Pro Se

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Court Fines DOCCS Defendants $9,600 for Contempt

In 2006, Anthony Amaker and two other prisoners filed a Section 1983 action claiming that DOCS, by refusing to allow prisoners other than those who designated their religion as Rastafarian to wear dreadlocks, was violating the plaintiffs' rights under the First Amendment and the Religious Land Use and Institutionalized Persons Act. The plaintiffs asserted that this policy wrongfully interfered with their desire to follow Nation of Islam (NOI) doctrine which prohibits followers from cutting their hair. The court granted a preliminary injunction **enjoining** (stopping) the defendants from **precluding** (barring) the plaintiffs' attendance at NOI services and classes on account of the plaintiffs' dreadlocks and from punishing plaintiffs for refusing to cut their hair or for refusing to change their religion to Rastafarianism. The court's order also stated: "failure to comply with this order by any named defendant, anyone knowingly acting on their behalf or in concert with them, or anyone inducing, directing, aiding, or abetting in any manner, others not to comply with this order, may be subject to civil and/or criminal contempt proceedings. See, Amaker v. Goord, 2012 WL 4718661, *1 (W.D.N.Y. Aug. 16, 2012).

In June 2010, federal district court judge Richard Arcara permanently enjoined the defendants from punishing plaintiffs for refusing to cut their hair or refusing to change their religious affiliation and from precluding plaintiffs' attendance at NOI services and classes because of their dreadlocks.

In a series of motions asking the court to hold the defendants in contempt, Plaintiff Amaker alleged that between October 2009 and February 27, 2012, security staff violated the court's order a number of times. Specifically, the plaintiff alleged that in 2009, at Elmira C.F., officers ordered Plaintiff Amaker to cut his hair or change his religion, keeplocked him and refused to allow him to attend the Eid-Ul-Adha festival, refused to allow him to attend NOI services until he cut his hair and subjected him to false disciplinary charges. The officers responded that they did so

Article continued on Page 3 . . . .

Also Inside . . .

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A Message From The Executive Director, Karen L. Murtagh and the Pro Bono Coordinator, Samantha Howell

Each year, the American Bar Association hosts a National Pro Bono Celebration during the last week of October. It is a chance for pro bono programs to honor their volunteers, engage in community awareness and recruit attorneys to aid in their efforts.

National Pro Bono Celebration
October 21 - 27, 2012

This year, Prisoners' Legal Services of New York celebrated the inaugural year of its Pro Bono Partnership Project, a statewide network of pro bono counsel to assist and represent individuals on a variety of cases. Through this program, a dozen incarcerated inmates have received representation in family cases, divorce cases, challenges to Tier III disciplinary hearings and Article 78 proceedings challenging parole denials.

We have also developed relationships with the pro bono programs at two law schools. The students at those schools volunteer their time to transcribe hearing tapes, research legal issues, draft memos and review Article 78 petitions for PLS or for pro bono attorneys.

Our Pro Bono Celebration Event, "Walking a Mile in Their SHUs," was held in Albany on October 25th, and highlighted stories, poems, letters and artwork submitted by incarcerated individuals. Six local actors read twelve written submissions to a full house and the response was overwhelming. Again and again, we were told how powerful the stories were and how important it was that prisoners have their voices heard. This event would not have been a success without the dozens of contributions we received from individuals throughout New York State. PLS offers our sincerest *thank you* to everyone who submitted a contribution and hope that, in the future, we can turn to you again to share your stories with the public.

I ♥ PRO BONO

We also awarded the second Paul J. Curran Award for Pro Bono Service to one of our volunteer attorneys for her work on an Article 78 that resulted in the expungement of the Tier III disposition and the restoration of one-year SHU time, loss of privileges and good time. The award is named after a former PLS' Board of Directors Chairman, who was unwavering in his dedication to defending the rights of incarcerated individuals.

Thanks to you, and to the pro bono attorneys who have dedicated their time, energy and spirit, we have had a very successful pro bono year! We look forward to expanding our program over the upcoming year and, in turn, our ability to provide critical legal services to incarcerated New Yorkers. Thank you again to all of the individuals who contributed to our event.

PLEASE NOTE that the Pro Bono Partnership Project only accepts referrals of cases after they have been reviewed by a PLS attorney. Thus, any requests for legal assistance should be directed to the appropriate PLS Regional Office (see back page to find out which office provides services to your facility). Additionally, PLS is funded – and tasked – to assist individuals with certain issues/problems that arise within New York State prisons. The Pro Bono Partnership Project does not accept referrals of criminal cases.

. . . continued from Page 1

in reliance on a 2009 CORC decision from the Inmate Grievance Program stating that the DOCCS policy allows only Rastafarians to wear dreadlocks. Plaintiffs also alleged that in 2010, at Attica C.F., officers refused to allow him to attend NOI services and that in 2012, officers threatened to bar him from NOI services unless he cut his hair and refused to allow him to attend NOI services.

The officers involved claimed that they had not disciplined Plaintiff Amaker for having dreadlocks, but rather for his responses to being told that he either had to cut his hair or change his religion. None of the officers were aware of the court's order. One hearing officer, when shown a copy of the injunction, allowed the 14 day period for completing a hearing to pass, allowing the hearing to be dismissed. Two others found that the order did not excuse plaintiff's behavior and sentenced him to a total of 6 months SHU.

A party may be held in contempt when the order that he or she failed to comply with is clear, the proof of non-compliance is clear and convincing and the party has not diligently attempted to comply in a reasonable manner. In this case, the court found that the order clearly states that plaintiff cannot be punished or denied attendance at NOI services because he has dreadlocks. Nonetheless, officers ordered him to cut his hair and change his religion and disciplined him for protesting their orders. Further, although the officers claimed that the disciplinary actions were the result of the plaintiff's response to their orders, rather than the result of his failure to comply with their orders that he cut his hair or change his religion, the court "could not overlook" the fact that the order precluded the defendants from issuing the orders which provoked plaintiff's objections.

