Pro Se

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Court Holds Criminal Defendants Have No State or Federal Constitutional Right to Legal Representation on Applications for Leave to Appeal to the Court of Appeals

In 2012, Jakim Grimes was convicted of criminal possession of a controlled substance in the third degree and criminal possession of a controlled substance in the fourth degree. His attorney in that matter filed and perfected an appeal in the Appellate Division, 4th Department. In November 2015, the 4th Department affirmed Mr. Grimes' conviction. A copy of their decision was served on Mr. Grimes' attorney on November 17, 2015.

Per Criminal Procedure Law (CPL) §460.10 (5), there is a 30 day time limit within which an application requesting leave to appeal to the Court of Appeals must be filed. On November 18, 2015, Mr. Grimes' attorney wrote to him saying that he was in the process of drafting a leave application. The attorney further told Mr. Grimes that he would send him (Mr. Grimes) a copy of the leave application "shortly." Unfortunately, although a leave application was drafted, the attorney inadvertently failed to send it to the Court of Appeals.

Over a year later, Mr. Grimes was released from prison. Approximately six weeks after that, he wrote to his attorney asking about the status of his leave application. Mr. Grimes' attorney then discovered his error: he had failed to submit the leave application. Since it was beyond both the 30 day deadline to submit the application as well as the one year deadline for a motion requesting additional time to file a leave application, Mr. Grimes' attorney moved for *coram nobis* relief in the Appellate Division. In this motion, the attorney argued that his failure to submit a leave application violated Mr. Grimes' right to Due Process under Article I section 6 of the New York State Constitution and that the Court, as a remedy, should

Continued on Page 3 . . .

Also Inside . . .

Subscribe to Pro Se, see Page 17

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Education & Vocational Programs: What Is Available, Accessible, & Necessary

A Message from the Executive Director, Karen L. Murtagh

This issue's Executive Director's message is a bit different from the others I have written. Rather than writing an informational column on a particular topic, I am seeking your input. I would like to hear from our incarcerated readers about what educational and vocational programs are available and accessible in prison. I also want to know what programs aren't available, but should be, and why you think such programs are necessary.

I am requesting this information because Michael Miller, the President of the New York State Bar Association (NYSBA), asked me to serve on a Task Force on Release Planning and Programs. I am on a subcommittee that is focused on the availability of educational and vocational programming during and immediately after incarceration.

In 2016, the NYSBA formed a Special Committee on Reentry. The Special Committee issued a report which was approved by the NYSBA's House of Delegates in January 2016. The underlying rationale for the report was that "(1) confinement often increases the likelihood of recidivism by leaving unaddressed or exacerbating a person's identifiable problem areas; whereas (2) a coordinated, systematic and quickly undertaken effort to identify and focus on these problem areas is likely to diminish recidivism considerably."

The Special Committee made nine principal recommendations with respect to the following areas: diversion programs, pre-release planning, individualized assessment of collateral consequences, employment, education, housing, medical and mental health care and juveniles. President Miller has created the current Task Force to help build on the recommendations made by the Special Committee. Along those lines, I would like to hear from our readers about their experiences in prison and after release, with respect to educational and vocational programming. While I am interested in anything you have to say regarding your educational and/or vocational experience in prison or post-release, I am particularly interested in answers to the questions that are set forth on the insert. The insert gives you space to answer the questions. If you need more space, please use an additional piece of paper and use the question number to show which question you are answering.

As you can see from the questions, our Task Force subcommittee is trying to get a clear picture of the educational and vocational programming that is available for incarcerated and recently released individuals, whether the available programs are useful and individually tailored to the person, and what barriers exist to accessing these programs. Once we have gathered and studied this information, our Task Force will make recommendations to the NYSBA regarding ways to improve release planning so as to, hopefully, reduce recidivism and increase a person's chances of successful reintegration into his/her community upon release.

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therefore extend the time limit for Mr. Grimes to do so now. The Appellate Division declined to extend the deadline and dismissed the motion. The attorney then moved to appeal the dismissal in the Court of Appeals. While that Court agreed to review the matter, it ultimately affirmed the lower court's decision denying the motion.

In *People v. Grimes*, 2018 WL 5259792 (Ct. Apps. Oct. 23, 2018), the Court began its analysis by noting that it had previously found a lawyer's failure to file a timely leave application with the Court of Appeals did not violate a defendant's right to the effective assistance of counsel under the Fifth or Sixth Amendments of the United States Constitution (*People v. Andrews*, 23 N.Y.3d 605 (2014)). This was because there is no federal due process right to counsel on a "second-tier appeal" (that is, an appeal taken after the Appellate Division has rendered a decision on an initial appeal), and thus an attorney's failure to file a leave application does not by itself violate a defendant's right under the federal constitution to the effective assistance of counsel.

Turning to the State Constitution, the Court noted that only individuals who received the death penalty have a state constitutional right to appeal their convictions to the Court of Appeals (NY Const., Art. VI §3). For other non-capital criminal matters, there is a statutory right to seek permission for such an appeal at the second tier level (CPL §460.10), but no corresponding state constitutional right. Furthermore, the Court of Appeals may (and frequently does) refuse to grant such permission. This, the Court held, was because its primary role is to review questions of law with larger public import and not to correct errors in individual cases.

Since there is no state constitutional right in New York to appeal a non-capital criminal matter to the Court of Appeals, the Court reasoned, there is no subsequent right to counsel during a second tier appeal either. Thus, the Court wrote, while Appellate Division rules do require counsel in the first tier appeal to assist in filing a leave application (if the defendant requests that they do so) those rules "do not create a [state] constitutional entitlement to counsel during the CLA [leave application] process, or a claim of a constitutional deprivation of due process when counsel's performance is deficient at that stage of appellate review." Turning to the specific facts of the case before it, the Court of Appeals then concluded that while Mr. Grimes' attorney erred by failing to file the leave application, his representation of Mr. Grimes in that particular process was not based on a state constitutional requirement and his error could therefore not sustain an ineffective assistance of counsel claim.

Notably, Judge Wilson, who was one of the Justices presiding over this case, issued a strongly worded dissent, likening the majority's holding to one that requires appointed counsel to prepare a leave application, but also refuses to hold that counsel "to minimal standards of professional conduct." This dissent, however, is not a controlling legal precedent and the majority opinion remains the law in New York. Accordingly, while individuals are statutorily entitled to have their appellate attorneys assist them in filing a leave application to the Court of Appeals, an attorney's failure to properly prepare that application does not constitute the ineffective assistance of counsel under the New York State constitution.

