Pro Se

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Trial in Lawsuit Seeking Damages for Illegally Imposed PRS Set for December 2015

In the last issue of ***Pro Se***, we reported that the court in Betances v. Fischer, 2015 WL 4692441 (S.D.N.Y. Aug. 6, 2015), had rejected the defendants' third motion for qualified immunity and granted summary judgment to the plaintiffs on the issue of whether two current and one former DOCCS executives – Brian Fischer, Anthony Annucci and Terence Tracey − were liable for the injuries suffered by prisoners who had been subject to illegally imposed post-release supervision. These two decisions seemed to clear the way for a trial on damages. Six days after the court set a trial date of December 7, 2015, however, the defendants filed an interlocutory appeal seeking to have the Second Circuit review the judge's most recent qualified immunity decision and asking for adjournment of the trial while the appellate court reviews their assertions that they are entitled to qualified immunity. The plaintiffs responded by seeking an order from the district court judge certifying that the appeal from the court's decision finding that the defendants were not entitled to qualified immunity is frivolous. Such an order allows the district court to retain jurisdiction pending disposition of the appeal and minimizes the disruption of the proceedings before the district court.

Continued on Page 3 . . . . .

Also Inside . . .

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POPE FRANCIS SPEAKS TO US ALL

A Message from the Executive Director – Karen L. Murtagh

On September 27, 2015, the last day of his six-day tour of the United States, Pope Francis met with prisoners at the Curran-Fromhold Correctional Facility in Philadelphia, PA. That evening, countless news agencies across the country reported on the speech that the Pope "gave to the inmates." However, if you read the speech, it is clear that he was not only speaking to the prisoners in the room, he was speaking to all of us. His words were soft, but his message was powerful. Because his message is a universal one that we should all heed I am reprinting his speech here. Following is a transcript of his remarks, according to the Vatican press office.

Thank you for receiving me and giving me the opportunity to be here with you and to share this time in your lives. It is a difficult time, one full of struggles. I know it is a painful time not only for you, but also for your families and for all of society. Any society, any family, which cannot share or take seriously the pain of its children, and views that pain as something normal or to be expected, is a society "condemned" to remain a hostage to itself, prey to the very things which cause that pain. I am here as a pastor, but above all as a brother, to share your situation and to make it my own. I have come so that we can pray together and offer our God everything that causes us pain, but also everything that gives us hope, so that we can receive from him the power of the resurrection.

I think of the Gospel scene where Jesus washes the feet of his disciples at the Last Supper. This was something his disciples found hard to accept. Even Peter refused, and told him: "You will never wash my feet" (Jn 13:8).

In those days, it was the custom to wash someone's feet when they came to your home. That was how they welcomed people. The roads were not paved, they were covered with dust, and little stones would get stuck in your sandals. Everyone walked those roads, which left their feet dusty, bruised or cut from those stones. That is why we see Jesus washing feet, our feet, the feet of his disciples, then and now.

Life is a journey, along different roads, different paths, which leave their mark on us.

We know in faith that Jesus seeks us out. He wants to heal our wounds, to soothe our feet which hurt from travelling alone, to wash each of us clean of the dust from our journey. He doesn't ask us where we have been, he doesn't question us what about we have done. Rather, he tells us: "Unless I wash your feet, you have no share with me" (Jn 13:8). Unless I wash your feet, I will not be able to give you the life which the Father always dreamed of, the life for which he created you. Jesus comes to meet us, so that he can restore our dignity as children of God. He wants to help us to set out again, to resume our journey, to recover our hope, to restore our faith and trust. He wants us to keep walking along the paths of life, to realize that we have a mission, and that confinement is not the same thing as exclusion.

Life means "getting our feet dirty" from the dust-filled roads of life and history. All of us need to be cleansed, to be washed. All of us are being sought out by the Teacher, who wants to help us resume our journey. The Lord goes in search of us; to all of us he stretches out a helping hand. It is painful when we see prison systems which are not concerned to care for wounds, to soothe pain, to offer new possibilities. It is painful when we see people who think that only others need to be cleansed, purified, and do not recognize that their weariness, pain and wounds are also the weariness, pain and wounds of society. The Lord tells us this clearly with a sign: he washes our feet so we can come back to the table. The table from which he wishes no one to be excluded. The table which is spread for all and to which all of us are invited.

This time in your life can only have one purpose: to give you a hand in getting back on the right road, to give you a hand to help you rejoin society. All of us are part of that effort, all of us are invited to encourage, help and enable your rehabilitation. A rehabilitation which everyone seeks and desires: inmates and their families, correctional authorities, social and educational programs. A rehabilitation which benefits and elevates the morale of the entire community.

Jesus invites us to share in his lot, his way of living and acting. He teaches us to see the world through his eyes. Eyes which are not scandalized by the dust picked up along the way, but want to cleanse, heal and restore. He asks us to create new opportunities: for inmates, for their families, for correctional authorities, and for society as a whole.

I encourage you to have this attitude with one another and with all those who in any way are part of this institution. May you make possible new opportunities, new journeys, new paths.

All of us have something we need to be cleansed of, or purified from. May the knowledge of that fact inspire us to live in solidarity, to support one another and seek the best for others.

Let us look to Jesus, who washes our feet. He is "the way, and the truth, and the life." He comes to save us from the lie that says no one can change. He helps us to journey along the paths of life and fulfillment. May the power of his love and his resurrection always be a path leading you to new life.

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Legal Standard

Generally, the filing of a notice of appeal **divests** (takes away) the district court's authority over those aspects of the case involved in the appeal. Jin Zhao v. State Univ. of NY, 2015 WL 4940355 (2d Cir. Aug. 20, 2015). To the extent that an order denying qualified immunity turns on an issue of law, a defendant can appeal the order. Appealable matters include disputes about the substance and clarity of pre-existing law. The issue of what occurred or why an action was taken is not appealable. Thus, the issue relating to a denial of qualified immunity that an appellate court can address while the matter is still pending before the district court is limited to the defendants' arguments that undisputed facts (if the qualified immunity decision was made in the context of a motion for summary judgment, as it was here) show either that the defendant did not take the action at issue or that it was objectively reasonable for him to believe that his action did not violate clearly established law.