The court was also affected by the defendants' and their counsel's failure to comply with the order. The staff at Elmira C.F. was not informed of the order and after the Superintendent became aware of it, he failed to inform the security staff. The court was dismayed that there was a policy for circulating CORC decisions but no such policy for informing staff about court orders, which in this case would have forbidden the very policy affirmed by a CORC decision issued after the order was granted.

The court found that the defendants were in contempt of court and granted Plaintiff Amaker damages in the amount of $19,600, or $100.00 per day for each day the he was confined to SHU in violation of the court order.

News and Briefs

Child Support or Visitation Issues?

Are you having problems with child support or visitation issues? PLS is able to handle a limited number of cases involving these issues. Please write the regional office that is responsible for handling legal problems at the prison where you are residing.

Problems With Child(ren) During Prison Visit?

If you have had a challenging situation with your child or children during a prison visit, please write Pro Se and tell us about the issue, how you resolved it and suggestions you might have for other prisoners who have problems with a child or children during a prison visit.

Important Notice Regarding Your *Pro Se* Subscription

***Pro Se* is not considered legal mail. As such, DOCCS will not forward your *Pro Se* newsletters to you if you are transferred. It is important that you let the staff at *Pro Se* know your location each time you are transferred.**

Due to the cost of postage, we cannot re-mail issues of *Pro Se* to inmates. You may miss issues if you do not inform us of your current location.

You can contact *Pro Se* at: *Pro Se*, 114 Prospect Street, Ithaca, New York 14850.

LETTERS TO THE EDITOR

Anyone who does more than a little bit of time eventually learns the initials PLS. Those who do any of that time inside the parallel world of SHU swear by those three letters, so often deciphered with the possessive apostrophe in the wrong position. I myself have had the need of Prisoners' Legal Services twice over the years, and have been reading ***Pro Se*** cover to cover since 2003. So what exactly is this entity?

In the 1960's, one disenfranchised group after another struggled and overcame, resulting in an America with new liberties for women, blacks, gays and others. How could names like Selma and Stonewall not resound with the last group of society's outcasts, the incarcerated? In September of 1971, conditions at Attica C.F. were intolerable. When circumstances unexpectedly permitted, prisoners took over the prison. The uprising, sometimes referred to as a riot, was televised, bringing the demands of angry (and often ethnic) prisoners directly into middle class homes.

Today, the rights of minority groups are protected and expanded altogether differently. Special interest groups are represented by unions and lobbyists. Once again, the incarcerated population of about 60,000 is left out. After all, we're poor, ignorant, bad and can't vote so there isn't much political capital in representing us. In truth, beyond our bedraggled families and some martyrdom-seeking clergy, we have only one protector: PLS. It's PLS, and it's a mitzvah. Having been in SHU for both "not enough urine in the sample" and the "unauthorized exchange of five (5) human souls," I can tell you that we need someone to defend us from the **vagaries** [unpredictable actions] of those who guard us. This is the role that PLS plays in our lives; PLS protects the last group of society in which no one else is invested except the "Bust the Move" jailhouse catalogue. And for that I am grateful. I still have a year of lost good time as a result of the madness that DOCCS put me through, but PLS was at my side when it happened.

And ***Pro Se*** always arrives in the mail; even in the deepest, darkest dungeon that DOCCS could find for me. We have much to be thankful for.

Thank you,

Daniel Genis

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Daniel Genis is incarcerated at Groveland C.F. His letter was edited due to space limitations.

STATE COURT DECISIONS

Disciplinary

Hearing Officer's Duty to Inquire When Witness Changes His Mind

In Matter of Abdur-Raheem v. Prack, 950 N.Y.S.2d 800 (3d Dep't 2012), the Third Department again considered the question of what a hearing officer is required to do when a witness who initially agrees to testify at a Superintendent's Hearing later says that he will not testify. In this case, after agreeing to testify the witness allegedly refused to do so because he had no knowledge of [the subject matter of the hearing]" and because "he does not want to be involved."

The facts which gave rise to this claim are as follows. The petitioner worked as a porter in the Family Reunion Program (FRP). His duties included cleaning the FRP trailers. Prior to a visit in which petitioner was to participate, an officer noticed that film was missing from the FRP office. He found one cartridge hidden in the trailer which the petitioner was scheduled to use and charged the petitioner with smuggling, stealing and violating FRP guidelines.

At his hearing, the petitioner requested the other FRP porter as a witness. This porter also had access to the FRP trailers. The second porter first agreed to testify, but then refused, according to the witness refusal form, because he had no knowledge of "the photographs" and "did not want to be involved." The block officer and an officer from the

hearing office spoke to the porter about his refusal. The hearing officer did not talk to the officers and made no further inquiry into the porter's refusal to testify. The hearing officer found the petitioner guilty.

In his Article 78 challenge to the hearing, the petitioner asserted that his right to call witnesses had been violated by the hearing officer's failure to inquire into the alleged refusal to testify. The court held that it was the hearing officer's duty to conduct a personal inquiry unless a genuine reason for the refusal is apparent from the record **and** the hearing officer made a sufficient inquiry into the facts surrounding the refusal to ascertain its authenticity. Notably, the court stated, an inmate's refusal to testify that is based on a desire not to be involved is not adequate to excuse a personal inquiry by the hearing officer.

Even if, the court went on, the refusal form were construed to contain a justifiable reason based upon a lack of knowledge, there is nothing in the record to demonstrate that the hearing officer spoke with the officers who obtained the refusal form to establish the authenticity of the porter's refusal. Under these circumstances, the court concluded, the hearing officer denied petitioner his regulatory right to call witnesses and the matter must be reversed and a new hearing conducted.

Substantial Evidence Did Not Support Determination That Inmate Organized a Demonstration

In Matter of Kempsey v. Fischer, 950 N.Y.S.2d 804 (3d Dep't 2012), the petitioner challenged a Tier III hearing at which he was found guilty of organizing a demonstration. The misbehavior report stated that an officer had observed petitioner talking to a group of prisoners about problems that they were having with the count procedure and with staff. According to the report, petitioner appeared to be "attempting to solicit" ideas on the manner in which the prisoners wished to handle the situation.