News and Notes

Do You Have a Preference?

When we write articles for *Pro Se*, we often need to refer to people in prison by a word or phrase, for example prisoner or prisoners, inmate or inmates, incarcerated individual or individuals, incarcerated person or people, etc. How do you think people in prison should be identified? Are some terms offensive? And if responses show a preference for one of the longer terms, like incarcerated individual or incarcerated person, would you accept the abbreviation II or IP? This is an informal poll. The results will be taken into consideration for use in future issues of *Pro Se*.

Please send your response to:

Betsy Hutchings
Pro Se
114 Prospect Street
Ithaca, NY 14850

Deadline for Serving Notice of Intention for Claim of Wrongful SHU Confinement

Prisoners sometimes want to pursue claims in the NYS Court of Claims for time wrongfully spent in SHU. This claim is known as an excessive confinement or wrongful confinement claim. People who want to file such claims need to be mindful of the deadline for filing the notice of intention. The Court of Claims Act requires that within 90 days of the date upon which the claim accrues (comes into being), a claimant must serve a Notice of Intention to File a Claim on the Attorney General of the State of New York. Courts in New York have concluded that a wrongful confinement to SHU claim accrues on the day that the claimant is released from SHU. For this reason, the Notice of Intention for **wrongful confinement to SHU claims must be filed within 90 days of the day that the prisoner is released from SHU.**

Requests for Legal Assistance

If you need assistance with a legal issue, please do not address your letter to ***Pro Se***. At the end of this issue, there is a list of PLS offices and the prisons each office serves. Write to the office that serves your prison. Mail sent to ***Pro Se*** should be about ***Pro Se*** issues only (add to the mailing list, change of address, Letters to the Editor, etc.). Sending your request for legal assistance to ***Pro Se*** will delay a response to your letter.

Letters to the Editor

To Pro Se,

I am writing to you because I receive a copy of ***Pro Se*** every time it is printed and I wanted to let you guys know that reading the ***Pro Se*** gave me the courage to sue DOCCS for sending me to the box for something I did not do.

Back in October 2017, I was at Collins C.F. and was charged with a couple of rule violations. I was found guilty of the charges with no evidence. They gave me 90 days and 3 months loss of good time. While in the box, I read a ***Pro Se*** and decided to appeal my ticket. The appeal was denied so I filed an Article 78. After I got that going, I sent my briefs to the Appellate Division, Third Department. A year later, DOCCS agreed to reverse the ticket. I would say that I got my first *pro se* victory at the age of 24.

Respectfully,

Latiff Dudley

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.

STATE COURT DECISIONS

Disciplinary and Administrative Segregation

Threat to Sue Does Not Violate Rule Prohibiting Threats

While at Attica C.F., Clarence Gourdine wrote a letter in which he said that he would sue a particular corrections officer if, by a certain date, the officer failed to adequately address one of Mr. Gourdine's complaints. The officer charged Mr. Gourdine with violating the inmate rule prohibiting threats. After Mr. Gourdine was found guilty and his appeal denied, he filed an Article 78 challenge to the determination of guilt, arguing that his conduct did not violate the rule.

Rule 102.10 provides that "an inmate shall not, under any circumstances make any threat, spoken, in writing, or by gesture."

In *Matter of Gourdine v. Annucci*, 164 A.D.3d 1647 (4th Dep't 2018), the court acknowledged that the respondent was correct when he argued that an inmate need not threaten violence in order to be found guilty of making threats. However, citing *Matter of Sinclair v. Annucci*, 151 A.D.3d 1511 (3d Dep't 2017) and *Matter of Cabassa v. Kuhlman*, 173 A.D.2d 973 (3d Dep't 1991), the court held, a statement cannot be a threat within the meaning of inmate rule 102.10 unless, at the very minimum it conveys an intent to something illegal, improper, or otherwise prohibited. Mr. Gourdine, the court found, had not communicated an intent to do anything illegal, improper or otherwise prohibited.

In fact, the court went on, Mr. Gourdine's letter communicated his intent to exercise his constitutional right to access the courts and "he cannot be penalized for 'threatening' to do something, i.e., file a lawsuit, that he has every right to do." The court then turned to the leading United State Supreme Court decision on this topic, *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), in which the Supreme Court wrote the following: "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, . . . and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is patently unconstitutional."

Finally, the court noted that respondent's interpretation of the word "threat," in this context, would effectively nullify the protections afforded by Corrections Law §138(4) which provides that DOCCS shall not discipline an inmate "for making written or oral statements, demands or requests involving a change of institutional conditions, policies, rules, regulations, or laws affecting an institution."

The court ordered DOCCS to reverse the determination finding the petitioner guilty of violating Rule 102.10 and directed the respondent to expunge all references thereto from petitioner's institutional record.

Leah R. Nowotarski of Wyoming County-Attica Legal Aid represented Clarence Gourdine in this Article 78 proceeding.

Substantial Evidence Did Not Support Determination that Petitioner Engaged In Lewd Conduct

After an announcement was made that 1) the count was starting, and 2) there was a female officer entering the housing unit, an officer saw Mr. Burroughs urinating into his toilet. The officer ticketed Mr. Burroughs, charging him with, among other rule violations, lewd conduct. Mr. Burroughs filed an Article 78 challenge to the determination that he was guilty of lewd conduct. In *Matter of Burroughs v. Annucci*, 164 A.D.3d 1558 (3d Dep't 2018), the Attorney General agreed with Mr. Burroughs' argument. The court, noting that the female correction officer testified that while Mr. Burroughs continued to urinate as she walked by his cell, he did not make any gestures or expose his genitalia to her, concluded that the determination of guilt was not supported by substantial evidence.

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Theopholis Burroughs represented himself in this Article 78 proceeding.

Whether Charges Were Brought in Retaliation is a Credibility Issue

A commonly raised defense at Tier III hearings is that the charges were filed in retaliation for the accused having engaged in constitutionally or socially acceptable conduct. What are the hearing officer's obligations when the accused raises a retaliation defense? Put another way, what must a hearing officer do to show that he or she considered a retaliation defense? This was the issue addressed by the court in *Matter of Striplin v. Griffin*, 164 A.D.3d 1347 (2d Dep't 2018). In *Striplin*, the petitioner asserted that the hearing officer failed to consider his defense of retaliation. The court finding that the record reflected that the hearing officer had considered the petitioner's testimony, which included his testimony that the correction officer who wrote the misbehavior report did so in retaliation, concluded this assertion was "without merit." In doing so, the court noted that "The petitioner's testimony and the testimony of his witnesses presented a credibility question to be resolved by the hearing officer.