In resolving the issue of whether it should issue an order declaring the appeal of the qualified immunity decision frivolous, the court, in its latest decision in Betances v. Fischer, 2015 WL 6001098 (S.D.N.Y. Oct. 14, 2015), noted that although successive pre-trial motions for qualified immunity were rare, the Supreme Court has recognized that "the availability of a second appeal affords an opportunity for abuse." See, Behrans v. Pelletier, 516 U.S. 299 (1996). Further, the court noted, "it is well within the supervisory powers of the courts of appeals to establish summary procedures . . . to weed out frivolous claims – such as the practice of a district court appropriately certifying the [defendants'] immunity appeal as 'frivolous' − which enable the district court to retain jurisdiction pending summary disposition of the appeal and thereby minimizes disruption of ongoing proceedings."

This approach has been adopted by several district courts within the Second Circuit.

Here the court found that the defendants' latest attempt to assert qualified immunity was its fourth in four years. During each attempt, the case stopped moving toward trial; the first appeal of the court's denial of qualified immunity stalled progress on the case for 2½ years.

The court found that the qualified immunity claims were frivolous for the following reasons:

1. The Second Circuit, in Vincent v. Yelich, 718 F.3d 157 (2d Cir. 2013), had already once held that the defendants had not shown that they were entitled to qualified immunity because subsequent to the decision in Earley v. Murray, 451 F.3d 71 (2d Cir. 2006), which held that DOCCS had no authority to impose post-release supervision and attempts to do so were a nullity, DOCCS continued to impose post-release supervision on individuals who had not been sentenced to post-release supervision;

2. The Second Circuit, in the Vincent decision, stated that "further discovery might show that the defendants had made reasonable efforts either to seek resentencing of the individuals upon whom it had administratively imposed post-release supervision or to end their unconstitutional imprisonment. The undisputed record in Betances, however, revealed that the defendants' post-Earley conduct could in no way be described as objectively reasonable efforts to relieve the individuals of the burdens of unlawfully imposed post-release supervision. Rather, the defendants admitted that they knew about the Earley decision, decided not to follow its holding, opposed the holding when individuals sought relief from administratively imposed post-release supervision, continued to administratively impose post-release supervision, and failed to seek resentencing or expungement of illegally imposed post-release supervision sentences which they knew about.

Further, the court held, the defendants' appeal of the qualified immunity decision does not present any legal questions for the Second Circuit to review. That Court had remanded the case to the district court to determine what evidence there was that the defendants had taken objectively reasonable steps to comply with Earley. The undisputed record, the court found, is that they took no actions.

The court found that dual jurisdiction was warranted and would not be unduly burdensome to the defendants. It found that this result would promote judicial economy and the interests of justice in a case where both have been in short supply.

Matthew Brinckerhoff and Haley Horowitz of Emery Celli Brinckerhoff & Abady, represent the plaintiff class in this Section 1983 action.

News and Notes

Reflections on National Pro Bono Week – Healing of the Spirit: A Focus on Restorative Justice

By Samantha Howell, Director of Pro Bono & Outreach

Each year, in October, Prisoners' Legal Services of New York (PLS) hosts an event in conjunction with National Pro Bono Week. Started by the American Bar Association, National Pro Bono Week is a time to recognize and honor our volunteers, raise awareness of

access to justice issues and, in PLS' case, share the voices of incarcerated individuals with the community. To do so, we pick a topic each year and ask incarcerated New Yorkers to write to us on that topic. This year, focusing on restorative justice, we asked people to send us letters that they wrote to someone they had hurt or someone who had harmed them.

The submissions we received were incredibly moving − individuals shared their feelings of anger, forgiveness and fear and relayed their experiences of abuse, drug use and violence.

Members of the Soul Rebel Performance Troupe, a Capital Region theater troupe that focuses on social justice issues in their featured plays, performed the pieces at the Capital Repertory Theater in Albany. Members of the community in attendance raved about the performances and the heart-wrenching stories that were shared.

While we received dozens of wonderful essays, letters and poems, we were only able to include a small number in the performance. Nonetheless, we wish to give our sincerest *thank you* to each and every person who submitted a piece this year, including Christopher Gregoris, Michael Hopper, Michael Taffinger, and Robert Medina, whose pieces were featured at this year's event.

We are forever indebted to each person who shared his or her story this year, as in years past, and are eager to receive new submissions as we prepare for National Pro Bono Week 2016. Please watch for an announcement of the topic in a future issue of *Pro Se*.

Prison Debate Team Defeats Harvard Debate Team at Eastern C.F.

On September 16, 2015, at Eastern C.F., the Bard Prison Initiative Debate Team (BPIDT) – comprised of three incarcerated individuals − debated the Harvard College Debating Union. The debate topic was: Resolved: Public schools in the United States should have the ability to deny enrollment to undocumented students. The Bard Prison Initiative Debate Team was assigned the side of the debate that supported the resolution. The Harvard team argued that the U.S should not have the ability to deny enrollment to undocumented students. After an hour of debate, the judges announced that the BPIDT had won! The judge noted that the Harvard team had failed to rebut the argument made by the prisoner team that schools attended by many undocumented children were failing so badly that students were essentially being warehoused. The team proposed that if these schools could deny undocumented children admission, non-profits and wealthier schools would step in to better educate the children. ***Pro Se*** extends hearty congratulations to the members of the Bard Prison Initiative Debate Team – Carlos Polanco, Carl Snyder and Dyjuan Tatro − on the team's most recent success!

New Approach to Oral Addictions

Written by Walt Allen, 903 Maple Avenue Niagara Falls, NY 14035

I am 83 years old. I was abused verbally, physically and sexually as a child. All my life, I had a problem with my weight. About twenty years ago I went on a diet and lost 51 pounds. I have been able to keep this weight off by watching every bite since then. In addition to the weight problem, I am an alcoholic [sober since 1983] and in addition to that, I smoked for 40 years [quit in 1982].