The court found that the determination of guilt was not supported by substantial evidence. The rule involved prohibits leading, organizing, participating or urging others to participate in a work-stoppage, sit-in, lock-in, or other actions which may be detrimental to the order of the facility. The observations in the report that petitioner was speaking to a group of prisoners about problems with the count procedure and staff, and was heard saying, "We have to decide what we are going to do," were the basis for the determination of guilt. The court found that the statement, standing alone, did not constitute conduct prohibited by the disciplinary rule. For that reason, the court ordered the hearing annulled.

Sentencing

Court of Appeals Rules on 40 Day Deadline in Correction Law §601-d

In People v. Velez, 951 N.Y.S.2d 461 (2012), the Court of Appeals held that the 40 day period within which Correction Law §601-d requires a court to conduct a resentencing procedure after it has been notified by DOCCS that a period of post release supervision is missing from a defendant's sentence is not mandatory. Under C.L. §601-d, after DOCCS notifies a court that by not including a period of post release supervision, the court failed to impose a lawful sentence, there are a series of actions which the court must take. Within 10 days of receiving the notice, the court must appoint counsel. Within 20 days, an initial court appearance must occur. Within 30 days, the court must commence a proceeding to consider resentencing and within 40 days, the court must enter a written determination and order.

In Velez, two individuals challenged their resentencing procedures, asserting that because the courts did not adhere to the deadlines in the legislation, the sentences must be vacated. In one case, the resentencing process began before the maximum expiration date of the defendant's determinate term but was not completed within 40 days or before the defendant's sentence had expired. In the second case, the resentencing process took more than 40 days but was completed before the defendant had finished serving his determinate term.

The Court of Appeals, noting that the legislation is unclear as to the significance of the deadlines, looked to the legislative history. In the governor's memorandum approving the bill, the

governor stated: Resentencing is not precluded if the court fails to issue a decision within the mandated time. A memorandum by the bill's sponsor stressed the importance of imposing post release supervision where it is warranted. From this, the Court concluded that it is reasonable to infer that the Legislature would not have wanted to endanger the public solely because a timetable was not met. Thus, the Court held, the statute does not bar resentencing after the 40 day deadline has passed, at least where the delays were not egregious and where nothing suggests that they were willfully caused by the People or that they prejudiced the defendants.

The Court did limit the application of its ruling to those situations where the resentencing, although past the 40 day deadline, took place before the determinate sentence actually imposed by the Court had expired.

Court of Claims

Court Awards $606,750 to Prisoner Raped by Officer and Confined to SHU

In ***Pro Se***, Vol. 22, No. 1, we reported on the case of Anna O. v. State, 946 N.Y.S.2d 65 (Ct. Clm. Oct. 19, 2011). In that case, the claimant, formerly an inmate at Albion C.F., sued for damages after she was sexually assaulted by a correction officer. The claim was based on the state's negligent protection of her. This means that the case focused on what the supervisors of the officer failed to do as opposed to what the officer did. [Anna O. had already sued the correction officer in federal district court and obtained a judgment against him]. Specifically, Anna O. alleged that the failure of the officer's supervisors to prevent him from to continuing to work in a position where he had contact with female prisoners while they were investigating the allegations that he had sexually assaulted J.R., another female prisoner. This negligence, the claimant argued, was the proximate and substantial cause of her injuries.

In her **application** (motion) for summary judgment, Anna O. submitted documents and other proof of the following facts:

1. That the officer who raped her previously had reported to his supervisor that his (the officer's) girlfriend had received a phone call from an unidentified female who said that the officer was having an affair with a female prisoner with the initials J.R.
2. That both the supervisor and a captain were also informed by others that the officer was sexually involved with J.R.
3. That the Inspector General (IG) opened an investigation into the allegations that the officer and J.R. were sexually involved and that the Superintendent of Albion told the I.G. that although the facility's initial investigation had not been conclusive, he thought that the matter was worth investigating further.
4. That the IG interviewed J.R. and obtained details of where and when the sexual relations took place and was able to corroborate several details confirming that J.R. and the officer had an inappropriate relationship, but not that it was of a sexual nature.
5. That while the IG's investigation of J.R. and the officer was ongoing, facts emerged that were suggestive of an inappropriate relationship between Anna O. and the officer.
6. That ultimately the officer admitted to having had unprotected sexual relations with Anna O. and was criminally prosecuted and pled guilty and his employment was terminated;
7. That following the officer's conviction, the IG issued a report finding that the officer had had sexual relations with J.R. and Anna O.

In Anna O.'s Court of Claims case, the court found that the facts showed that prior to the time that the officer engaged in sexual relations with the claimant, the officer's supervisors were well aware of his inclination to engage in unauthorized relationships with prisoners. Four months after the Superintendent initiated an investigation into allegations that the officer had had inappropriate relations with J.R., the investigation was still ongoing and the claimant was raped. In spite of the investigation, the officer was permitted to work in a capacity that allowed him access to the inmate population at Albion with little if any additional

supervision. Even though the there was no corroboration supporting J.R.'s allegation that the officer had engaged in multiple acts of sex with her, there was evidence to demonstrate the officer and J.R. had an *unauthorized* relationship only months prior to the officer's sexual misconduct with claimant. It is not necessary, the court wrote, that the defendant know about the **propensity** (tendency) of the employee to behave in the exact manner in which he behaved with the claimant. Rather, it is sufficient that the defendant had notice of the employee's propensity to engage in behavior of the type by which the claimant was harmed.

Here, the court found, the evidence clearly showed that, prior to the rape of the claimant, the defendant knew or should have known of the officer's propensity to pursue unauthorized relationships with prisoners. Despite this information, his supervisors allowed the officer to remain in a position where he could continue to pursue unauthorized relationships with prisoners at Albion C.F. Based on this analysis, the court granted summary judgment to the claimant.