In support of this analysis, the court cited *Matter of Cruz v. Annucci*, 152 A.D.3d 1100 (3d Dep't 2017), *Matter of Antrobus v. Lee*, 140 A.D.3d 745 (2d Dep't 2016) and *Matter of Jackson v. Prack*, 137 A.D.3d 1133 (2d Dep't 2016).

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Joseph Striplin represented himself in this Article 78 proceeding.

Inconsistencies within the Misbehavior Report Presented a Credibility Issue for the HO to Resolve

In Matter of Ballard v. Kickbush, 165 A.D.3d 1587 (4th Dep't 2018), the court reviewed a hearing at which the petitioner had been found guilty of refusing a direct order and violating the rules for the telephone program. Relying solely on the facts asserted in the Misbehavior Report, the hearing officer determined that the petitioner was guilty of violating the rules at issue.

In his Article 78 challenge to the hearing, Mr. Ballard argued that in the absence of testimony from the author of the Misbehavior Report, the determination of guilt was not supported by substantial evidence. Relying on *Matter of Perez v. Wilmot*, 67 N.Y.2d 615 (1986), which held that misbehavior reports standing alone can constitute substantial evidence, the court rejected that argument. Further, the court held, any inconsistencies in the corrections officer's description of the incident in the Misbehavior Report presented

only a credibility issue for the hearing officer to resolve.

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Darnell Ballard represented himself in this Article 78 proceeding.

Charged with Losing State Property, Accused's Recovery of Property Presented Credibility Issue

In *Matter of Fernandez v. Venettozzi*, 164 A.D.3d 1557 (3d Dep't 2018), after being found guilty of losing state property, the petitioner filed an Article 78 petition challenging the determination of guilt. The facts that emerged at the hearing were that when the petitioner's cell was frisked prior to moving petitioner to another cell, the officer frisking the cell failed to locate petitioner's state razor. Petitioner was then allowed to look through his property to see if he could find the razor. The petitioner's search was unsuccessful. Between the petitioner's search and the commencement of the hearing, the petitioner found the razor in his property. He showed the razor to officer involved in the search and, at the hearing, testified about the circumstances of recovering the razor.

In his Article 78, the petitioner argued that determination of guilt was not supported by substantial evidence. The court however, found that it was the hearing officer's job to resolve the credibility issue created by the petitioner's testimony that he had not lost state property and the officer's testimony and misbehavior report which stated that he had.

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Pablo Fernandez represented himself in this Article 78 proceeding.

Sentencing

2004 DLRA Bars Imposition of Persistent Felony Offender Status For Drug Offenders

Background

Based on offenses that occurred in 2012, Reginald Boykins was charged with and convicted of violating Penal Law §220.16(1), criminal possession of a controlled substance in the third degree (CPCS3), and Penal Law §220.39(1), criminal sale of a controlled substance in the third degree (CSCS3). Both are class B felonies. Mr. Boykins was then sentenced as a persistent felony offender (PFO) to concurrent indeterminate terms of 15 years to life. To be sentenced as a PFO, a defendant must have committed at least 2 prior felony offenses. In 2016, Mr. Boykins made a Criminal Procedure Law §440.20 motion to vacate his sentence on the ground that he had been unlawfully sentenced as a PFO. In support of this claim, he argued that because CPCS3 and CSCS3 fall within Penal Law Article 220, a defendant convicted of those crimes cannot be sentenced as a persistent felony offender (PFO) and contended that the 2004 DLRA removed the trial court's discretion to sentence a defendant convicted of controlled substance or marijuana offenses as a PFO.

The Law

In 2004 and 2009, the NYS Legislature passed the Drug Law Reform Acts (DRLA). Penal Law (PL) §60.04(1), part of the DLRA, provides that, "**[n]otwithstanding the provisions of any law**, this section shall govern the dispositions authorized when a person is to be sentenced upon a conviction of a felony offense

defined in [Article 220 or 221] of this chapter **or when a person is to be sentenced upon a conviction of such a felony as a multiple felony offender** as defined in [PL §60.04(5)].

PL §60.04(3) provides that "[e]very person convicted of a class B felony must be sentenced to imprisonment in accordance with the applicable provisions of [PL §70.70].

PL §60.04(5) provides that "[w]here the court imposes a sentence pursuant to [PL §70.70(3)] of this chapter, upon a second felony drug offender . . . it must sentence such offender to imprisonment in accordance with . . . 70.70.

PL §70.70 defines a second felony drug offender as a second felony offender as that term is defined in PL §70.06(1) . . . who stands convicted of any felony defined in Article 220 or 221 in this chapter other than a class A felony.

PL §70.06, which deals with sentences of imprisonment for second felony offenders, defines such an offender as "a person other than a second violent felony offender, . . . who stands convicted of a felony defined in this chapter, other than a class A-1 felony, after having previously been subjected to one or more predicate felony convictions."

PL §70.30(3)(a) provides that a sentence of imprisonment for a second felony drug offender applies to those second felony drug offenders "whose prior felony conviction was not a violent felony."

Finally, PL §70.70(3)(b) provides that when a court finds that a defendant is a second felony drug offender who stands convicted of a class B felony, "the court shall impose a determinate sentence of imprisonment" and the term shall be at least 2 years and shall not exceed 12 years."

Court's Analysis and Decision

The court agreed with the defendant's arguments and found that the DLRA did not permit the court to sentence an individual with no prior violent felony convictions as a PFO. The court reached its decision based on "the plain language of the statutes" which state that a person convicted of a drug offense must be sentenced as required by PL §60.04. The sections of the law set forth above, nowhere reference sentencing a defendant under PL §70.10, the section of the laws that discusses the requirement for sentencing an individual as a PFO.

In further support of its conclusion, the court wrote that "[a]s noted by the Court of Appeals, [in *People v. Coleman*, 24 N.Y.3d 114 (2014] 'when the legislature enacted . . . the DLRA, it sought to **ameliorate** (lessen the harshness of) the excessive punishments meted out to low level non-violent drug offenders under the so-called Rockefeller Drug Laws, and therefore the statute is designed to spread relief as widely as possible within the bounds of reason, to its intended beneficiaries." The court went on to state that its conclusion that the DLRA prohibited non-violent drug offenders from being sentenced as PFO was consistent with the remedial purpose of the DLRA.

The court granted Mr. Boykins's motion to vacate his sentence and remitted the matter to the County Court for resentencing.