You will notice that all of my addictions – food, alcohol and tobacco − are oral. I have had years of therapy. During this therapy, I learned that oral addictions are the result of an individual's perception, formed during infancy and childhood, that he is not loved. The result is a craving for parental love. This craving results in oral addictions to food, cigarettes and alcohol and may also result in anorexia and bulimia. Some people choose one, some another. Actually, I don't think we choose, I think we are driven to one or the other.

I believe the cure for these addictions is to have the CRAVING for the love of both parents satisfied. I found a way to accomplish this by proving to myself that my parents did love me even though all my life, my memories had convinced me that my parents did not love me. And here it is:

It is NORMAL for parents to love their children, like the parents of other animals love their offspring, and to protect their children like the parents of other animals protect their offspring. So, if you think that your parents did not love and take care of you and protect you the way they should have, your parents were not normal. THERE WAS NOTHING WRONG WITH YOU!!! There is nothing wrong with any infant or child that would cause any normal parent not to love them or love to take care of them and protect them.

But, if we think our parents did not love us, we think there is something wrong with us, don't we? And then we try to win their love and approval by doing things for them, don't we? Or we might just hate them for this "perceived" lack of love and avoid them!

However, if we view unloving parents as NOT NORMAL, we can forgive them for not behaving the way they should have. We should not hate someone for being abnormal, but we do! We should not hate ourselves for being abnormal, but we do! Also, consider this: if you think your parents didn't love you, you may be wrong . . .

My therapist suggested that I make a list of everything I could think of that my parents did for me or said to me [praise or approval] THAT THEY DIDN'T HAVE TO DO OR SAY. I also included things they bought for me, because that was how my parents showed their love. I didn't list what they didn't do; I just listed everything they did that they didn't have to, because that was how they showed their love for me. THAT WAS THEIR VERSION OF LOVE!

I could think of only 2 or 3 things for each parent but it was enough to convince me that they really did love me so I was able to forgive them. I MEAN REALLY FORGIVE THEM for all they did that I thought was wrong.

My therapist told me having parental love is very important to how an individual feels about himself. If you do not believe that your parents love you, it will affect your whole life negatively unless you can get this straightened out. He also said that if a person thinks that he was not loved by his parents, there is hell to pay and he will be the one who pays, not the parents! He went on to say people who think their parents didn't love them commit suicide by addictions or by more direct means!

If you were abandoned, you would probably conclude that your parents didn't love you. Normal animals do not abandon their offspring. If your parents abandoned you, your parents were NOT normal; there was nothing wrong with you. Or, maybe your parents gave you up because they wanted the best for you. That's their version of love and there is still nothing wrong with you!

Also, if your parents feel bad when you feel bad, THAT'S LOVE! If they worry about you, THAT'S LOVE! Did they get angry when you didn't come home when you said you would? THAT'S LOVE! Are you overweight, underweight, depressed, drinking too much, messing with drugs? Do they get angry about any of this or anything else I haven't mentioned? THAT'S LOVE! Anger is caused by fear: your parents were afraid FOR YOU, and THAT'S LOVE! Did your parents do anything for you as an adult, either giving you or loaning you money or helping you physically? THAT'S LOVE! There may be other evidence I haven't thought of.

If you attempt to make a list but can't think of anything to put on it, you may be right that your parents do not love you. But even if they don't, THERE IS NOTHING WRONG WITH YOU!!! It is your parents who are ABNORMAL; that is, they are not behaving like other animals, so maybe you can accept them on that basis. And, once again, THERE IS NOTHING WRONG WITH YOU.

I tried all of my adult life to forgive my parents but was unable to until I made the list. I quit drinking, smoking and overeating the hard way before I came up with the idea of comparing how other animals treat their offspring with how humans treat their children. For me, making the list greatly reduced the cravings I have for the addictions that I still felt after all those years! I write in the hope that the process I described will help you with your addiction issues.

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Inmates who have been released, and/or families of inmates, can read ***Pro Se*** on the PLS website at www.plsny.org.

PRO SE VICTORIES!

Matter of Issac L. McDonald v. Anthony J. Annucci, Index No. 1384-15 (Sup. Ct. Albany Co. Sept. 25, 2015). Issac McDonald successfully challenged a Tier III hearing determination that was based on the contents of an outgoing letter sent by Mr. McDonald which was opened without the Superintendent's authorization.

Noting that 7 N.Y.C.R.R. §720.3(e) provides that outgoing correspondence may not be opened, inspected or read without express written authorization from the prison superintendent, and that a superintendent may not authorize a mail watch in the absence of a reason to believe that a prison rule has been violated, the court held that where there was no evidence in the record that the Superintendent had authorized the mail watch and that where the respondent admitted the mail was opened pursuant to an order from the Inspector General, the determination of guilt must be annulled.

Matter of Rudolph Williams v. NYS Parole Board, Index No. 145418 (Sup. Ct. St. Lawrence Co. Sept. 30, 2015). Rudolph Williams successfully challenged a parole denial. He argued that the May 2014 decision did not set forth the basis for the denial in sufficient and non-conclusory detail. The court agreed, finding that the conclusions were merely a recitation of portions of the language set forth in the Executive Law and that the Board had made only a minimal effort to tailor the largely boilerplate list of factors to the specific facts and circumstances of Mr. Williams' case. Noting that a parole denial in the Third Department may be based solely on the nature of the inmate's crime, here the court found that it was left to speculate as to whether the Parole Board actually weighed the other statutory factors, because several of the factors they purported to have considered, e.g., letters of recommendation and sentencing minutes, were not even in the record. Based on these deficits, the court granted the petition and ordered a new hearing.

Matter of Donnell Jefferson v. DOCCS, Index No. 4616-14 (Sup. Ct. Albany Co. Feb. 23, 2015). Article 78 leads to production of certified documents. Donnell Jefferson requested and received copies of a three page privileged mail log through the NYS Freedom of Information Law (FOIL). He then asked that the documents be certified and was told that DOCCS does not certify these particular records. He appealed this decision and his appeal was denied. Mr. Jefferson then brought an Article 78 seeking certification of the documents and the respondents provided him with certified copies of the documents and moved to dismiss the petition as moot. Mr. Jefferson's motion for costs was denied; the court held that the petition was moot. As to the motion for costs, that court ruled that because it could not conclude that Mr. Jefferson had substantially prevailed or that the agency had had no reasonable basis for denying access, Mr. Jefferson was not entitled to an award of costs.