Damages

This fall, the court conducted a trial into the issue of the amount of damages that the State should be required to pay to Anna O. to compensate her for the injuries caused by its negligence. See Anna O. v. State, Claim No. 1114085 (Ct. Clm. Oct. 17, 2012). The court found that the State was 100% responsible for Anna O.'s injuries and therefore should pay 100% of the damages. In **assessing damages** (figuring out how much money the injuries were worth), the court first noted that both the attempted rape and the completed rape were forcible and resulted in physical injuries. In addition, following the second rape, the officer who raped her threatened that if she told anyone, he would go after her and her family, a threat that Anna O. took seriously and caused her to delay reporting the rape. The court also took into account that following her report of the rape, Anna O. was placed in solitary confinement, was denied her medications and was not provided with counseling. A mental health expert testified that Anna O.'s pre-existing mental health issues were **aggravated** (made worse) by the rape and by her subsequent mistreatment by corrections officials.

The court found the testimony regarding Anna O.'s injuries credible and awarded Anna O. $158,500 for past pain and suffering and $447,250 for future pain and suffering.

Inmate Proves Medical Malpractice and Recovers Substantial Award

Sergio Black first complained of back pain in October of 2005. In December, he was transferred to Five Points C.F. where he participated in an over-35 basketball league and weight lifting. He experienced some back pain from these activities and saw the medical staff about his back pain several times in the next six months. In November 2006, Mr. Black was rendered immobile following an accident on the basketball court. He stayed in the infirmary overnight and the next morning complained of tingling and swelling in his left leg. He was examined by a doctor who diagnosed a stinger burn **neurapraxia** (a typically temporary compression of the spine caused by direct cervical spine trauma) and a sprained left ankle. When the pain worsened, the doctor ordered a MRI. The MRI was done on November 15; results were returned on November 20. The results showed significant **cervical spinal stenosis** (a narrowing of the uppermost portion of the spine) and **myelomalacia** (a softening of the spinal cord). Mr. Black and the doctor discussed the MRI results on December 7. At that time, Mr. Black signed a contract to see a neurosurgeon and told the doctor that he was in pain and so dizzy upon standing that he sometimes felt he would pass out.

On December 18, 40 days after he was injured and a month after the MRI was administered, Mr. Black fell in his cell and could not get up. He was taken to the infirmary on a back board. At that point, his arms and hands were floppy but responsive to painful stimuli. He could not grip his hands. He was scheduled for surgery the next day. The hospital records show that Mr. Black could not feel or move his legs and had minimal movement in his arms. He was diagnosed with acute spinal cord compression syndrome. During the surgery parts of the spinal column were removed to relieve pressure on his spine.

Since the surgery, Mr. Black has not been able to move his legs or arms and cannot feel anything from his chest down. He takes anti-seizure medication. He is housed in a regional medical unit. He needs assistance with all of the basic tasks of daily living: eating, hygiene and moving about and suffers from depression, bedsores, urinary tract infections, low back pain and headaches. Following the surgery, Mr. Black brought a lawsuit against the State of New York seeking damages for the injuries he sustained as a result of the negligence by a State employee. See Black v. State of New York, Claim No. 115567 (Ct. Clm. Mar. 30, 2012).

The State has a duty to provide prisoners with reasonable and adequate medical care. Doctors providing this care have a duty to possess the necessary knowledge and skill possessed by average practitioners in their field, to use reasonable care and diligence in applying that knowledge and skill and to exercise their best judgment in treating and caring for their patients. See, Pike v. Honsinger, 155 N.Y. 201 (1898). In deciding whether the State should be held **liable** (responsible) for the injuries which Mr. Black suffered, the court had to decide whether the medical treatment given to Mr. Black **deviated** (departed) from the accepted standards of care. If the treatment deviated from the accepted standards of care, the court would then decide whether the deviation was the **proximate cause** of Mr. Black's injuries. When the defendant's acts (or failure to act) were a substantial factor leading to the injury or when the injury was a reasonably foreseeable consequence of the risk created by the defendant's acts , the defendant's acts are said to be the proximate cause of the injury.

At the time of Mr. Black's injury, DOCCS had a procedure for referring patients for testing, evaluation and treatment both inside and outside of the prison. The procedures had several steps and were time consuming. In Mr. Black's case, after review and approval by DOCCS to see an outside specialist, SUNY Upstate Medical Center began its procedure for evaluating and scheduling DOCCS' request that Mr. Black be treated there.

At trial, Mr. Black's medical expert testified that on July 20, when Mr. Black complained about body numbness, a neurological consultation should have been ordered. Further, on November 9, when a partial neurological exam was done, a full neurological exam was called for. This, Mr. Black's expert testified, was a **deviation** (departure) from the standards of care. The expert also criticized the prison doctor's failure to rule out neuropraxia as the cause of Mr. Black's pain when the pain continued beyond a few days. A patient with neuropraxia, the expert testified, recovers within a few days. Mr. Black's expert testified that Mr. Black should have had spinal surgery immediately after the MRI results were obtained because it was critical to decompress the spinal cord. Instead, the surgery was performed after the spinal cord was irreparably injured. Had the surgery been performed soon after November 15, the progression would have stopped and Mr. Black would have had a 50% chance of significant improvement. He would not have been a quadriplegic.

Mr. Black's medical expert also testified that the prison doctor's neurontin prescription for pain also contributed to Mr. Black's injuries. At the time that this was prescribed, Mr. Black was having difficulty walking. The side effects of neurontin include dizziness, an inability to coordinate muscles and sleepiness, all three of which lead to clumsiness even in the absence of weakness. Thus, the expert testified, this medication increased the likelihood that Mr. Black would fall and suffer more injury. And, the expert testified, the medication would not reduce Mr. Black's pain.

The court held that Mr. Black had established that beginning in November 2006, the prison doctor's care fell below acceptable standard of practice. The doctor should have recognized, after viewing the MRI and being made aware of Mr. Black's increasing pain and limitation of movement, that Mr. Black needed immediate surgery. His failure to send Mr. Black for surgery after receiving the MRI results and observing Mr. Black's progressive loss of balance and muscle control was a deviation from the standard of care. Also a deviation from the standard of care was the prison doctor's decision to prescribe neurontin, a medication that can cause clumsiness and a lack of coordination, to a man who was already unsteady on his feet. Finally, the court found that due to the prison doctor's failure to recognize the urgency and risks of Mr. Black's condition, and the absence of prompt and efficient internal procedures, the state was responsible for the delay between the date upon which the doctor received the MRI report and date upon which Mr. Black was scheduled to be examined at the neurological clinic at SUNY Upstate Medical Center. Based on these findings,

the court held the state 100% liable for Mr. Black's injuries.