John A. Cirando of D.J. & J.A. Cirando, Esqs., represented Reginald Boykins in this CPL §440.20 motion.

Court of Claims

Court Finds Inmate Claimant More Credible than Correction Officer

In *Willie Williams v. State of New York*, 61 Misc.3d 743 (Ct. Clms. 2018), the claimant filed a claim seeking damages for the destruction of, among other items, his family photos. The claim went to trial, where the officer who had conducted the cell search following which the photos were missing, denied having taken the photos.

In its written decision, the court first noted that "the State has a duty to secure an inmate's personal property while the property is in the State's control." The court found that the property at issue in the claim was in defendant's control on the day that the search took place. The court further found that the defendant had authority to confiscate and get rid of the contraband found in the claimant's cell; the State also had a duty to return non-contraband items that were confiscated.

The court then noted that at trial, a "critical component" of the fact finding process is assessing each witness's credibility. After observing the testimony of the correction officer who had conducted the search of the claimant's cell and that of the claimant, the court found that the claimant's testimony was credible but the officer's testimony was not. The officer admitted that there were tons of complaints against him for confiscating the property of inmates. In addition, the court characterized as "agitated" the officer's demeanor while being cross examined. Based on tone of the officer's testimony and his appearance at trial, the court concluded that the claimant's photographs were maliciously taken by the officer.

Willie Williams represented himself in this Court of Claims action.

Claimant Assumed the Risk of Injury While Weightlifting

While at Mid-State C.F., Calvin Williams suffered "**catastrophic**" (severe) injuries when he dropped a 495 pound barbell while he was engaged in a squat lifting exercise. Dropping the barbell caused the squat rack to flip over, which caused Mr. Williams to fall backwards and hit the back of his neck on the barbell. Through his lawyer, Mr. Williams alleged that the State was negligent because the squat rack was not fastened to the floor and, increasing the risk of injury, was placed on top of cow matting. The claim also asserted that the State had been negligent in its inspection and maintenance of the squat rack and that the doctrine of ***res ipsa loquitur*** (a situation in which the facts of a case make it self-evident that the defendant's negligence caused the plaintiff's injury) applied to this case.

The State asserted that it did not have notice that the positioning of the squat rack was a reasonably foreseeable dangerous condition. The rack had been positioned as it was on the day of the accident for over 20 years and was not designed to be fastened to the floor. The defendants also argued that Mr. Williams assumed the risks of attempting to do a squat with 495 pounds of weight, in the absence of a spotter and that Mr. Williams was not entitled to the application of the *res ipsa loquitor* doctrine.

<u>Trial Testimony</u>

Mr. Williams testified that on the date of the accident, he, a self-described expert weightlifter, engaged in his normal weightlifting routine. While he sometimes used a spotter, he did not always do so, and did not do so on the date of the accident, having rejected another inmate's offer to spot for him.

On other occasions prior to the date of the accident, when he did not use a spotter, he had dropped the weight.

At the trial, shown photographs of signs posted in the gym saying, "DON'T DROP OR SLAM WEIGHTS," and "ALWAYS USE A SPOTTER," Mr. Williams testified that he was not aware of the posted rules.

There was **equivocal** (not clear or straightforward) testimony from an inmate witness that the witness had told a correction officer that the rack should be bolted to the floor. The work records of another inmate witness showed that he was working in a different area of the prison when the incident occurred and could not have witnessed the accident. A third inmate witness's testimony disputed the claimant's testimony that he had successfully performed 7 repetitions with 495 pounds before the accident occurred. A fourth inmate witness testified that he always used a spotter when lifting heavy weight, which he defined as over 225 pounds; he had been a spotter for Mr. Williams when Mr. Williams lifted 300 pounds. The fourth witness also testified that he had told DOCCS staff that the rack was "loose," but did not remember the staff names or when he told them and he did not file a grievance about the condition of the rack.

The recreation supervisor testified that he had no memory of any inmate complaining about the condition of the rack and that for over 20 years, the rack had been positioned as it was at the time of the accident and there had been no prior accidents of this nature.

The claimant's expert testified that spotters are not essential for safety when a lifter is in training. The defense expert testified that spotters are utilized for safety.

After trial, in *Calvin Williams v. State of NY*, 2018 WL 4957770 (Ct. Clms. Aug. 22, 2018), the Court issued a decision resolving the issues in the case.

Court's Analysis of the Application of the Law to the Facts

To prevail on his claim, the court wrote, Mr. Williams had to show:

1. That a foreseeably dangerous condition existed;

2. That the State had created the condition or had actual or constructive notice of the condition;

3. That the State failed to fix the condition;

4. That the condition was a proximate cause of his accident; and

5. That he sustained damages.

The court found that the credible evidence showed that there were no prior similar accidents and no written complaints or grievances regarding the stability of the squat rack. In addition, the proof showed that the squat rack was not designed to be bolted to the floor. The testimony showed that no witness had seen the rack flip before the accident that led to plaintiff's claim. For these reasons, the court found that the claimant had failed to meet his burden of showing that the defendant had notice that the squat rack was defective or that defendant had created a dangerous condition by the defendant's positioning of the squat rack.

With respect to whether the positioning of the squat rack was the proximate cause of the claimant's injuries, the court found that the inmate witnesses' testimony differed from the claimant's as to how the accident occurred.

Without a clearly established factual basis regarding the accident, the testimony of the experts as to how any alleged defect or instability was a proximate cause of the accident, the court found, was purely speculative.

The court found that there was another explanation for the claimant's accident: his failure to follow the posted rules, "DON'T DROP OR SLAM WEIGHTS," and "ALWAYS USE A SPOTTER." The court did not credit the claimant's testimony that he had used the gym on a regular basis for a year but had not seen the posted rules. Also, the court noted, the claimant had acknowledged that he had dropped weights in the past when he failed to use a spotter and on the day of the accident, the claimant had affirmatively refused the offer made by another inmate to serve as a spotter. Thus, the court held, there was a lack of credible evidence to meet the claimant's burden of proof that any alleged negligence by the defendant was the proximate cause of the claimant's accident and resulting injuries.

The court found that the doctrine of assumption of risk applied, holding that by engaging in weightlifting, the claimant consented to those commonly understood risks which are inherent in and arise out of the nature of weightlifting generally. Further, while the claimant contended that the squat rack, as positioned was visibly unstable, he used the equipment on a regular basis despite his observations. Accordingly, the court wrote, another basis for finding that claimant consented to the risks associated with using the squat rack as it was positioned is based on the fact that the risks associated with using the squat rack were not concealed and were obvious and known to the claimant.

