.D.3d 1352 (4th Dep't 2019)

Matter of Isiah Williams v. Paul J. Chappius, 169 A.D.3d 1151 (3d Dep't 2019)

Matter of Darren Ack v. Donald Venettozzi, 169 A.D.3d 1138 (3d Dep't 2019)

Matter of Robert Meseck, v. Shirley Noworyta, 170 A.D.3d 1371 (3d Dep't 2019)

Matter of Solomon Billups v. Anthony J. Annucci, 170 A.D.3d 1300 (3d Dep't 2019)

Matter of Robert Haigler v. Lynn J. Lilley, 170 A.D.3d 1411 (3d Dep't 2019)

Matter of Marco Sockwell v. Darwin LaClair, 170 A.D.3d 1416 (3d Dep't 2019)

Matter of Samuel Small v. State of New York, 96 N.Y.S.3d 920 (3d Dep't 2019)

Matter of Thomas Jackson v. Anthony J. Annucci, 96 N.Y.S.3d 919 (3d Dep't 2019)

Matter of Rohan Hamilton v. Anthony J. Annucci, 96 N.Y.S.3d 917 (3d Dep't 2019)

Matter of Stoney Harrison v. Donald Venettozzi, 96 N.Y.S.3d 917 (3d Dep't 2019)

Matter of Paul Watkins v. NYS DOCCS, 97 N.Y.S.3d 536 (3d Dep't 2019)

Pro Se Victories! *features summaries of successful unreported pro se litigation. In this way, we recognize the contribution of pro se litigants. We hope that this column will encourage our readers to look to the courts for assistance in resolving their conflicts with DOCCS. The editors choose which unreported decisions to feature from the decisions that our readers send us. Where the number of decisions submitted exceeds the amount of available space, the editors make the difficult decisions as to which decisions to mention. Please submit copies of your decisions as Pro Se does not have the staff to return your submissions.*

STATE COURT DECISIONS

Disciplinary and Administrative Segregation Hearings

Inadequately Recorded Hearing Results in Reversal and Expungement

Following the administrative affirmation of the determination of guilt made at a Tier III hearing, Javon Gonzalez filed an Article 78 challenge to the hearing. He had been found guilty of fighting, engaging in violent conduct and disobeying direct

orders. The Supreme Court, Albany County rejected Mr. Gonzalez's arguments and dismissed the petition. Mr. Gonzalez then appealed to the Third Department.

In *Matter of Gonzalez v. Annucci*, 95 N.Y.S.3d 901 (3d Dep't 2019), the petitioner argued that:

1. he was prejudiced by the absence of an endorsement on the misbehavior report;
2. he was denied the right to call witnesses; and
3. his right to the production of documents was violated.

Over the respondent's opposition, the court found that the transcript had significant gaps that precluded meaningful review of the petitioner's claims. Typically, courts find that the appropriate remedy for an error of this nature is a remittal for a new hearing. In this instance, the court found that because the petitioner had completely served the sanction imposed at the hearing and because more than two years had passed since the incident occurred, the appropriate remedy was reversal of the hearing and expungement of all references to the charge from the petitioner's prison records.

Javon Gonzalez represented himself in this Article 78 proceeding.

Failure to Produce Videotape Leads to New Hearing

A correction officer alleged that while he was escorting Darnell Davison to his cell, Mr. Davison attempted to head butt the officer, following which the two fought and a second officer was kicked in the knee. After Mr. Davison was found guilty of violent conduct and assaulting officers, he filed an Article 78 challenge to the hearing, arguing that the hearing officer violated his rights to the production of evidence when he failed to produce a videotape. In reaching this decision, the hearing officer did not find the videotape to be irrelevant or immaterial to the resolution of the charges.

In *Matter of Davison v. Annucci*, 169 A.D.3d 1318 (3d Dep’t 2019), the Third Department found that the hearing officer had violated Mr. Davison’s right to the production of evidence when he concluded that because Mr. Davison had not requested the videotape from his employee assistant, the request was unpreserved and the videotape was unavailable. The court found that there was nothing in the record to suggest that the videotape was actually unavailable or that the hearing officer had made any effort to find out whether the videotape existed. Based on these facts, the court found that the request to produce the videotape had been improperly denied.