Matter of Thomas Gucciardo v. Tina Standford, NYS Board of Parole, Index No. 2084-15 (Sup. Ct. Albany Co. Sept. 9, 2015). Court orders de novo parole consideration where petitioner graduated from Shock Incarceration and was denied parole based on the absence of evidence that the factors listed in Executive Law 259-i(2)(c)(A) were considered. Thomas Gucciardo graduated from Shock Incarceration, following which he was entitled to review for parole release. In such cases, there is no interview with the Parole Board. The Board considers the application on the papers. Nine N.Y.C.R.R. §8010.2(a) provides that an inmate who successfully completes the shock incarceration program will normally represent an excellent candidate for parole release. In

considering such an individual for release, the Board is required to consider a number of factors, including an assessment of the individual's risks and needs.

In this case, the Board of Parole repeatedly stated that it had interviewed Mr. Gucciardo and that the decision was in part based on the interview. The Board concluded that there was a reasonable probability that if released, Mr. Gucciardo would violate the law and that his release was incompatible with public safety.

The court found that there was no indication in the record that the Board had considered the factors listed in Executive Law §259-i(2)(c)(A), including the conclusions reached in the COMPAS risk and needs assessment instrument. Further, the only negative factor considered was petitioner's criminal history.

Due to the presumption that parole release will be granted to individuals who successfully complete shock incarceration and the failure to consider the statutory factors – particularly the COMPAS assessment which was favorable to Mr. Gucciardo − the court was unable to conclude that the respondents had complied with the Executive Law and ordered a de novo consideration of Mr. Gucciardo's application.

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

STATE COURT DECISIONS

Disciplinary and Administrative Segregation Finding that Prisoner Made Notes in a Library Book Was Not Supported By Sufficient Evidence

While in local custody (county jail), Joseph Belile was accused of making notes in a book that he had borrowed from the jail's law library. He was found guilty after a hearing and his appeal was denied. Mr. Belile then filed an Article 78 challenge to the hearing. The case was transferred to the Appellate Division because the petition raised an issue of whether the determination of guilt was supported by substantial evidence. In Matter of Belile v. St. Lawrence County Sheriff's Department, 16 N.Y.S.3d 346 (3d Dep't 2015), the court ruled that where the hearing officer based his conclusion that petitioner had written in the book by comparing the writing in the book to samples of the petitioner's handwriting, the failure to include the handwriting samples in the record of the hearing deprived the determination of a sufficient evidentiary foundation. The court ordered the hearing reversed and the charges expunged.

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Joseph Belile represented himself in this Article 78 proceeding.

Fatal Error: HO Did Not Consider Reliability and Credibility of CI

After investigating an incident where an inmate was stabbed from behind, an officer wrote a misbehavior report alleging that confidential informants had identified Spencer Bridge as the assailant. In Matter of Bridge v. Annucci, 2015 WL 6510476 (3d Dep't Oct. 29, 2015), Mr. Bridge argued that the determination was not supported by substantial evidence

because the hearing officer had failed to independently assess the reliability and credibility of the confidential informants. Citing Matter of Muller v. Fischer, 1 N.Y.S.3d 585 (3d Dep't 2015), the court noted that a disciplinary determination may be based on hearsay confidential information provided that it is sufficiently detailed and probative for the hearing officer to make an independent assessment of the informant's reliability. Other than noting that the confidential informants in this case had either proven reliable in the past or disclosed detailed information about the incident, the correction officer did not testify with any specificity or detail regarding the substance of the information that the hearing officer was given to independently assess the informants' reliability or credibility. Because the confidential information was listed in the statement of evidence relied upon, the court held that the determination was not supported by substantial evidence and reversed the hearing and ordered the charges expunged.

The Plattsburgh Office of Prisoners' Legal Services of NY represented Spencer Bridge in this Article 78 proceeding

Court Reverses Supreme Court's Order Granting Article 78 Petition

In Matter of Sileo v. Annucci, 2015 WL 6509812 (3d Dep't 2015), the Third Department considered whether the lower court had properly concluded 1) that the Respondent had violated Petitioner's right to call witnesses and 2) the remedy for the violation was reversal of the hearing and expungement of the charges. The case arose when, after a search of his cell resulted in the recovery of weapons and a TV set inscribed with the name of another prisoner, the petitioner was charged with possession of weapon and contraband. The petitioner asked that the prisoner whose name was inscribed on the TV set and who had reported the TV stolen be called as a witness. The hearing officer denied the request. The Appellate Division found that because the witness' testimony would have been relevant only to the charge that the petitioner possessed contraband, the hearing should not have been reversed and the charges expunged. Even if the denial was of constitutional dimension, ordering the reversal of the determinations of guilt with respect to both charges was improper. Further, the Appellate Division held, testimony from the other inmate was unnecessary to prove the charge of possession of contraband. Guilt of that charge was established by possession of a TV set that the petitioner had no authority to possess. Based on this analysis, the Appellate Division reversed the judgment and ordered the petition dismissed.

Steven Sileo represented himself in this Article 78 proceeding.

Court Finds Identically Worded Misbehavior Reports not to be Substantial Evidence of Guilt

At his Tier III hearing, the petitioner in Matter of Jackson v. Annucci, 2015 WL 6492263 (2d Dep't Oct. 28, 2015), introduced misbehavior reports written about the conduct of several other inmates concerning their involvement in the incident which was the basis for the charges against the petitioner. The court noted that the reports were in the form of first person narratives and provided factual details about the reporting officers as well as the inmates, including the direction from which the officer approached the scene, the location from which the officer first observed the disturbance, the officer's observation of petitioner yelling and shouting, his inability to hear the accused inmate's exact words and the number of orders that he gave to the accused inmate. The Court stated that, "[o]rdinarily, such a particularized statement would be sufficiently relevant and probative to constitute substantial evidence of

guilt." However, the court went on, the petitioner had successfully challenged the reliability of the report by introducing identically worded reports that were signed by different officers. While it is entirely plausible that inmates in the course of a disturbance could have engaged in substantially similar behavior, the court found it "inherently incredible" that several officers could have experienced the same particularized encounter with a number of different inmates. In addition, the court was struck by the fact that the hearing officer twice denied the petitioner the opportunity to ask the reporting officer whether he had actually written the report. Based on these findings, the court held that the determination of guilt was not supported by substantial evidence and ordered the hearing reversed.