Finally, the court held that the doctrine of res ipsa loquitor did not apply. To establish such a claim, the claimant must prove:

1. The event must be of a kind which ordinarily does not occur in the absence of negligence;

2. The instrumentality [here, the squat rack] causing the event is within the exclusive control of the defendant; and

3. The event was not due to any voluntary action or contribution on the part of the claimant.

Here the court found that the squat rack was not within the exclusive control of the defendant because inmates had access to the rack for more than 20 years prior to the accident.

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Sam Elbadawi and Zachary M. Mattison of Sugarman Law Firm, LLP, represented Calvin Williams in this Court of Claims action.

Miscellaneous

RTF Update: *Miguel Gonzalez v. Anthony Annucci*

Pro Se has reported previously on Residential Treatment Facility (RTF) issues. In short, the Sexual Assault Reform Act (SARA) does not allow many sex offenders to live within 1,000 feet of a school. In New York City and in many other parts of the state it is extremely difficult to locate SARA-compliant housing. Many sex offenders have been held beyond the maximum expiration (ME) dates of their determinate terms, in prisons that are also designated as residential treatment facilities (RTF's)

because they have not been able to locate approved SARA-compliant housing. DOCCS relies on two statutes that provide authority for holding someone in RTF status beyond the ME date of a sentence. Penal Law §70.45(3) states the parole board can impose as a condition of release that a person spend up to the first six months of post release supervision (PRS) in an RTF. Corrections Law §73(10) says the Commissioner of DOCCS can use an RTF as a residence for any person on community supervision.

Confinement of sex offenders in RTF status has generated quite a bit of litigation. All of those cases have been addressed at county-level supreme courts. A few have been decided at the Appellate Division level. *Gonzalez v. Annucci,* 2018 WL 6173959 (Ct. Apps. Nov. 27, 2018), is the first RTF case to be decided by the Court of Appeals, the highest court in the state court system.

These are the facts that gave rise to the *Gonzalez* decision. Mr. Gonzalez had a CR date of May 20, 2014, and he was awarded all of his good time. However, since he did not have an approved SARA-compliant residence he was not released. On September 30, 2014 he reached the ME date of his determinate sentence, but still did not have an approved residence. For this reason, DOCCS transferred Mr. Gonzalez to Woodbourne C.F., a prison which DOCCS has designated as an RTF, where he was held in RTF status. Mr. Gonzalez was eventually released from Woodbourne in February 2015 and placed in a SARA-compliant shelter in New York City.

In December 2014, while confined at Woodbourne Mr. Gonzalez filed an Article 78 challenging his RTF confinement at Woodbourne. The principal issue addressed in the *Gonzalez* case is how much DOCCS has to do to assist sex offenders in finding a residence to which they can be released.

Since Mr. Gonzalez was released from prison in 2015 and completed his period of PRS in 2017, his claims are technically moot, meaning a court ruling on the legal claims would no longer directly affect him. However, both the Appellate Division and the Court of Appeals did consider the merits of the case, particularly the housing assistance claim, on the ground that it fits into the mootness exception. The mootness exception allows a court to consider a case that is technically moot if the case presents substantial and novel issues that are likely to be repeated and evade review.

The issue of housing assistance turns on the meaning of Corrections Law §201(5) which says that DOCCS "shall assist inmates eligible for community supervision and inmates who are on community supervision to secure employment, educational or vocational training, and housing." The evidence of the assistance that DOCCS provided was that Mr. Gonzalez was able to meet with a counselor or parole officer, and propose residences, which his parole officer would then investigate for SARA compliance. In one instance DOCCS proposed a residence, but Mr. Gonzalez did not accept that residence because he could not afford the cost. Eventually DOCCS was able to place Mr. Gonzalez in a New York City shelter. Mr. Gonzalez argued that DOCCS did not provide meaningful assistance, and did little besides reject residences he proposed. DOCCS argued that they provided the assistance required by statute and that no further assistance was required.

In its decision, the Appellate Division, Third Department described the extreme difficulties sex offenders face in locating approvable SARA-compliant housing while confined in RTF status with limited telephone access and no internet, and held that in light of those difficulties, DOCCS had "an affirmative statutory obligation to provide substantial assistance to petitioner in identifying appropriate housing." *Gonzalez v. Annucci*, 149 A.D.3d 256 (3rd Dep't 2017). The Appellate Division held that DOCCS could not satisfy its duty to assist in locating housing by passively waiting for a prisoner to propose a residence, and then investigating to determine if the residence was SARA-compliant.

The case was then appealed to the Court of Appeals, the highest court in the state court system. The Court of Appeals reversed the Appellate Division and held that DOCCS had provided all the assistance required by statute by allowing Mr. Gonzalez to meet with counselors and parole officers, investigating housing options he proposed,

proposing a SARA complaint residence for Mr. Gonzalez that he could not afford, and eventually, securing a placement for Mr. Gonzalez in a New York City shelter. The Court of Appeals held Correction Law §201(5) does not include the word "substantial" and does not require that assistance rise to the level of being substantial. The Court of Appeals found that Correction Law §201(5) is a general statute which applies to all people being released to community supervision, and therefore does not require a particular or heightened level of assistance based on the special needs of sex offenders held in RTF confinement.

The Gonzalez case also raised the issue of whether Woodbourne was a lawful RTF, and based on that, whether Mr. Gonzalez' confinement in that RTF after his ME date was lawful. The lawfulness of the RTF depends on whether the conditions and programs in the RTF comply with Corrections Law §2(6), which defines RTF's, and Corrections Law §73, which describes the programs and services that must be provided in RTF's.

The Court of Appeals affirmed the Appellate Division's decision to dismiss the claim that Woodbourne was not a proper RTF. The Court observed that there was "insufficient record evidence to establish that DOCCS' determination to place petitioner at the Woodbourne RTF was irrational or that conditions of his placement at that facility were in violation of the agency's statutory or regulatory obligations." The Court's reference to the insufficient record evidence means that in the *Gonzalez* case, there was no discovery and no trial. Thus, the only evidence of the conditions at Woodbourne RTF was in the form of affidavits and other documents filed in court and the lower court had not made any findings of fact with respect to the conditions. The Court noted in a footnote that the adequacy of the Fishkill RTF is currently being addressed in *Alcantara v. Annucci*, 55 Misc.3d 1216[A] (Sup Ct Albany County 2017), where discovery is being conducted. The Court's reference to discovery in *Alcantara* suggests that a case such as *Alcantara*, with discovery and a more fully developed record than there was in *Gonzalez*, may present a better opportunity for a ruling on what constitutes a lawful RTF and when DOCCS can properly exercise its statutory authority to place people in RTF's. (PLS is co-counsel with the Legal Aid Society and Wilkie, Farr & Gallagher in *Alcantara*).