Turning to the issue of remedy, the court found that under the circumstance before the court, the appropriate remedy was remittal for a new hearing.

Darnell Davison represented himself in this Article 78 proceeding.

Court of Claims

State Liable for Injuries Resulting From Hard Braking While Driving

Orlando Vicens, a formerly incarcerated person, was ordered to get into a van for a transport from Collins C.F. to Groveland C.F. The seat that Mr. Vicens was required to sit on did not have a seat belt nor were there armrests, wall handles, seat railings or other devices that he could hold onto as the van accelerated, turned or stopped. Further limiting his ability to brace himself throughout the roughly 9 hour trip, Mr. Vicens’ arms and legs were secured with handcuffs, leg restraints and a waist chain.

At various times during the trip, the driver suddenly braked, causing the passengers to lose their balance. The passengers told the driver that his driving was causing them to lose their balance. On the final leg of the trip – from Livingston C.F. to Groveland C.F. – the driver saw a small animal run

across the roadway in front of the van and braked quickly. The force of the sudden stop propelled Mr. Vicens forward, causing him to hit his head on the metal grate immediately in front of his seat. The inmate across the central aisle from Mr. Vicens was similarly propelled and also suffered a head injury. When the transport van arrived at Groveland C.F., medical staff took the two to the infirmary for treatment.

Mr. Vicens filed a claim in the Court of Claims, seeking damages for the injuries that he suffered as a result of the driver’s negligence. The driver testified that he had been driving at 5 miles per hour – barely above brisk walking speed, the court commented – when he braked to avoid hitting the animal. The court found this portion of the driver’s testimony was not **credible** (believable). Where the distance to Groveland C.F. was 200 yards from Livingston C.F., the court reasoned that it was unlikely any driver would have driven the distance that slowly. Further, the court reasoned, the consequence of the sudden stop propelling Mr. Vicens forward with a force that caused his head to strike the grate would require that the van was going significantly over 5 miles per hour. Thus, the court found the van was traveling at over 5 miles an hour when the driver suddenly braked.

To decide whether the state was liable for the injuries suffered by Mr. Vicens, the court first determined that the standard by which the conduct of the driver of the van would be judged was the ordinary negligence standard (as opposed to the “emergency doctrine” – whether the conduct was a reasonable response to an emergency – or the “reckless disregard” standard). To decide whether the state was liable for the injuries suffered by Mr. Vicens, in its post-trial decision, see *Orlando Vicens v. State of New York*, Claim No. 124921 (Ct. Clms. Mar. 4, 2019), the court first determined that the standard by which the conduct of the driver of the van would be judged was the ordinary negligence standard (as opposed to the “emergency doctrine” – whether the conduct was a reasonable response to an emergency – or the “reckless disregard” standard).

Turning to the law relating to the duty of care that the State owes to prisoners, the court noted that the State has a duty to safeguard inmates from risks of harm that are reasonably foreseeable, referencing *Sanchez v. State of New York*, 99 N.Y.2d 247 (2002). This duty the court found, citing *Quackenbush v. State of New York*, 29 Misc.3d 1155 (Ct. of Clms. 2010), applies in the transport of prisoners, particularly those who are wearing restraints. The court also noted, citing *Urquhart v. NYC Transit Authority*, 85 N.Y.2d 828 (1995), that a bus driver can be held liable for negligence to a passenger for injuries.

The court also concluded that with respect to the State's duty to safeguard prisoners from the risk of harm that are reasonably foreseeable, the driver's knowledge that the passengers in the van did not have seat belts and were unable to protect themselves from sudden stops at high speeds because they were fully restrained was a factor in determining whether the driver had breached his duty of reasonable care in transporting the passengers and in determining the foreseeability that the passengers would not remain secure in their seats if there was a sudden stop.