Based on a projected life expectancy for Mr. Black of approximately 30 years after his release from prison in 2013, the court awarded Mr. Black close to 16 million dollars in damages. Three and a half million dollars was for past and future pain and suffering. Twelve million dollars was the court's estimate cost for future medical and life care needs.

Mr. Black was represented by Brian Dratch and Stephen Dratch of Franzblau Dratch, P.C., of New York City and New Jersey.

Court Finds State Liable for Incarceration Beyond Max Date

Robert Miller was sentenced to 1½ years and 1½ years of post release supervision. His maximum expiration date on his determinate term was May 4, 2009. He had completely served his determinate term while in pre-trial detention at Rikers Island and arrived at Downstate C.F. on May 12, 2009. Mr. Miller was released on parole supervision on June 3, 2009 and in Miller v. State, 37 Misc.3d 1202(A), 2012 WL 4473135 (Ct. Clms. June 28, 2012), sued the State for damages for having confined him for 30 days beyond the date on which they last had authority to incarcerate him.

The facts in the case were not disputed. The parties differed as to whether confining Mr. Miller was legally proper. The State took the position that the confinement was privileged and that the State was not negligent because it had to take steps to ensure that prior to Mr. Miller's release, the conditions for his post release supervision, such as housing and treatment, were in place. The plaintiff called a facility parole officer as a witness. The parole officer testified about what happens when people arrive at Downstate after their release dates have passed. According to the officer, these cases are given priority and fast tracked, but if there is more than one such case at a time, delays can occur. Here, although plaintiff arrived at Downstate a week past his release date, the officer did not learn about his situation for two days. Nonetheless, a parole officer did not interview Mr. Miller until a week after he had arrived at Downstate. Two weeks after Mr. Miller reached Downstate, the officer who testified at his trial in the Court of Claims notified the Parole Board that he needed approval of parole conditions for Mr. Miller and two days later, the Parole Board approved the conditions. The testifying officer followed up by telephone with the field office on June 1, received approval on June 2 and on June 3, Mr. Miller was released. The testifying officer also explained why it took a month to develop a supervision plan for Mr. Miller.

The **elements** (what the plaintiff must prove) of unlawful confinement are 1) that the defendant intended to confine the plaintiff, 2) that the plaintiff was conscious of and did not consent to his confinement and 3) that the confinement was not otherwise privileged. In this case, the first two were not disputed.

Confinement is privileged, the court wrote, to the extent that it is imposed under color of law or regulation, specifically in accordance with the regulations. Where the terms of confinement are set forth in a sentence and commitment order, prison officials are conclusively bound by the contents of the order. Based on these principles, the court found that the claimant had proven his cause of action sounding in wrongful confinement.

The defendants argued that its conduct was privileged because it was based upon a valid Sentence and Commitment order which placed Mr. Miller in DOCCS custody and directed that DOCCS set up and impose a term of PRS. This argument was based on the court's decision in Jackson v. State, UID No. 2010-039-209 (Ct. Cl. Ferreira, J. Dec. 6, 2012). The court in Jackson wrote, "[g]enerally, where a facially valid order issued by a court with proper jurisdiction directs confinement, that confinement is privileged and everyone connected with the matter is protected from liability for false imprisonment."

The flaw in this reasoning, the Miller court wrote, is that while a facially valid order directing confinement insulates those involved from liability for claims of false imprisonment with respect to the confinement directed in the sentencing order, it does not follow that imprisoning someone beyond his or her ME date is privileged. Here, the terms of the Sentence and Commitment order only gave the defendant authority to confine Mr. Miller until May 4, 2009. The privilege upon which the defendant relies only attaches to the duration of the actually imposed term of imprisonment.

Further, the court held, although Mr. Miller's sentence included a period of post release

supervision, DOCCS does not have the authority to confine him beyond the date that he is supposed to be released from prison. Regardless of the demands placed on DOCCS to determine the conditions of post release supervision and to find Mr. Miller a place to live, there is no statutory or regulatory authority justifying his confinement beyond the length of his determinate term.

The Miller court found that the State's reliance on Donald v. State, 929 N.Y.S.2d 552 (2011), was also misplaced. In Donald, four people sued the State after DOCCS, rather than a court, imposed terms of post release supervision on them. There, the Court held that the State was immune from judgment because even though DOCS made a mistake of judgment in imposing post release supervision, DOCS was exercising the discretion given it by law and its acts cannot be a basis for state liability.

For these reasons, the court found that Mr. Miller had established his cause of action for wrongful confinement.

Miscellaneous

Three Court of Appeals Judges Question Diagnosis Frequently Used as the Basis of Civil Commitment

In State v. Shannon S., 2012 WL 5305798 (Ct. Apps. Oct. 30, 2012), Shannon S., the respondent, challenged the court's finding that there was legally sufficient evidence to support the finding that he suffers from a "mental abnormality" as this term is defined in Article 10 of the Mental Hygiene Law. At respondent's Article 10 trial, the burden was on the State to show that he is a sex offender who is suffering from a mental abnormality. The statute defines mental abnormality as a condition, disease or disorder that affects the emotional, cognitive or volitional capacity of a person in a manner that predisposes him or her to engage in the commission of conduct that constitutes a sex offense and that results in that person having serious difficulty in controlling such conduct. If the State is successful in proving by clear and convincing evidence that the respondent is a sex offender who suffers from a mental abnormality, the court must decide whether the individual is a dangerous sex offender requiring confinement or a sex offender requiring strict and intensive supervision. In this case, there was no question as to whether the respondent met the definition of a sex offender. The issue at trial was whether he suffers from a mental abnormality.

Shannon S. had been convicted of three prior sex offenses before he was convicted of the sex offense which led to his review by the Office of Mental Health to determine whether he should be referred to the Attorney General for a civil commitment proceeding. Of the four convictions, two involved force, one involved giving marijuana and alcohol to a girl who was below the age of consent and the fourth involved sex with a girl below the age of consent when respondent was 30 years old.