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Dwight Jackson represented himself in this Article 78 proceeding.

Court Orders a New Hearing Where Basis for Exclusion Was Unclear

In Matter of Shoga v. Annucci, 17 N.Y.S.3d 816 (4th Dep't 2015), the petitioner asserted that he had been wrongfully excluded from his hearing when at his hearing, after an adjournment, the hearing officer stated on the record that during the adjournment the accused prisoner had been "verbally inappropriate and abusive" and that she had therefore excluded him from the hearing. The adjournment was unrecorded and the hearing officer did not describe the conduct in other than a conclusory manner. The respondent **conceded** (admitted) that the hearing should be annulled. The respondent also urged that the appropriate remedy was a re-hearing. The court agreed and remanded the case for a new hearing.

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The Wyoming County Attica Legal Aid Bureau represented Alex Shoga in this Article 78 proceeding.

Court Finds Substantial Evidence that Prisoner Was Under the Influence of an Intoxicant

After his urine tested positive for the presence of synthetic marijuana, the petitioner in Matter of Ralands v. Prack, 16 N.Y.S.3d 788 (3d Dep't 2015), was found guilty of violating the rule prohibiting being under the influence of an intoxicant. The rule provides that, "[A]n inmate shall not . . . be under the influence of any alcoholic beverage or intoxicant." In his Article 78 challenge to the determination of guilt, the petitioner argued that the rule that he was charged with violating prohibits only the use of alcohol. The court disagreed, holding that the rule bars being under the influence of alcohol *or* an intoxicant. Thus, the court wrote, the rule prohibits being under the influence of intoxicants other than alcohol. The court found that because synthetic marijuana can cause someone to lose control of their faculties or behavior (the definition of intoxicating), the rule encompasses being under the influence of synthetic marijuana.

The court also found that the misbehavior report, positive test results and supporting documentation provided substantial evidence of guilt.

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Curtis Ralands represented himself in this Article 78 proceeding.

Possession of Loose Stamps Leads to Disciplinary Charges

In Matter of Bottom v. Annucci, 2015 WL 6180950 (Ct. Apps. Oct. 22, 2015), the petitioner challenged a determination that he violated the facility rules prohibiting the possession of loose stamps in the law library. At the hearing, he testified that he was unaware of the rule and acknowledged that the rule was set forth in the Attica inmate handbook. In his

petition, he raised an issue that he had not raised in his administrative appeal: he argued the rule was unenforceable because it had not been filed with the Secretary of State as is required by the New York State constitution. The constitution provides that no rule or regulation made by an agency . . . shall be effective until it is filed in the office of the department of state. The court dismissed this claim because it was not preserved.

The court also rejected the petitioner's argument that the determination of guilt was not supported by substantial evidence because the stamps were found before he entered the library. It noted that prison rules state that inmates who attempt to violate rules are subject to punishment in the same manner as violators of the rules. Having admitted that he was carrying the stamps while on the way to the law library, the court held, was substantial evidence that the petitioner attempted to violate the rule.

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The Wyoming County-Attica Legal Aid Bureau represented Anthony Bottom in this Article 78 proceeding.

Sentencing

Calculation of Concurrent Sentences That Were Imposed on Different Dates

In Matter of Williams v. Annucci, 16 N.Y.S.3d 632 (3d Dep't 2015), the court discussed the issue of the calculation of two sentences, imposed 8 years apart, where the second sentence was imposed to run concurrently to the first sentence. In this case, the first sentence, imposed in 2001, was 15 years (a determinate sentence). In 2009, the second sentence, an indeterminate sentence with a minimum period of incarceration of 4 years and a maximum term of 12 years, was imposed to run concurrently to the 2001 sentence. When DOCCS computed his sentence, it credited the time that Mr. Williams spent in DOCCS custody between 2001 and 2009 only to the minimum period of incarceration of the 2009 sentence. In his Article 78 petition, the petitioner argued that this had the effect of converting his concurrent sentence to a consecutive sentence and asked that the court order the maximum term of the 2009 sentence be reduced by the amount of time he had served on the 2001 sentence.

The court rejected the petitioner's argument. Penal Law §70.30(1)(a), the court wrote, states that where a person is serving concurrent indeterminate and determinate sentences, the person receives credit for the prison time served under the first sentence against the minimum period of the second sentence; the law does not provide for application of the same credit against the maximum term of the second sentence. See also, Matter of Deary v. Goord, 820 N.Y.S.2d 369 (3d Dep't 2006). While the maximum term of the indeterminate sentence and the determinate sentence merge, the petitioner's maximum term of imprisonment is only satisfied by the discharge of the term which has the longest time to run. The date upon which the maximum term of the second sentence expires is determined by adding the maximum term of that sentence to the date upon which it was imposed.

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Earl Williams represented himself in this Article 78 proceeding.

Parole

Failure to Consider Sentencing Minutes Leads to De Novo Hearing

In Matter of Duffy v. NYS Department of Corrections and Community Supervision, 2015 WL 6510424 (3d Dep't Oct. 29, 2015), the Appellate Division reviewed a lower court's decision to reverse a parole denial and order a de novo hearing. The case involved an individual who is serving a sentence of 20 years to life. He had been denied parole 6 times before the board decision challenged in this Article 78. The basis for the lower court's decision to grant the petition was the Board's failure to consider the recommendations by the sentencing judge and its representation that the sentencing minutes were unavailable when the court was able to locate the minutes.