Applying the law to the facts before it, the court found that the stop that resulted in Mr. Vicens' injuries was unusual and violent, in that it caused two passengers to be propelled into the grate with sufficient force to cause injury. This was in contrast to several other stops that caused the passengers to lose their balance but did not result in injuries. Absent an emergency, which the court found was not present in this case, the court concluded that the driver's conduct breached the duty of care owed to the shackled passengers.

The court held that the State was 100% liable for Mr. Vicens' injuries.

Brian Dratch of Franzblau Dratch, P.C., represented Orlando Vicens in this Court of Claims action.

Court Finds Claimant's Testimony More Credible than the Officer's

Before he was released from prison, Kenneth Bazil filed a claim asserting that DOCCS officers had used excessive force against him. Before the claim could be resolved, Mr. Bazil was deported to Guyana. When the case went to trial, Mr. Bazil testified from Guyana by means of Skype. After hearing the evidence, in *Bazil v. State of New York*, 2019 WL 1592096 (Ct. Clms. Feb. 19, 2019), the court summarized the evidence as follows.

Testimony and Evidence

Mr. Bazil testified that during a pat frisk, Officer Willson ordered him to keep his hands on the wall and step backward until his body was almost parallel to the floor. Mr. Bazil attempted to comply, and when the officer asked him to take off his shoe while in that position, he fell. As he was falling the officer grabbed Mr. Bazil's head and pushed it against the wall. He also twisted Mr. Bazil's ankle and took Mr. Bazil's gloves from him. When Mr. Bazil asked that the gloves be returned, the officer ordered him to resume the pat frisk position on the wall. Mr. Bazil complied. As soon as his hands were on the wall, he felt a blow to his head and was thrown to the ground. The officer then jumped on Mr. Bazil's back and grabbed his hands and restraints were applied. Following the application of restraints, while the officer's full weight was on his back, other officers kicked and punched him, including in the face.

After he was restrained, Officers Tabor and Eull escorted Mr. Bazil to the SHU. During the escort, one of the officers twisted the handcuffs so that they cut into Mr. Bazil's wrists. When he complained, the officer twisted the cuffs more tightly. The officers also lifted the cuffs, causing Mr. Bazil to walk bent over with pain shooting through his shoulder blades. The other escorting officer bent Mr. Bazil's thumb causing additional stress and pain. As they walked, the officers rammed Mr. Bazil's head into the wall and punched him.

According to the Unusual Incident Report, after the restraints were applied, Mr. Bazil ceased struggling. This report also documented that Officer Willson did not claim that he was injured during the incident. According to the Inmate Injury Report, Mr. Bazil's injuries consisted of edema to his right temple, a small cut to his lip, pain in both shoulders with noticeable marks and bruises, and two cuts on his wrist and some swelling.

Officer Willson testified that he did not have a complete memory of the incident. He did not remember the pat frisk. He remembered taking Mr. Bazil's gloves and telling him that he would return them if inmates were permitted to have them. He remembered Mr. Bazil coming up behind him and grabbing his shoulder and testified that he did not know whether Mr. Bazil was trying to cut him. He remembered spinning around, pushing Mr. Bazil to the floor and landing on top of him. He denied punching or kicking Mr. Bazil. Officer Willson did not remember the names of the other officers involved in restraining Mr. Bazil.

Officer Willson testified that although he did not remember the pat frisk, he knew that he did not use excessive force because he would not do that. He affirmatively testified that he did not shove Mr. Bazil's head into the wall and did not remember any other officer using force on Mr. Bazil. He did not remember seeing any of the injuries that were documented in the use of force report.

The officers who escorted Mr. Bazil to SHU did not testify.

Court's Judgment

The court began its analysis by reviewing the basic legal principles to be applied in adjudicating an excessive force claim. First, the court noted, correction officers may use force where they reasonably believe that it is reasonably necessary to enforce compliance with a lawful order. 7 NYCRR 251-1.2. Whether the force used was excessive is largely determined by the **credibility of the witnesses** (which witnesses appear to be telling the truth). *Shirvanion v. State of New York*, 64 A.D.3d 1113 (3d Dep't 2009).