Jill K. Sanders, Pappalardo & Pappalardo, LLP, represented Miguel Gonzalez in this Article 78 proceeding. PLS joined the Legal Aid Society in an *amicus curiae* brief in *Gonzalez v. Annucci* in the Court of Appeals.)

Failure to Serve Papers as Directed By an OSC Leads to Dismissal

In 2017, Royal Hall submitted an Article 78 petition seeking to compel the respondent to produce certain records to the Supreme Court, Albany County and asking to proceed by order to show cause. In response, the court issued an order to show cause, directing the petitioner to serve the order and his petition, together with any exhibits and supporting affidavits upon the Attorney General and the respondent by ordinary first class mail on or before July 14. [For a description of service by order to show cause, see PLS Memo, "How to File an Article 78 Proceeding On Your Own"]. While the petitioner served the parties as directed, he did not do so on or before July 14. The respondent moved to dismiss the action for failure to comply with the order to show cause. In response, the petitioner sent an unsworn letter asserting that the Albany County Clerk's Office had twice assured him – by letters dated March 8 and May 3 – that it would serve his petition and supporting documents. The petitioner also stated that he did not have the resources to properly make service.

In *Matter of Hall v. Benziger*, 163 A.D.3d 1382 (3d Dep't 2018), citing *Matter of Watkins v. NYS DOCCS*, 159 A.D.3d 1252 (2018), the court stated that "an inmate's failure to serve papers as directed by an order to show cause requires the dismissal of the petition on jurisdictional grounds, absent a showing that imprisonment presented an obstacle to compliance." Here, the court found, the petitioner did not dispute the allegation in the Attorney General's affidavit that the petitioner had failed to serve the papers in the manner called for by the

order to show cause. Rather, the petitioner asserted that the County Clerk had stated that it would serve the papers. The court found that, in fact, the letters from the County Clerk's Office did not accept responsibility for service and that the order to show cause itself expressly stated that the grant of poor person relief does not authorize the Clerk's Office to provide service of papers on behalf of a pro se litigant. Further, the court stated, with respect to the petitioner's contention that he lacked resources to properly effectuate services, the Third Department has consistently held that neither an inmate's lack of funds or lack of access to a photocopier nor his/her confinement status are a sufficient obstacle to complying with the service requirements set forth in an order to show cause. Based on this analysis, the court affirmed the lower court judgment dismissing the claim.

Royal Danniel Hall represented himself in this Article 78 proceeding.

FEDERAL COURT DECISIONS

Plaintiff Exhausted His Administrative Remedies and Defendants Were Personally Involved

In *Thomas v. Waugh*, 2018 WL 1508563 (N.D.N.Y. Mar. 27, 2018), the plaintiff asked for **declaratory and injunctive relief** (asked the court **to declare** that the defendants' conduct violated his rights and **to order** the defendants to conduct themselves differently) with respect to the defendants' decision to prohibit the plaintiff, who is Jewish, from wearing a tsalot-kor or tam (hereinafter tam), a form of head covering. This is a First Amendment claim related to plaintiff's right to practice his religion.

As a practitioner of the Jewish faith, the plaintiff believes that he is required to cover his head. Because the plaintiff wears dreadlocks, instead of wearing a yarmulke, he wears a tam, a head covering that DOCCS permits Rastafarians to wear. After the Eastern C.F. rabbi advised the security staff that the plaintiff's head covering met the requirements of the Jewish faith, the security staff issued the plaintiff a permit to wear a tam. In spite of the fact the plaintiff had a permit to wear the tam, an officer repeatedly threatened to ticket the plaintiff because he was wearing a tam but was not Rastafarian.

In response to the officer's harassment, the plaintiff filed a grievance asking that the officer be reprimanded. The Inmate Grievance Resolution Committee (IGRC) denied the grievance because the sanction was not available through the grievance system. The plaintiff appealed, first to the Superintendent and then to the Central Office Review Committee (CORC). Both denied his appeal.

The IGRC, without the plaintiff's involvement, referred to the "central office" the question of *whether the plaintiff should be allowed to wear the tam* (as opposed to *whether the threatening officer should be sanctioned*). In response, an investigator in the "Special Operations Office" contacted the Director of Ministerial, Family and Volunteer Services (MFVS) concerning the IGRC's request for clarification. The Director replied that the tam is not "for a member of the Jewish faith," but that she would defer to the security personnel as to whether the plaintiff could keep his tam. A few months later, a second member of the central office security staff informed Eastern C.F. that the plaintiff was not allowed to keep the tam, the plaintiff sent the tam to a relative and commenced a lawsuit.

The defendants moved for summary judgment, asserting that with respect to the two defendants from the central office security staff who determined that security needs should trump the plaintiff's religious needs, the plaintiff had failed to exhaust his administrative remedies and had failed to show that the two defendants were personally involved in the deprivation.

Before filing a federal lawsuit about a prison condition, the Prison Litigation Reform Act, §1997e(a) requires an incarcerated person to fully use the administrative remedies provided by the department of corrections which confines him or her. Where the person is in the custody of the NYS DOCCS, this means that he or she must follow the steps for filing and appealing a grievance that are

set forth in the DOCCS Inmate Grievance Program (IGP). The IGP requires that within 21 days of the incident about which s/he is complaining, an incarcerated person file a grievance. If the grievance is denied, he or she must then appeal to the Superintendent. If the Superintendent denies the appeal, the incarcerated person must appeal to CORC. Only after CORC has decided the appeal has the incarcerated person exhausted his/her administrative remedies. The purpose of requiring that the incarcerated individual exhaust his/her administrative remedies is to give DOCCS notice of the problem and an opportunity to **adjudicate** (consider and make a decision about) the plaintiff's claims. The purpose is not, as the *Thomas* court noted, to provide notice to a particular official that he may be sued.