The Appellate Division found that "inasmuch as the sentencing minutes – previously believed to have been lost – were located after the Board's decision, directing a de novo hearing for the Board to consider such minutes was not error under the unique circumstance of this case." By unique circumstances, the court referenced the reappearance of the sentencing minutes after the Board's decision and the fact that the sentencing judge, while not making an explicit recommendation as to when the petitioner should be released, had expressed his discomfort with imposing a life sentence − the required maximum − and had imposed less than the most severe minimum term permitted. These factors, the court stated, together with the failure to timely locate the sentencing minutes and the fact that the Board's decision was based primarily on the seriousness of the crime, provide a "narrow path" for distinguishing this case from those where the court has found that the Board's failure to consider the sentencing minutes was harmless error. The cases in which the court had found the failure to consider the sentencing minutes to be harmless error include Matter of Matos v. NYS Board of Parole, 929 N.Y.S.2d 343 (3d Dep't 2011) and Matter of Ruiz v. NYS Division of Parole, 894 N.Y.S.2d 582 (3d Dep't 2010).

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The Legal Aid Society (of New York City) represented John Duffy in this Article 78 proceeding.

Miscellaneous

Court Denies Petition Seeking Intra-hub Transfer

In Matter of Muggelberg v. Annucci, 16 N.Y.S.3d 358 (3d Dep't 2015), the petitioner sought an order requiring the respondent to transfer him to a correctional facility within the Wende hub. He had filed a grievance relating to this request, but it was denied because the Department Directive permits intra-hub transfers only for departmental or programmatic needs, and not for "inmate preference." The Sullivan County Supreme Court dismissed the petition. On appeal, the Third Department affirmed the lower court judgment, holding that the interpretation of the directive is rational and therefore the determination that the request was not permissible was not arbitrary and capricious.

The court also noted that the Department has broad discretion in where to house prisoners and that a prisoner has no right to be housed at any particular prison. Thus, a court cannot mandate that the Department transfer a prisoner to a different prison.

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John Muggelberg represented himself in this Article 78 proceeding.

Prohibition of Internet Legal Defense Fund Not Unconstitutional

After Alvin McLean was disciplined for creating an online legal defense fund, he filed a grievance challenging the application and constitutionality of the rule prohibiting solicitation. Ultimately, CORC affirmed the decision of the IGRC and the Superintendent of Shawangunk C.F. denying the grievance. After Mr. McLean filed an Article 78 challenge to the decision, the court found that the rule was constitutional and dismissed the petition.

On appeal, in Matter of McLean v. NYS DOCCS, 2015 WL 5839214 (3d Dep't Oct. 8, 2015), the Appellate Division noted that the standard for assessing the constitutionality of a prison regulation is whether it is reasonably related to legitimate penological interests. The rule at issue prohibits prisoners from soliciting goods and services from anyone other than their families. According to the respondent, the rule is intended to limit unwanted solicitations of the general public, staff, and volunteers. Based on this representation, the court found that the rule was reasonably related to the penological objective of maintaining prison security and safety. Further, the court held, the rule does not unduly burden a prisoner's First Amendment rights because, with the superintendent's permission, a prisoner can engage in solicitation.

Finally, the court found that the rule was not unconstitutionally vague as the language used provides a person of ordinary intelligence with notice that posting information on a website seeking donations to a legal defense fund would violate the rule.

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Alvin McLean represented himself in this Article 78 proceeding.

FEDERAL COURT DECISIONS

Court Finds HO Violated Plaintiff's Right to Call and Question Witnesses

In 2008, Frederick Diaz was elected an inmate representative to the IGRC at Wende C.F. According to the complaint and other documents filed in Diaz v. Burns, 2015 WL 5167181 (W.D.N.Y. Sept. 3, 2015), shortly after the election, other prisoners warned Mr. Diaz that if he did not resign, he would "get a ticket out of Wende by way of SHU." On the first day of his IGRC term, as Mr. Diaz was leaving his gallery, Officer Burns punched him in his right eye, whereupon several other defendants joined Officer Burns in assaulting Mr. Diaz. Mr. Diaz was then charged with violent conduct, creating a disturbance, assault on staff, and interference. He was found guilty at his hearing and sentenced to 12 months SHU. The hearing was reversed on administrative appeal and a second hearing was conducted. By the time of the second hearing, Mr. Diaz had been transferred to Upstate C.F. The hearing officer at the rehearing found Mr. Diaz guilty and imposed a penalty of 12 months recommended loss of good time in addition to 12 months SHU. Mr. Diaz filed a successful Article 78 challenge to the re-hearing. The court ruled that at the re-hearing, the hearing officer had violated Mr. Diaz's right to call witnesses. Mr. Diaz then brought a federal action for damages.

Complaint

The federal complaint alleged, among other claims, that:

- Officer Burns had violated Mr. Diaz's First Amendment rights when he filed a false misbehavior report in retaliation for Mr. Diaz's decision not to resign from the IGRC;

- Officer Burns and two other defendants violated Mr. Diaz's Eighth Amendment rights when they assaulted Mr. Diaz;

- Hearing Officer Zerniak violated Mr. Diaz's Fourteenth Amendment rights when he refused to call several witnesses requested by Mr. Diaz at the second Tier III hearing and refused to ask the witnesses that he did call the questions proposed by Mr. Diaz; and

- Defendant Bezio violated the above described rights to due process of law when he failed to reverse the Tier III hearing.

Prior to the motions discussed in the most recent decision, the court had dismissed a claim that Officer Burns had violated Mr. Diaz's First Amendment rights by writing a false misbehavior report.

Motions for Summary Judgment

The parties cross-moved for summary judgment on the four above described claims. In addition, the plaintiff moved to reinstate the claim that Defendant Burns had violated Mr. Diaz's First Amendment rights by filing a false misbehavior report.

Plaintiff's Rights to Due Process of Law at the Rehearing

Witness Denials

At the re-hearing, Mr. Diaz requested that the hearing officer call as witnesses:

- the IG investigator who had investigated his complaint that Officer Burns, in retaliation for Mr. Diaz's failure to resign his IGRC position, had assaulted him and written a false misbehavior report;

- Inmate Jones, who, Mr. Diaz asserted, had seen and heard the defendants assault him; and

- The inmate in Cell C-15-7 whom Mr. Diaz learned had been present during the assault.