At his trial, the State's expert testified that Shannon S. has been diagnosed with paraphilia NOS (not otherwise specified), defined in the Diagnostic and Statistic Manual (DSM) as **"recurrent and intense sexual fantasies, urges or behaviors which involve . . . the physical or psychological suffering, including humiliation of oneself or one's partner or children or other non-consenting partners which occurs over a period of at least 6 months and results in personal distress or impairment in some clinically significant area of functioning."** The expert opined that four sex offenses with non-consenting partners fell within the definition of paraphilia; more notably, three of the offenses also demonstrated respondent's particular sexual proclivity for females below the age of consent. The latter, the expert testified, showed a compulsive attraction to minor adolescent females. Finally, the expert testified, the respondent's impulsive behavior, irritability and aggressiveness supported a finding that his paraphilic urges constitute a congenital or acquired condition affecting his emotional, cognitive and volitional capacity and ability to control his sexually offending conduct. A second expert agreed with this analysis adding that the respondent's apparent attraction to **pubescent** (teenage) girls reflected a form of paraphilia known as hebephilia.

The respondent's expert testified that there was insufficient evidence to determine that respondent suffers from recurrent intense sexual urges or behaviors. In this expert's view, there was no

evidence that respondent was particularly aroused by teenage girls; that respondent had engaged in 3 incidents of forcible rape and statutory rape was statistically insignificant and could not be used as the sole basis for the conclusion that respondent suffers from a mental abnormality; and that hebephilia is neither abnormal nor deviant as "most males are sexually attracted to fully formed teenage girls." This expert testified that a diagnosis of paraphilia NOS should be reserved for individuals who suffer from sexual disorders that are widely recognized by the medical community and are so unusual as to be statistically deviant and morally deviant, such as **pedophilia** (sexual attraction to children).

At the end of the trial, the court concluded that the State had proved by clear and convincing evidence that respondent suffers from a mental abnormality. At a later proceeding, respondent was found to be a dangerous sex offender requiring civil confinement and ordered to be committed to a secure treatment facility. The Appellate Division affirmed the result. The Court of Appeals granted respondent's petition for leave to appeal to the Court of Appeals.

Four of the 7 judges on the Court of Appeals agreed with the Appellate Division. Judge Jones, writing for the majority, noted that the diagnosis of paraphilia NOS was in the DSM and was described as "recurrent intense sexually arousing fantasies, sexual urges, or behaviors" that "cause clinically significant distress or impairment in social, occupational, or other important areas of functioning" and are directed at, as relevant to the respondent's case, the suffering or humiliation of "children or other non-consenting persons." The trial court found respondent's behavior to have satisfied the criteria in the DSM. The majority of the Court of Appeals agreed that the testimony of the State's expert witness that three of respondent's convictions demonstrated an attraction to non-consenting minors satisfied the definition of paraphilia NOS and thus established that he suffered from a mental abnormality. Further, the majority noted, the State's expert witnesses testified that the respondent's lack of **compunction** (guilt) and inability to understand the inappropriateness of his conduct, in combination with his attraction to teenage girls, continued sexual involvement with teenage girls in spite of the punishments meted out with respect to each conviction and impulsive behavior demonstrated respondent's compulsion to act on his sexual urges toward teenage girls. Thus, the evidence supported the finding that respondent's mental abnormality involves a strong predisposition to commit sex offenses, and such an inability to control behavior, that he is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility.

Three judges disagreed with the majority. Writing for the dissenters, Judge Smith conceded that the civil commitment of mentally abnormal sex offenders is not per se constitutionally forbidden. "It is permissible, as a general rule, to use civil proceedings to commit to institutions people who are mentally ill and dangerous to themselves or others," wrote Judge Smith. But, he continued, the state civil confinement statutes can also be abused in a manner that threatens important principles. That is, many sex offenders are or could reasonably be found to be dangerous, and as we commonly use the term, they all have mental abnormalities. Normal people, Judge Smith wrote, do not commit sex crimes. But, Judge Smith cautioned, unless the term "mental abnormality is defined with scientific rigor," Article 10 could become a license to lock up indefinitely, without the procedural protections offered by criminal law, every sex offender a judge or jury thinks is likely to offend again. And this, the judge wrote, is a very bad idea, because not even a concern for public safety should be elevated above an individual's rights to due process of law. Among these rights are:

1. A criminal should only be confined for crimes he has already committed;
2. A criminal should only be confined after his guilt is proved beyond a reasonable doubt;
3. A criminal should only be confined after he has received the many protections given to an accused by the Constitution; and
4. A criminal should only be incarcerated for the maximum term of the sentence authorized by law.

Thus, Judge Smith concluded, the scope of statutes permitting the commitment of sex offenders must be limited to people who can be shown by scientifically valid criteria to have a serious mental illness, abnormality or disorder that distinguishes them from the dangerous but typical recidivist convicted in an ordinary criminal case. In the view

of the dissenters, there was nothing in the record to support a finding that the respondent was other than the dangerous but typical recidivist convicted in an ordinary criminal case.

The dissenters took issue with the majority's conclusion that paraphilia NOS was, in Shannon S.'s situation, the appropriate diagnosis. According to the DSM, the NOS diagnosis is intended to include paraphilias that are less frequently encountered than the specific forms of paraphilia listed in the DSM – such as necrophilia (attraction to corpses) or zoophilia (attraction to animals). The DSM description of paraphilia NOS is thus plainly not applicable to the respondent's abnormality – a tendency to have sex with teenage girls. Hebephilia, they noted, does not even appear in the DSM.