The *Thomas* court made short work of the defendants' argument that because he had only appealed from the decision denying his grievance seeking the sanctioning of the employee who had been threatening him, the plaintiff had failed to exhaust his administrative remedies with respect to the two central office security staff defendants who had made the decision regarding whether the plaintiff should be allowed to keep his tam. The goals of exhaustion, the court found, had been achieved by plaintiff's filing of the grievance and his appeal of the denials: DOCCS had notice of the free exercise problem and opportunity to adjudicate it with respect to plaintiff outside of federal court, and produced a record which the court can use to resolve the controversy. As such, the court concluded, plaintiff had exhausted his first amendment free exercise claim.

The two central office security staff defendants also argued that they were not personally involved in violating the plaintiff's First Amendment rights because before they determined that the plaintiff, for security reasons, could not possess or wear the tam, the Director of MFVS had told them that the wearing of the tam was not related to the practice of Judaism. The *Thomas* court also rejected this argument, finding that while the two defendants may have relied on the determination of the Director of MFVS that the plaintiff had no religious based entitlement to the tam, they still advised a course of action that resulted in a possible deprivation. Thus, the court concluded, given the two defendants' role in the decision to prohibit the plaintiff from wearing the tam, there is a triable question of fact as to whether they were personally involved in depriving the plaintiff of federally protected rights.

_____

Errol Thomas represented himself in this Section 1983 action.

Court Imposes Sanctions on Plaintiff for Non-responsive Discovery Responses

In *Shawn Woodward v. Correctional Officer Holtzman*, 2018 WL 5113643 (W.D.N.Y. Oct. 18, 2018), Plaintiff Woodward filed a §1983 complaint alleging violations of his First and Fourteenth Amendment rights. While the case was in pre-trial discovery, the defendants moved either to dismiss First Amendment claims alleging the defendants retaliated against plaintiff as punishment for plaintiff's prior grievances and complaints against four of the defendants or to preclude the plaintiff from submitting evidence in support of his retaliation claims as a sanction. This motion was brought pursuant to Federal Rules of Civil Procedure 37(b)(2)(A)(ii), (iii) and (iv) (failure to comply with court orders), and 37(d)(3) (failure to provide answers to interrogatories).

The defendants alleged that the plaintiff had failed to:

1. Provide timely and complete responses to defendants' request for production of documents;

2. Provide sufficient answers to defendants' interrogatories; and

3. Provide sufficient answers to defendants' requests for admission.

According to the defendants, the discovery requests to which the plaintiff had failed to

sufficiently respond related to his First Amendment claims, thus warranting either the dismissal of those claims or, at trial, the preclusion of evidence relating to those claims. The defendant correction officers also sought reasonable expenses, including attorneys' fees or a monetary sanction in keeping with plaintiff's financial status as an incarcerated person.

The court examined each type of discovery with respect to which the defendants asserted the plaintiff had submitted incomplete, insufficient and/or untimely responses.

Production of Records

Plaintiff's deposition was taken several days after his response to the defendants' document request was due. At his deposition, the plaintiff stated that other than documents provided to him by the defendants, he had no documents responsive to the defendants' document request. In their motion for sanctions for failure to comply with the federal discovery rules, the defendants argue that this response is not sufficient; Federal Rule of Civil Procedure (FRCP) 34 requires that a party make a written response. Only a written response, the defendants argued, will prevent the plaintiff from attempting **to interpose** (introduce) in **dispositive motions** (motions that result in final judgments, such as motions to dismiss or motions for summary judgment) or at trial, documents not previously disclosed in response to discovery requests. Based on the record, the court ruled that the plaintiff had not offered a persuasive excuse for failing to comply with Rule 34 and ordered that he serve a written response in accordance with Rule 34.

Interrogatories

Plaintiff failed to give substantive answers to the interrogatories relating to, among other topics, his drug use before prison, his drug use in prison, his drug testing history in prison, the grievances he had filed while in prison, letters of complaint concerning the defendants, actions that the defendants took that the plaintiff alleges were retaliatory, and the protected speech that preceded each retaliatory act. Roughly a month after the defendants filed their motion for sanctions, the plaintiff filed an amended response to the interrogatories which, the court wrote, "provided, in sharp contrast to Plaintiff's initial answers, substantially detailed responses to Defendants' Interrogatories . . . ." Defendants no longer argued that the response was deficient, rather, defendants contended that by serving such amended answers, the plaintiff had admitted that his initial answers amounted to material misrepresentation and therefore sanctions were warranted pursuant to FRCP 26(g) (authorizing sanctions for false certifications that the answers to discovery were not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation).

The court found that with respect to the plaintiff's initial answers to interrogatories, there was not a proper basis for dismissal of the plaintiff's claims. However, the court concluded, the plaintiff had clearly engaged in an unjustified "run-a-round" in responding to the interrogatories and his initial answers were deliberately non-compliant. Somewhat mitigating was the fact that the answers were no longer inadequate. (A mitigating fact makes the person who did something wrong deserving of a less severe penalty). Nevertheless, it was obvious that the plaintiff's initial answers unnecessarily resulted in defendants' motion to compel and a significant delay in the progress of the case, including the time that it took for the court to consider the defendants' motion. For this reason, the court decided that it was appropriate to require the plaintiff to pay $500.00 to the defendants' attorney as a partial reimbursement for costs of bringing the motion.

Request for Admissions

FRCP 36 permits a party to serve a request to admit to which the receiving party must respond by admitting, denying or stating in detail why the answering party cannot truthfully admit or deny the fact. The purpose of requests for admission is to narrow the issues at trial. In the defendants' motion to compel answers or deem plaintiff's responses as admissions, the defendants noted that the plaintiff had failed to adequately respond to 5 factual

assertions. By the time the court decided the motion, there remained only one factual assertion with respect to which the plaintiff's response was inadequate: *"The witnesses plaintiff requested to testify at his Tier III hearing have no knowledge of the facts concerning the drug test on July 9, 2016."* In response to this assertion, plaintiff objected to having to admit or deny this statement as to admit the fact would falsely imply that his requested witnesses did not have relevant testimony. Because he was not calling them to testify about the drug test but rather to help prove his claim that the charges were retaliatory, he thought that admitting this fact would be misleading.

The court rejected this as a basis for failing to admit or deny the truth of the statement. That the witnesses may have had testimony relevant to retaliation did not preclude the plaintiff from admitting that the witnesses had no knowledge of facts concerning the drug test. Based on this analysis, the court ordered the plaintiff to admit or deny the fact.

Shawn Woodward represented himself in this Section 1983 action.