The hearing officer did not call the IG investigator because he had not been present at the incident and, the hearing officer concluded, therefore had no relevant information about the misbehavior report. He did not explain his reason for not calling Inmate Jones or the prisoner in cell C-15-7.

In analyzing the claim that the hearing officer had violated Mr. Diaz's right to due process of law by not calling these three witnesses, the court, citing Wolff v. McDonnell, 418 U.S. 539 (1974), noted that inmates have a constitutional right to call witnesses when to do so will not be unduly hazardous to prison safety or correctional goals. Further, the court wrote, in Fox v. Coughlin, 893 F.2d 475 (2d Cir. 1990), the Second Circuit had held that prison authorities may not refuse to interview a requested witness without assigning a valid reason. And, when a hearing officer refuses to call a witness, the burden of proof is on the hearing officer to prove the rationality of his

decision. See, Ayers v. Ryan, 152 F.3d 77 (2d Cir. 1998). Thus, the court held in Diaz, the prison official bears the burden of showing that the denial of witnesses "is logically related to preventing undue hazards to institutional safety or correctional goals or that it is justified due to irrelevance or lack of necessity."

IG Investigator

Mr. Diaz requested that the hearing officer call the IG investigator who looked into his complaint of retaliatory discipline and use of force. According to Mr. Diaz, the investigator had agreed to interview the prisoners on the gallery to determine which of them had witnessed the incident and would talk to Inmate Jones, who had originally agreed to testify and but then refused to go to the hearing. The hearing officer refused to call the investigator because he was not present for the incident and thus did not have relevant testimony.

In its decision reversing the hearing, the Third Department found that the hearing officer's failure to call the IG investigator violated Mr. Diaz's right to call witnesses. The Department noted that Mr. Diaz's defense to the charge that he had assaulted Officer Burns – an officer whom he did not know – was that in fact, Burns had assaulted him in retaliation for his work on the IGRC. The Third Department found that the investigator could have offered testimony relevant to plaintiff's defense because his investigation started shortly after the first hearing and in addition to questioning witnesses who had testified, he was planning to interview witnesses who had refused to testify out of fear of retaliation by DOCCS staff. According to the Third Department's decision in Mr. Diaz's Article 78 challenge, IG investigators "routinely testify in prison disciplinary hearings, as do other witnesses who have gained information through investigation rather than personal knowledge." See, Matter of Diaz v. Fischer, 894 N.Y.S2d 218 (3d Dep't 2010).

The Third Department concluded that because the investigator might have provided testimony that was material, his absence substantially prejudiced Mr. Diaz's ability to present his defense and because the hearing officer denied the testimony for reasons other than prison safety, the denial was a violation of Mr. Diaz's constitutional right to call witnesses. The district court agreed with the Third Department's analysis and held that by refusing to call the investigator as a witness, Defendant Zerniak violated Mr. Diaz's rights to due process of law.

Inmate Jones

Inmate Jones had told the employee assistant at the first hearing that he would testify. However, the EA did not, as requested, get a statement of his proposed testimony – which Mr. Diaz explained he wanted because he was concerned that officers would intimidate him – and when he was to be escorted to the hearing, he refused to testify because "he did not want to get involved." By the time of the second hearing, Mr. Diaz had forgotten Mr. Jones' first name and his cell number. The hearing officer, the court noted, made no efforts to help identify Inmate Jones, although his name is found in the documents which comprise the hearing record, and made no finding that his testimony was irrelevant or that his appearance as a witness would threaten safety or interfere with correctional goals. The court noted that Inmate Jones would likely have offered highly relevant testimony as another witness commented that he had heard Jones ask why the officers were assaulting Mr. Diaz when he had not done anything to warrant the use of force. The defendants argued that the failure to call the witness was futile, because the case against Mr. Diaz was so strong.

The court rejected this argument, citing the Second Circuit's decision in Patterson v. Coughlin, 905 F.2d 564 (2d Cir. 1990), which held that prison officials cannot take advantage of a record that is missing a witness' testimony as a result of the officials' obstruction of the accused prisoner's attempt to secure the witness' testimony. The court noted that in addition to the hearing officer's obstruction of Mr. Diaz's attempt to identify Inmate Jones, there was circumstantial evidence from which it could be inferred that DOCCS staff obstructed Plaintiff's right to call witnesses by intimidating Inmate Jones. The court concluded that the hearing officer's handling of the request that Inmate Jones be called as a witness violated Mr. Diaz's right to call witnesses.

The Prisoner in Cell C-15-7

The court concluded that the evidence before it showed that the hearing officer made no attempt to contact or call the prisoner in Cell C-15-7 as a witness or to determine the relevancy of his testimony. Because he ignored the existence of this witness, the court wrote, the hearing officer obviously did not make a finding that calling him would pose a threat to prison safety or correctional goals or that his testimony was irrelevant or redundant. In fact, the court concluded, this inmate's testimony is likely to have been relevant as he was on the gallery when the alleged assault took place. Finally, the court found, citing Kingsley v. Bureau of Prisons, 937 F.2d 26 (2d Cir. 1991), as the hearing officer failed to fulfill his obligation to provide any reason for denying the witness, he cannot prove the rationality of his position. For these reasons, the court held that Defendant Zerniak violated Mr. Diaz's right to due process of law.

Denial of Rights to Present a Defense and Question Witnesses and to the Production of Defendant Burns' Medical Records

Due process requires that an inmate be given a meaningful opportunity to marshal and present a defense. Wolff v. McDonnell, 418 US 539 (1974). To that end, an inmate should ordinarily be permitted to call witnesses and present documentary evidence so long as doing so will not be unduly hazardous to prison safety or correctional goals. Id. A hearing officer may **curtail** (limit) questioning if the questions would be unduly hazardous to prison safety or correctional goals. Id. In assessing whether the hearing officer had violated Mr. Diaz's rights to present a defense and to call witnesses when he limited the questioning of two inmate witnesses and Defendant Burns, the author of the misbehavior report, the court noted that all three witnesses testified extensively at the first hearing without incident and that Defendant Zerniak had not made a finding that allowing the plaintiff to question the witnesses would be unduly hazardous to prison safety or correctional goals. Without discussing the **parameters** (boundaries) of the questioning that the hearing officer permitted, the court found that the hearing officer, while nominally allowing the individuals to testify, limited Mr. Diaz's right to question them so significantly that it amounted to a denial, in substance, of his right to present a defense.