In Judge Smith's opinion, the respondent's expert gave testimony which supports a finding that the two diagnoses with which the State's experts labeled Shannon S. – paraphilia NOS and hebephilia – amount to junk science devised for the purpose of locking up dangerous criminals. He doubted whether either would survive a hearing to determine whether it is sufficiently established to have gained general acceptance in the psychiatric community. However, because no such hearing was held, and because the fact finder below accepted the State's experts' testimony, Judge Smith did not find the diagnoses scientifically indefensible. Nonetheless, he concluded that the diagnoses cannot be the basis for civil commitment in a case like that of Shannon S. because they fail to distinguish the dangerous sexual offender whose serious mental illness, abnormality or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case. Referencing the testimony of the State's expert describing paraphilia NOS, set out above in bold on page 10, Judge Smith commented, "this could describe the mental state of every dangerous rapist."

Similarly, Judge Smith took issue with the significance of the diagnosis hebephilia, defined by the State's expert by distinguishing it from an indisputably recognized disorder pedophilia – an attraction to pre-pubescent children. The idea that a man's mere attraction to teenage females is abnormal is, Judge Smith wrote, absurd. Rather, he continued, what is abnormal about the respondent and others who commit statutory rape by having sex with girls below the age of consent is not that they find the girls attractive, but that they are willing to exploit them – in other words, they commit statutory rape.

The dissenters think that the State is defining paraphilia NOS as a tendency to commit rape and hebephilia as a tendency to commit statutory rape. If, Judge Smith wrote, paraphilia NOS and hebephilia are mental abnormalities warranting civil commitment, most if not all of the people who commit these crimes could be civilly committed. But, he concludes, "a statutory interpretation that permits civil confinement to become a mechanism for retribution or general deterrence cannot be sustained under Supreme Court precedent.

Court Defines Deductions "From Prison Wages"

In 1999, the court entered a restitution order requiring that payments be deducted from Rashad Scott's prison wages. When he discovered that DOCCS was making payments toward the restitution order from money he received from outside sources, Mr. Scott filed a grievance. DOCCS Directive 2788 provides that 20% of an inmate's payroll receipts and 50% of his outside receipts can be deducted to pay reimbursement orders. The Central Office Review Committee (CORC) affirmed the IGRC's denial of the grievance. Mr. Scott filed an Article 78 challenge to the denial of his grievance asking that the court narrowly construe the reimbursement order and allow deductions only from that portion of the funds in his inmate account that are prison wages. The Supreme Court, Ulster County, dismissed the petition.

In Matter of Scott v. Fischer, 945 N.Y.S. 2d 584 (3d Dep't 2012), the appellate court found that the interpretation of the order urged by petitioner was inconsistent with the established policy of encouraging restitution to crime victims "to the extent that the defendant is reasonably able to do so." Based on this policy, the court agreed with the lower court's ruling that the Department's interpretation of the order was not unreasonable and the grievance determination was not irrational, arbitrary or capricious or affected by an error of law. The court therefore affirmed the lower court's dismissal of the petition.

FEDERAL COURT DECISIONS

The Second Circuit, Finding the Defendants to be Entitled to Qualified Immunity, Affirms Dismissal of Action and Fails to Reach the Merits of Plaintiff's Claim

In a complaint that recently reached the Second Circuit, the plaintiff alleged that his rights to due process of law had been violated when he was held beyond the actual expiration date of his sentence. Sudler v. City of New York, et al., 689 F.3d 159, (2d Cir. Aug. 7, 2012). This came about when the State defendants — DOCCS and the Division of Parole officials — failed to properly calculate his legal dates. The State defendants calculated a local sentence imposed for a crime committed while the defendant was on parole, as running consecutively rather than concurrently. The criminal court had imposed the sentence to run concurrently.

When the case was before the district court, the defendants moved for summary judgment. A court is authorized to decide a motion for summary judgment when there are no contested material issues of fact and the case can be resolved based on the application of the law to the facts. In Sudler, the magistrate-judge who was responsible for deciding pre-trial motions, rejected DOCCS' argument that judgment should be granted in their favor because the Division of Parole had sole authority to calculate parole jail time credit and because prison officials are not bound by a sentencing judge's order that the new sentence should run concurrently with the undischarged portion of a prior sentence on which an inmate had been paroled. As to the latter point, the State Defendants argued that Penal Law §70.40(3)(a), the law dictating when a returned parole violator's interrupted sentence begins to run again, effectively prohibited having a local sentence running concurrently to parole time owed. (The plaintiff argued that Penal §70.25(1) authorizes local judges to impose local sentences to run concurrent to parole time owed). The State Defendants argued that it was reasonable for them to run all local sentences imposed on parole violators consecutively to the time owed on their undischarged felony sentences. The magistrate-judge rejected DOCCS' arguments and determined that New York State judges have the authority to order that a returned parole violator's sentence for parole violation run concurrently with another sentence and that DOCCS has a legal responsibility to calculate an inmate's legal dates in accordance with the sentence pronounced by the court.

Citing Hill v. United States ex rel. Wampler, 298 U.S. 460 (1936), the magistrate-judge noted that a jailor's authority to confine a prisoner begins and ends with the sentence pronounced by the judge. The magistrate-judge found that the State Defendants' conduct had the effect of altering the length of the sentence pronounced by a judge. The magistrate-judge further found the defendants' argument that they had no duty to seek out any inmate's sentence and commitment document . . . both "abhorrent and absurd" since the authority to detain inmates derives exclusively from the sentence or judgment of the court, and therefore it is **axiomatic** (goes without saying) that parole and prison officials know, or should know, the nature and duration of each prisoner's sentence.

Having concluded that the State Defendants had violated the plaintiff's constitutional rights, the magistrate-judge turned to the question of whether the State Defendants were entitled to qualified immunity. Qualified immunity is a legal doctrine that protects state officials from having to pay money damages when they violate an individual's constitutional rights at a time when a reasonable state official would not have known that his or her conduct was unconstitutional. In Sudler, the magistrate-judge found that the conduct underlying Sudler's suit occurred before the Second Circuit's decision in Earley v. Murray, 451 F.3d 71 (2d Cir. 2006). Earley v. Murray, the magistrate-judge wrote, was the Second Circuit's first decision that might have suggested the illegality of the State Defendants' conduct of administrative alteration of the sentence pronounced by the judge. Prior to the Earley decision, the magistrate-judge held, it cannot be said that the law was clearly established for the purposes of qualified immunity. Further, the magistrate-judge held, no case had yet been decided that clearly established that the precise conduct at issue here – the Division of Parole's placing the burden on the inmate to prove the terms of his sentence. Thus, the magistrate-judge found that the State Defendants were protected by qualified immunity.