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PRO SE PRACTICE

New Appellate Division Practice Rules

The presiding justices of the Appellate Division enacted statewide Practice Rules that became effective on September 17, 2018. Called "Practice Rules of the Appellate Division," the new rules are set forth at 22 NYCRR Part 1250. The rules apply to all matters in which a notice of appeal to the appellate division was filed, on or before September 17, 2018, and to all matters pending in the Appellate Division on September 17, 2018. The only appeals to which the new rules do not apply are those matters with respect to which the court, in response to a motion, issues a decision finding that the application of the rules to that particular matter would result in substantial prejudice to a party or would be manifestly unjust or impracticable under the circumstances.

Although the goal of the new rules is to have uniform rules among the four departments of the Appellate Division, each department is allowed to enact its own rules so long as the rules are not inconsistent with the Practice Rules of the Appellate Division.

Deadlines for Appellate Submissions

Except when an Appellate Division has ordered that an appeal be perfected by a particular date, in all four Appellate Divisions, the appellant must file the opening brief and record or appendix **within 6 months of the date of the notice of appeal.** 22 NYCRR 1250(a). (This is a change in the Third Department's prior rule that appellants were required to file the opening brief and record or appendix within 9 months when they filed their notice of appeal).

There are provisions for extending the 6 month deadline. Title 22 NYCRR 1250.9(b) provides that an appellant can apply to the court by letter, with notice to all parties, to extend the time to perfect by up to 60 days. This extension can also be obtained on consent of the parties. After that, the appellant can apply to the court by letter, with notice to all parties, for an additional 30 days to perfect the appeal.

Title 22 NYCRR 1250.9(c) provides that the party against whom the appeal is brought must file its brief within 30 days of when the appellant serves his or her record/appendix and brief. After the response is filed, the appellant has 10 days from the date of service of the answering brief within which to file a reply brief. Like the appellant's time to perfect the appeal, the responding party can apply by letter to extend the time to file and serve his/her brief by up to 30 days and the appellant may do the same to extend the time for filing a reply brief by up to 10 days. Both of these extensions can also be arranged on consent of the parties.

Title 22 NYCRR 1250.10(a) provides that if an appellant fails to perfect the appeal of a civil matter within 6 months of the filing of the notice of appeal, or within the period the court allows for extending that deadline, the matter will be deemed dismissed without further order. Pursuant to 22 NYCRR 1250.10(c), when an appeal has been deemed dismissed, within one year of the date of the dismissal, the appellant may make a motion to vacate the dismissal. To be successful, the appellant needs to show 1) good cause for vacating the order of dismissal, 2) the appellant's intent to perfect the appeal within a reasonable time, and 3) facts showing that the appeal has merit. Some appellants who had appeals pending on September 17, 2018, the day that the new rules took effect, may have already had their appeals dismissed because they did not perfect the appeals within 6 months of the date on which the notice of appeal was filed. If this happened to you, you can make a motion to vacate the dismissal. You should do this as soon as possible.

Limits on the Length and Formatting of Briefs

Computer generated appellants' and respondents' briefs shall not exceed 14,000 words, and reply briefs shall not exceed 7,000 words, inclusive of point headings and footnotes and exclusive of signature blocks and pages including

the table of contents, table of citations, proof of service, certificate of compliance or any addendum such as decisions, statutes, ordinances, rules, regulations, local laws or other similar matter cited therein that were not published or are not otherwise generally available. 22 NYCRR 1250.8.

Computer generated briefs printed in proportionally spaced typeface, such as Times Roman, shall be in 14 point type but the footnotes may be printed in 12 point type. Briefs in monospaced typeface, such as Courier, shall be printed in 12 point type containing no more than 10½ characters per inch. Footnotes may be printed in type of no less than 10 points. 22 NYCRR 1250.8.

Computer generated and typewritten briefs shall have 1 inch margins on all sides of the page. Text must be double spaced. Quotations of more than 2 lines may be indented and single spaced. Headings and foot notes may be single spaced. Pages must be numbered. 22 NYCRR 1250.8.

Typewritten appellants' and respondents' briefs shall not exceed 50 pages and typewritten reply briefs shall not exceed 25 pages exclusive of pages including the table of contents, table of citations, proof of service, certificate of compliance or any addendum such as decisions, statutes, ordinances, rules, regulations, local laws or other similar matter cited therein that were not published or are not otherwise generally available. 22 NYCRR 1250.8.

Typewritten briefs shall be in type of no less than elite in size and in a pitch of no more than 12 characters per inch. The original of the brief shall be signed and filed as one of the number of copies required by section 1250.9. 22 NYCRR 1250.8.

Handwritten appellants' and respondents' briefs must not exceed 50 pages and reply briefs must not exceed 25 pages, exclusive of pages including the table of contents, table of citations, proof of service, certificate of compliance or any addendum such as decisions, statutes, ordinances, rules, regulations, local laws or other similar matter cited therein that were not published or are not otherwise generally available Handwritten briefs can be in cursive or printing and in blue or black ink. 22 NYCRR 1250.8.

Time, Number and Manner of Filing Records, Appendices and Briefs

Except where the court has directed otherwise, appellants who are reproducing the entire record (full record method), must file with the clerk an original and five hard copies of a reproduced full record and an original and five copies of the appellant's brief (with proof of service of one hard copy of the record and brief upon each party to the appeal). 22 NYCRR 1250.9(a)(1).

If, rather than using the full record method, you use the appendix method for presenting the portions of the record that are relevant to the appeal, the appellant must file with the clerk, the original and five hard copies of the appellant's brief and appendix. The appellant must also serve one hard copy of the brief and appendix upon each other party to the appeal. 22 NYCRR 1250.9(a)(2).

Respondents are subject to the same provisions with respect to the filing and service of their briefs and records. 22 NYCRR 1250.9(c).

The appellant must file with the clerk of the appellate division an original and five hard copies of the appellant's reply brief with proof of service of one hard copy of the brief upon each party. 22 NYCRR 1250.9(d).

Transferred Article 78 Proceedings are subject to the same rules as are appeals. The time to file the petitioner's brief is measured from the date of the order of transfer. 22 NYCRR 1250.12.

Some of the Rules of Appellate Divisions require that parties provide to the clerks of the appellate divisions digital copies of briefs, records, etc. Pro Se litigants are exempt from the requirement of filing a digital copy of any brief or other document. 22 NYCRR 1250.9(e).

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Pro Se Staff

EDITORS: BETSY HUTCHINGS, ESQ., KAREN L. MURTAGH, ESQ.
COPY EDITING AND PRODUCTION: ALETA ALBERT
CONTRIBUTING WRITERS: DAVID BENTIVEGNA, ESQ., JAMES BOGIN, ESQ.