Mr. Diaz requested that the hearing officer produce Officer Burns' medical records. Documents must be produced unless they are irrelevant or their production would threaten safety or correctional goals. Defendant Zerniak denied this request, calling it "information that [an inmate] is not privileged to." The court pointed out that there are numerous state court decisions requiring the production of an officer's medical records, citing, for example, Matter of Joseph v. Fischer, 889 N.Y.S.2d 275 (3d Dep't 2009). In Diaz, the court noted, the hearing officer had not found that the records

were irrelevant or unnecessary and it was possible that they would have been relevant to petitioner's defense that he did not strike Officer Burns and to potentially undermining Officer Burns' credibility. Nor did Defendant Zerniak find that the production of the records would threaten prison safety or correctional goals. Finally, the court wrote, given the **paucity** (small amount) of evidence supporting Defendant Burns' "rather vague and shifting description of the incident," the court was unable to conclude that the error was harmless. Accordingly, the court found that by failing to produce the documents, Defendant Zerniak violated Mr. Diaz's right to present a defense.

Supervisory Liability

The Court, citing Colon v. Coughlin, 58 F.3d 865 (2d Cir. 1995), found that Defendant Bezio, the individual who affirmed the hearing decision, was also liable for these violations of Mr. Diaz's right to due process of law because he was informed of the violations through Mr. Diaz's appeal and failed to remedy the wrong.

Reinstatement of Retaliation Claim

The court, based on Freeman v. Rideout, 808 F.2d 949 (2d Cir. 1986), had previously dismissed Mr. Diaz's claim that Defendant Burns violated his right to due process of law by filing a false misbehavior report. However, the Diaz court noted, in Freeman, the court had found that there were no violations of due process at the challenged hearing, and that the Freeman court had suggested that where an inmate can show that he was disciplined without adequate due process "as a result of the report," he may have a claim against the officer who wrote the report. Here, the Diaz court found, various constitutional violations occurred at the challenged hearing. The court accordingly found that plaintiff therefore has a viable claim against Defendant Burns for filing an allegedly false misbehavior report.

As an alternative basis for reinstating the claim, the Diaz court noted that the Second Circuit, in Franco v. Kelly, 854 F.2d 584 (2d Cir. 1988), held that where an inmate alleges that the false report was filed against him in retaliation for the exercise of a constitutional right, the inmate may have a due process claim based on the false report. Here, where Mr. Diaz alleged a claim of retaliation by staff at Wende C.F. based on his participation in the IGRC, Mr. Diaz has stated a viable due process claim under Franco.

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Tom Terrizzi represented Frederick Diaz in this Section 1983 action.

ADA Not Violated by Policy Prohibiting Electric Wheelchairs

Nathaniel Wright, a prisoner suffering from cerebral palsy and scoliosis, sought a judgment declaring that the Department's policy of prohibiting electric wheelchairs violated the Americans with Disabilities Act and Section 504 of the Rehabilitation Act and an order requiring that the Department allow him to use an electric wheelchair. The parties filed cross motions for summary judgment on the issue of whether DOCCS's policy with respect to electric wheelchairs violates Mr. Wright's right to reasonable accommodation. In Wright v. NYS DOCCS, 2015 WL 5751064 (N.D.N.Y. Sept. 30, 2015), the court ruled that the plaintiff had not produced sufficient evidence to establish his claim and dismissed the complaint.

In reaching this result, the court noted that while other prison systems allow motorized wheelchairs, the plaintiff had failed to show that the accommodations with which the Department had provided him did not ensure that he had meaningful access to the Department's services, benefits and programs.

The plaintiff entered DOCCS custody in 2012. Prior to entering prison, he was approved for a motorized wheelchair by Medicaid. That approval was based on a finding that the equipment was medically necessary. The plaintiff alleged that he needs a wheelchair to get around the prison; using a manual wheelchair for more than short periods causes him significant pain. The Department argued that it accommodates the plaintiff's disability by providing him with a manual wheelchair and a human pusher. The plaintiff filed a grievance asking that he be allowed the electric wheelchair. The grievance was denied based on the adequacy of the manual wheelchair and pusher.

The ADA provides, in relevant part, that no qualified individual with a disability shall, by reason of such disability be excluded from participation in or be denied the benefits of a public entity. With respect to the ADA, the issue before the court was whether the plaintiff had shown that he was denied the opportunity to participate in or benefit from the Department's services, programs or activities. The Second Circuit has held that with respect to the requirement of reasonable accommodation, "reasonable is a relational term: it evaluates the desirability of a particular accommodation according to the consequences that the accommodation will produce. See, Fulton v. Goord, 591 F.3d 37 (2d Cir. 2009). Here, the court wrote, the ultimate inquiry is not whether the plaintiff's actual request for an accommodation is allowed, but whether the accommodation offered to the plaintiff was reasonable.

In assessing the reasonableness of the accommodation provided, the court noted that 32 states and Washington D.C. have policies permitting the use of motorized wheelchairs. This means 18 states do not have such policies. The court found this fact alone did not make the Department's policy unreasonable.

The court also found that while Mr. Wright said that the policy had caused him to be late to programs and forced him to manually wheel himself places, he acknowledged not having informed prison officials of the problems that he was having. The court found that Mr. Wright's failure to inform prison officials, and his willingness to wheel himself, showed that most of his difficulties resulted from his unwillingness to take advantage of the accommodations provided by DOCCS. Under these circumstances, the court held, it could not conclude that the accommodations were unreasonable.

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Legal Services of Central New York − Syracuse represented Nathaniel Wright in this Section 1983 action.

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