In its review of the testimony, the court found that Mr. Bazil's testimony was credible and **forthright** (not evasive). The court found that Officer Willson's testimony was not compelling: "Willson purportedly lacked any recollection of the many details about which he was questioned and his recollection as to other facts was self-described as vague. Additionally, his testimony was self-serving and conclusory with regard to the allegations of excessive force employed by [him] and other correction officers."

Based on "the sum of the credible evidence," along with the photographs of Mr. Bazil's injuries and the reports detailing those injuries, the court concluded that the officers used excessive force on Mr. Bazil and found the State 100% liable on the excessive force claim.

Keith Szczepanski and Luna Droubi of Beldock, Levine & Hoffman, LLP, represented Kenneth Bazil in this Court Claims action.

Alleged Hazardous Working Conditions Did Not Result in Finding of Liability

In *Leggio v. State*, 171 A.D.3d 1564 (4th Dep't 2019) and in *Bobik v. State*, 97 N.Y.S.3d 925 (4th Dep't 2019), the Fourth Department of the Appellate Division affirmed the dismissal of two claims that DOCCS was liable for injuries that resulted from dangerous working conditions. In *Leggio*, the lower court dismissed the claim in response to a motion for summary judgment. In *Bobik*, the lower court dismissed the claim after trial.

Claimant Leggio

Claimant Leggio sought damages for injuries that she sustained when she tripped over a stump while she was cleaning up branches from a felled tree. In reviewing the lower court's dismissal of the claim, the Fourth Department noted that DOCCS may direct an incarcerated person to participate in a work program and while the Department owes that person a duty to provide a reasonably safe

workplace, that duty “ ‘does not extend to hazards that are part of or inherent in the very work’ being performed.” In addition, the court noted, “an open and obvious hazard is not actionable where it is inherent in the injury producing work.” In Claimant Leggio’s case, the reviewing court concluded that where claimant was cleaning up the branches of a felled tree, the existence of the tree stump was an open and obvious hazard inherent in the nature of the work and therefore could not serve as a basis for liability.

Claimant Bobik

Claimant Bobik sought damages for injuries that he sustained when he slipped and fell as he was mowing the grass at a prison. The court dismissed the claim after trial. The reviewing court first stated that while it has the authority to independently consider the weight of the evidence on an appeal from a non-jury case, it is required to give deference to the lower court’s findings where, as was the case in *Bobik v. State*, those findings are based largely on credibility determinations. Judges make credibility determinations when they are the fact finders at trials where there is no jury. A credibility determination occurs when the trier of fact decides whether a witness is believable.

In this instance, the appellate court found that “a fair interpretation of the evidence” supported the lower court’s conclusions the claimant had failed to show by the preponderance of the evidence that 1) the conditions for grass cutting were unsafe and 2) that a correction officer had ordered the claimant to mow the section of the hill where he allegedly had slipped. The appellate court found that the lower court had reasonably credited the correction officer’s testimony that at time of the accident, the grass was not wet and claimant did not appear wet after the accident. Further, the claimant had failed to present evidence that the correction officer had ordered the claimant to mow the section of the hill on which he claimed he had slipped.

Eugene Nathanson represented Deborah Leggio in *Leggio v. State*.

Brian Dratch of Franzblau Dratch, P.C., represented John Bobik in *Bobik v. State*.

Miscellaneous

Subject to Statutory Exceptions, DOCCS Must Comply with Judicial Shock Sentences

Prior to 2009, DOCCS had discretion with respect to which people in its custody were able to enroll in the shock program. In 2009, as part of the Rockefeller Drug Law Reform efforts, a law was enacted giving judges the authority to include shock incarceration as a part of the sentences that they imposed on people convicted of certain offenses. In spite of this change in the law, for various reasons, DOCCS continued to exclude from the shock program people whose sentences included judicially imposed shock incarceration. In *Matter of Michael Matzell v. Annucci*, Index No. 3111-18 (Sup. Ct. Albany Co. Mar. 7, 2010), the petitioner, whose sentence included shock incarceration, challenged DOCCS’ authority to exclude him from participating in the shock program. In Mr. Matzell’s case, DOCCS excluded him from the shock program because he had been found guilty at Tier III hearings.