The magistrate-judge's report and recommendation was adopted by the District Court judge. The judge agreed that the challenged conduct was unconstitutional but held that the defendants were protected from qualified immunity. Accordingly, the District Court Judge granted the State Defendants' motion for summary judgment and the plaintiff appealed.

The Second Circuit first reviewed the arguments that the plaintiff and defendants made regarding whether the defendants' conduct was unconstitutional. After doing so, the Court **declined to** (decided not to) rule on the parties' substantial disagreements as to New York State law or on their disagreement as to the scope of Wampler and Earley. The Second Circuit concluded that the district court had correctly decided that the defendants were entitled to qualified immunity on the claim that the plaintiff's due process rights were violated when DOCCS officials failed to promptly afford him parole jail time credits for the time that he served on his local sentence. Having decided that the defendants would be protected by qualified immunity if the Court were to reach the issue of whether the defendants conduct was unlawful, the Second Circuit wrote that "in the circumstances here, we best follow that 'older, wiser counsel not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.' "

Second Circuit Rejects Claim That Policy of Denying Parole to Violent Felony Offenders Violates Constitution

The Case Before the District Court

In 2006, a class of prisoners who were serving indeterminate sentences due to convictions for violent felony offenses filed the lawsuit known as Graziano v. Pataki, 2006 WL 2023082 (S.D.N.Y. July 17, 2006), in federal district court. This lawsuit challenged what the plaintiffs alleged was a policy put in place by Governor Pataki to deny the parole applications of offenders convicted of violent felony offenses. Class members alleged that the Parole Board ignored the statutory criteria for determining whether a prisoner should be released to parole supervision and substituted an unwritten policy intended to keep individuals who had been convicted of violent felony offenses in prison. The plaintiffs alleged that the unwritten policy violated the due process and equal protection clauses of the 14th Amendment and the Ex Post Facto clause.

The statutory criteria which the plaintiffs alleged the defendants were ignoring are found in Executive Law §259-i. Section 259-i provides that the Parole Board in making the determination of whether the Board members think that the inmate if released will live and remain at liberty without violating the law and that his release is not incompatible with the welfare of society and will not so deprecate the seriousness of his crime as to undermine the law shall consider:

1. The inmate's institutional record;
2. The inmate's performance in Temporary Release Programs;
3. The inmate's release plans;
4. The existence of a deportation warrant;
5. Statements from crime victims;
6. The length of the determinate sentence to which the inmate would be subject had he or she received a sentence pursuant to Penal Law §70.70 or 70.71 for a felony defined in Articles 220 or 221;
7. The seriousness of the offense with due consideration to the type and length of the sentence and the recommendations of the sentencing judge, the district attorney, the defense attorney, the presentence report as well as any mitigating and aggravating factors between arrest and confinement; and
8. The inmate's criminal record.

The named plaintiffs represented a class of prisoners who were convicted of A-1 violent felonies, were eligible for parole release and had their most recent applications for parole release denied by the Board because of the seriousness of the underlying offense. They allege that Governor Pataki – governor from 1996 through 2006 – adopted an unwritten policy to deny violent felony offenders parole without meaningful consideration of the relevant or statutory mandated factors. This policy, the plaintiffs said, led to a drop in release rates for violent offenders from a high of 28% in 1993-1994 to a low of 3% in 2000-2001. The plaintiffs asserted that the policy constituted a violation of due process and equal protection and

was an unconstitutional ex post facto increase in the sentences of class members.

The district court dismissed the complaint for failure to state a claim. This means the court found that even if the facts alleged by the plaintiffs were accepted as true, the defendants conduct would not violate the plaintiffs' constitutional rights.

The Court found that because the NYS parole statute does not create a legitimate expectation of release, the plaintiffs did not have a liberty interest in being released to parole supervision and thus the protections of the due process clause are inapplicable.

Turning to the equal protection claim, the Court noted that treating inmates convicted of violent offense differently from inmates convicted of non-violent offenses would only violate the equal protection clause if the reason for treating the two classes of inmates differently was not rationally related to a legitimate state interest. The Court found that there was a rational basis for treating the two groups of inmates differently: preventing the early release of potentially violent inmates who may pose a greater danger to safety than other inmates.

Finally, the Court rejected the Ex Post Facto argument, holding that the clause does not apply to guidelines that do not create mandatory rules for release but rather simply guide the parole board in the exercise of its discretion.

The Appeal

Finding that even if the plaintiffs could show that as dictated by then-Governor Pataki, the Division of Parole had a policy of systematically denying parole to violent felony offenders such a policy would not violate the Constitution, the Second Circuit Court of Appeals affirmed the District Court's dismissal of the complaint. See Graziano v. Pataki, 689 F.3d 110 (2d Cir. 2012). In a strongly worded dissent, Judge Stefan Underhill wrote that the complaint plausibly states a claim that the unwritten policy violates the plaintiffs' rights to substantive due process. The substantive dimension of the due process clause, Judge Underhill wrote, "bars certain government actions regardless of the fairness used to implement them." In his view, the allegation that the defendants considered only the seriousness of the plaintiffs' crimes and none of the other factors − as opposed to considering all factors and giving more weight to the seriousness of the crime – took this case out of the class of cases which challenge how guidelines are applied. Assuming the truth of the plaintiffs' allegations, he wrote, the governor's policy turned parole hearings into sham proceedings – inmates could present evidence and call witnesses, but they would waste their breath because the policy tied the commissioners' hands. Judge Underhill noted that conspiracy theories such as that alleged by the plaintiffs, are incredibly difficult to prove and wrote that he had little doubt that the plaintiffs would have found it difficult to present evidence from which a jury could infer that the governor and the Chair of the Parole Board made a backroom deal designed to thumb their noses at the other branches of government and condemn an entire class of offenders to life in prison. Nonetheless, Judge Underwood would have allowed the case to proceed to pre-trial discovery.

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