The issue before the court was what discretion DOCCS retained with respect to the enrollment in shock of people whose sentences include a provision that they participate in the shock program. The court began its analysis by explaining that Article 78 of the Civil Law and Practice Rules (CPLR) limits review of an agency’s determination to whether the determination being challenged was arbitrary and capricious, lacked a sound rational basis, or was affected by an error of law. CPLR §7803(3). Generally, the court noted, deference is given to an agency’s interpretation of the statutes it enforces when the interpretation involves some type of specialized knowledge. However, where the question before the court is purely one of statutory construction, dependent only on accurate apprehension of legislative intent, the court wrote, there is little reason to rely on or defer to the agency’s position with respect to what the statute

requires. In such circumstances, the court can determine the statute's meaning from its language and the legislative intent.

At issue in *Matzell* was the meaning of the italicized language in Penal Law §60.04(7)(a):

“. . . any defendant *to be enrolled* in [the shock incarceration program] pursuant to this subdivision shall be governed by the same rules and regulations promulgated by [DOCCS], including . . . those rules and regulations establishing requirements for completion and such rules and regulations governing disciplinary and removal from the program.”

The Department argued that the phrase any defendant “to be enrolled” referred to individuals who had not yet been placed in the program and therefore the statute allows DOCCS to apply its rules and regulations to preclude individuals, like petitioner, who had been found guilty at Tier III hearings.

The court rejected this argument, finding that the Department's “narrow reading of a single three word phrase ignores the larger context of the sentence and paragraph in which it is found.” The full sentence, the court noted, refers to any defendant who is “to be enrolled pursuant to this subdivision” – that is, a defendant who is to be enrolled in the shock program because a court has already ordered DOCCS to do so. A plain reading of the paragraph reveals that it contemplates that defendants who have been judicially ordered into the program will be subject to DOCCS' rules and regulations for completion, discipline and removal from shock; it does not however, contemplate that such defendants may be prevented from entering the program in the first place.

The court did agree that even with court orders, DOCCS is required to enroll in shock only those individuals who are eligible, i.e., meet the age, criminal history and other requirements. However, assuming an individual's sentence includes participation in shock incarceration and he or she meets the statutory eligibility criteria (and his or her mental or physical health does not preclude

participation), DOCCS must enroll the individual in the program.

The Plattsburgh and Albany Offices of Prisoners' Legal Services of New York represented Michael Matzell in this Article 78 action.

Judge Holds MHLS and the Executive Director of CNYPC in Contempt of Court

In July 2018, after a self-harm incident, Sara Kielly was transferred to Central New York Psychiatric Center (CNYPC). Later that month, the Oneida County Surrogate's Court ordered that Ms. Kielly remain at CNYPC for a period not to exceed six months. Ms. Kielly then filed a *pro se* petition in the Supreme Court, Oneida County, asking that the court order that she remain at CNYPC and not be returned to DOCCS custody. On August 16, the court assigned Mental Hygiene Legal Services (MHLS) to represent Ms. Kielly and ordered that she remain at CNYPC and not be transferred to DOCCS custody pending resolution of the petition. Ms. Kielly claims that she served this order on the respondent and the attorney general.

On September 10, the court set a return date for the petition of December 3 to allow the parties time to discuss a settlement.

On September 12, in contravention of the court's August 16 order, Sara Kielly was transferred to Attica C.F.

On September 21, the respondents moved to dismiss the petition and to strike the so-ordered paragraph of the August 16 Order, arguing that because they had not been served with the petition or the August 16 Order, they had had no opportunity to object to the court's directive that Ms. Kielly remain at CNYPC until the court decided her petition. The court denied the respondents' motion to dismiss and strike. The court also held both the respondents and MHLS in contempt of the court's August 16 order as result of their failure to ensure that Ms. Keilly remain at CNYPC. The court scheduled an additional hearing

to take evidence relating to the willfulness of the contemnors' (respondents and MHLS) conduct.

After the willfulness hearing the court, in *Matter of Sara Kielly v. Laurine Jones*, Index No. CA2018-2353 (Sup. Ct. Oneida Co. Jan. 29, 2019), summarized the parties' testimony as follows:

The Executive Director of CNYPC testified that CNYPC did not have knowledge of the August 16 order that Sara Kielly remain at CNYPC until further order of the court;

A lawyer from MHLS explained that MHLS understood that the Attorney General's Office would notify the appropriate personnel at CNYPC of the August 16 order and of her personal knowledge that the personnel at CNYPC had constructive knowledge of the order. She informed the court that Ms. Keilly had notified her CNYPC treatment team of the court's order that she remain at CNYPC.

The court wrote that Ms. Keilly had made very disturbing allegations both in her affidavit and her testimony, regarding the medical and emotional abuse that she had suffered for years, and that it takes seriously the barriers to fair and equitable treatment of the LGBTQ community in the court system. It would not turn a blind eye to the allegations due to what the court termed "procedural deficiencies" that may exist in petitioner's pleadings.

The court then turned to the standard governing contempt proceedings. It noted that Judiciary Law §753(a)(3) provides that a court has the authority to punish by fine and/or imprisonment a neglect or violation of duty by which a right or remedy of a party to a civil action may be defeated, impaired, impeded or prejudiced as a result of disobedience to a lawful mandate of the court. Citing *McCormick v. Axelrod*, 59 N.Y.2d 574 (1983), the court wrote that a contempt finding is intended to vindicate the right of a party to the litigation and that the punishment must be designed to compensate the injured party for interference with or loss of that right. A finding of criminal contempt is justified when there is an offense against public justice that violates the

dignity of the judicial system and its mandates. According to *McCormick*, "[t]he elements which serves to elevate a contempt from civil to criminal is the level of willfulness with which the contempt is carried out."

The court found that regardless of whether the respondents had actual notice of the August 16 order, they had constructive notice. The order was discussed at the September 10 conference and even if the respondents rejected "the basis for the order," they had a duty to follow it. The respondents violated the order when they transferred Ms. Kielly to Attica C.F. and she was prejudiced as a result. Further, the court found, according to the *McCormick* decision, because the respondents had notice of the order, it was not necessary to serve them. Based on the evidence, the court found the respondents in contempt. Because there was no evidence to establish that Ms. Keilly was transferred from CNYPC in an effort to intentionally defy the court's order, the court did not find the contempt was willful.

The court also held MHLS in contempt as both MHLS and the respondents had a duty to communicate the intent of the court's order to the appropriate powers, particularly, the court wrote, given the substance of the conference held on September 21. Although the MHLS lawyer testified that she believed the AG's office would communicate the information to CNYPC, MHLS failed to serve the order as requested by the court.

Having found the respondents and MHLS in contempt of the August 16 order, the court found that the contempt was not willful and assessed no penalty.

The court appointed Benjamin Coffin, Esq. to represent Sara Keilly in the contempt proceeding.

Second Department Affirms Contempt Finding Against Chair of NYS Parole Board

In *Matter of Danielle Ferrante v. Tina Stanford*, 2019 WL 1925915 (Sup. Ct. Dutchess Co. May 1, 2019), the Appellate Division, Second Department reviewed a contempt finding that Supreme Court Justice Maria G. Rosa imposed on Tina Stanford, the Chairperson of the NYS Board of Parole (BOP).

The case began when John MacKenzie, who in 1975 was convicted of killing Police Officer Matthew Giglio, was convicted of murder and sentenced to 25 years to life. Mr. MacKenzie became parole eligible in 2000 and was denied parole release 7 times. In 2014, having been in prison for 40 years and now aged 68, he went before the BOP for the eighth time. In support of his application, he submitted a personal statement, and numerous letters advocating for his release, including letters from a former prosecutor, a retired judge, and a former bishop. His record showed that he had earned three college degrees, had not received a ticket since 1980, had formed a Victims' Awareness Program, and was assessed low for all factors on his COMPAS risk assessment. Nonetheless, he was again denied parole.

Following the administrative affirmation of the 2014 parole denial, Mr. MacKenzie used an Article 78 proceeding to challenge the BOP's decision. *Finding that the denial was based solely on the severity of Mr. MacKenzie's crime and that there was no rational support in the record for the denial, in October 2015, Justice Rosa remitted the matter to the BOP for a new hearing before a different panel.**

At the new hearing, the BOP again declined to release Mr. MacKenzie to parole supervision. The petitioner then moved to hold the Chairperson of the BOP in contempt for failing to comply with the October 2015 judgment. In March 2016, Justice Rosa found that the December 2015 parole denial appeared to suffer from the same infirmities as the vacated December 2014 parole denial and ordered a

full transcript of the record to be produced for a hearing on May 20, unless an "actual de novo" hearing was conducted before then.

At the May 20 hearing, Justice Rosa granted the petitioner's motion that the Chairperson of the BOP be held in contempt for failing to comply with the October 2015 judgment and imposed a fine of \$500.00 per day beginning on June 7, 2016 until a de novo hearing was conducted and a decision issued in accordance with Executive Law §259-i. Justice Rosa wrote that she could not see any basis in the record for the parole board's denial of release other than the underlying crime. The respondent appealed the contempt finding.

Sadly, between the finding of contempt and the Appellate Division's resolution of the respondent's appeal of that finding, John MacKenzie lost his will to live and killed himself. After his death, Danielle Ferrante, as the administrator of Mr. MacKenzie's estate, continued to prosecute his petition.

The Second Department of the Appellate Division affirmed the lower court's finding that the respondent was in contempt of the October 2015 judgment. Under what it termed "the unique facts of this case," the Second Department agreed with the lower court's exercise of its discretion in granting the motion to hold the Chairperson of the Board of Parole in contempt.

The Appellate Division agreed that the Board was fully aware of the October 2015 judgment; that the judgment was a lawful and unequivocal mandate of the court; that the Board, by failing to give consideration to the requisite statutory factors set forth in Executive Law §259-i(2)(c)(A) disobeyed that mandate; and that prejudice to the petitioner resulted. The court further found that the respondent had failed to meet her burden of rebutting the evidence establishing the elements of civil contempt.

While the appellate court agreed with the lower court's finding of contempt, it disagreed with the lower court's decision to impose a \$500.00 a day fine. When a party is found to be in civil contempt, the court wrote, the fines that a court may impose are found in Judiciary Law §773. The purpose of a

civil contempt fine is to **compensate** (restore the party to the state that he would be in had the contempt not occurred). The statute provides for two types of awards. The first is imposed where actual damage results from the contemptuous act. In that situation, an award sufficient to **indemnify** (protect) the aggrieved party is imposed. The second is imposed where the complainant's rights have been prejudiced but where an actual loss or injury cannot be established. In the second situation, the fine is limited to \$250.00, plus the complainant's costs and expenses. In this case, the Second Department found that actual damages were not established and that therefore the petitioner could only recover reasonable costs and expenses, including attorney's fees, plus the \$250.00 fine.

*The law in the First, Second and Fourth Departments is that in the absence of aggravating circumstances, the Executive Law does not permit the BOP to deny parole release solely on the basis of the seriousness of the crime, *see Matter of Huntley v. Evans*, 77 A.D.3d 945 (2d Dep't 2010); *Matter of Johnson v. New York State Div. of Parole*, 65 A.D.3d 838 (4th Dep't 2009); *Matter of King v. New York State Div. of Parole*, 190 A.D.2d 423, 433 (1st Dep't 1993), *affd. on other grounds*, 83 N.Y.2d 788 (1994). The law within the Third Department is that the Executive Law permits the BOP to deny parole based solely on the seriousness of the crime so long as Board considers the other statutory factors, *see Matter of Hamilton v. NYS Div. of Parole*, 119 A.D.3d 1268, 1274 (3d Dep't 2014).

Kathy Selkirk represented Danielle Ferrante, the administrator of Petitioner John MacKenzie's estate, in this Article 78 proceeding.

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