Pro Se

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Correctional Association Report Paints Grim Picture of SHU, Recommends Changes

The Correctional Association of New York, a privately funded prison watchdog agency, recently released a report on disciplinary confinement in New York, titled *Lockdown New York: Disciplinary Confinement in New York State Prisons*. The report, based on three years of research involving 49 site visits to 26 Special Housing Units throughout the state, as well as interviews with 258 inmates, presents a grim portrait of life in disciplinary confinement.

According to the report, harsh conditions in SHU include solitary confinement or double-celling, where two men are confined together for 23 hours a day in a cell measuring 105 square feet. No programs are provided and simply enduring the extraordinary degree of idleness becomes one of the most difficult aspects of life. Inmates are "cell-fed" through feed-up slots in thick metal doors. Whenever prisoners leave their cells, they are mechanically restrained with handcuffs and a waist chain, and leg irons if they are considered seriously violent or escape-prone. To punish inmates who continue to violate rules in disciplinary confinement, corrections officials utilize increasingly punitive "deprivation orders," most commonly loss of recreation, loss of showers, and the use of mechanical restraints (handcuffs and waist chain) during recreation. The most severe punishment is the restricted diet, or "loaf." The "loaf" – a dense, binding, unpalatable one-pound loaf of a breadlike

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substance made of potatoes, carrots and flour – is served three times a day with a side portion of raw cabbage for seven days straight, followed by two days off.

The report cites several specific areas of concern, including a high prevalence of inmates with serious mental illness in disciplinary confinement as well as the psychological effects of long-term isolation on even high-functioning inmates, high rates of suicide and attempts of self-harm, overly-long sentences, extremely limited programming and inadequate recreation facilities, chronic idleness and, in some facilities, inaccessible staff and neglected inmates. Of the concerns raised, the prevalence of the mentally ill in SHU appear to be among the gravest. The report states that the most disturbing aspect of the Correctional Association's site visits was "encountering numerous individuals...who were actively psychotic, manic, paranoid or seemingly over-medicated." On nearly every site visit, the report states, the Association researchers, including independent psychiatrists assisting the researchers, "encountered individuals in states of extreme desperation: men weeping in their cells, men who had smeared feces on their bodies or lit their cells on fire; prisoners who cut their own flesh...; inmates who rambled incoherently and paced about their cells like caged animals [and] individuals with paranoid delusions."

The report states that the use of SHUs or lockdown units has grown in recent years. The units, designed for inmates who violate prison rules or who corrections officials deem are threats to security, are attractive because they are easier to manage and cheaper to operate than regular prisons. With no congregate activity and little out-of-cell movement, contact between inmates and staff is minimal.

The report states that between 1997 and 2000, New York built ten high-tech, total lockdown facilities, representing a dramatic expansion of high-security housing. The report also states that 7.6% of the inmate population (approximately 5,000 of the state's 65,000 inmates) are in disciplinary confinement in New York, which, the report states, is one of the highest proportions of inmates in SHU in the country. Nearly a quarter of the inmates in disciplinary lockdown system-wide are on the mental health caseload, according to the report. In some units visited by the Correctional Association, over half of the inmates were identified as seriously mentally ill. Other findings from the report include the following:

- Between 1998 and 2001, over half of the system's 48 suicides occurred in 23-hour lockdown, although inmates in these units comprise less than 10% of the general population. Of the 258 inmates interviewed by the Correctional Association, the report states, 44% reported previous suicide attempts while in prison and 20% had prior admissions to psychiatric units.

- Over one-third of the inmates interviewed by the Correctional Association reported committing acts of self-mutilation while in prison. The report criticizes DOCS' practice of issuing misbehavior reports to inmates who attempt to harm or kill themselves.

- Although there are nearly 1,000 New York inmates with mental illness in disciplinary segregation, the prison system's sole psychiatric hospital, Central New York Psychiatric Center (CNYPC), has space for only about 200 inmate-patients. CNYPC has not increased its capacity since it opened in 1980, although the prisoner population has tripled over that time.

- While the Department claims that deprivation orders are used infrequently and for only the most incorrigible inmates, nearly half (49%) of the inmates interviewed by the Association received such an order for violating rules while in SHU. Forty-one percent reported receiving four or more.

- If an inmate's prison sentence ends before their term in disciplinary confinement, the inmate is released without any reorientation program, directly from the isolation of a disciplinary housing unit to the community.

- Disciplinary confinement often takes a heavy toll on correction officers as well as inmates. Officers in some units are stabbed, spat at, assaulted or "thrown at." Some officers use antidepressants to cope with the stressful and depressing nature of the job.

The report states that some SHU units appeared well managed. Interviews with inmates and staff at those facilities often revealed efforts by staff to be attentive to inmate needs and provide programming and counseling beyond that usually provided in SHU. Those SHUs commended for good management included those at Shawangunk, Sing Sing and Sullivan Correctional Facilities, as well as the S-Block at Greene Correctional Facility.

The report makes a number of recommendations for improving SHU. In general, it recommends that SHU be used with less frequency and be reserved only for more serious rule infractions, and that there be greater oversight of SHUs by independent bodies, such as the State Legislature. More specifically the report recommends that DOCS expand and improve programs for SHU inmates, including the Progressive Inmate Movement System, in which inmates are given incentives to improve behavior, as well as substance abuse programs, the Special Treatment Program for inmates with mental illnesses and educational programs. It also recommends that separate psychiatric facilities be created for disciplinary inmates with serious mental illnesses, and that certain unnecessarily harsh, counter productive or dangerous practices – such as diet restrictions – be eliminated.

Commissioner Criticizes Report; State Moves to Address Concerns

Shortly after the Correctional Association report was released, Commissioner of Corrections, Glenn Goord issued a press release in which he criticized the Association for bias, charged that the report "reflects the political agenda of this inmate lobbying group" and refused to respond to the issues raised beyond taking issue with some of the figures cited in the report. He noted, for example, that disciplinary confinement as a proportion of the inmate population has decreased over the past three years and that approximately 1,500 of the inmates included in the CA's count of those in disciplinary confinement are actually serving only brief "keeplock" sentences in their own general confinement cells.

The Commissioner also argued: "The inmates confined in disciplinary housing are 'the worst of the worst.' The majority of all inmates committed violent crimes on our streets and many of them continue to violate the rules even in our prisons. But the fact that inmates know we will lock them up for misbehavior contributes to the fact that inmate-on-staff and inmate-on-inmate assaults are at 20-year lows. That increases prison safety for the employees who work in these facilities every day. It also removes disruptive inmates so the balance can apply themselves to positive programs. The public benefits when these offenders are released better prepared to live law-abiding lives."

The Commissioner also prohibited the Correctional Association from entering New York's SHUs in the future.

Despite the Commissioner's criticism and his moves against the Association, the State in recent months has appeared to take modest steps to address some of the concerns raised in the CA report. For example, the State recently proposed creating two "Behavioral Treatment Units" with a total of 100 beds for inmates with serious mental health problems in disciplinary housing, as well as funding other improvements in the care of the mentally ill. *See* related stories below.

A copy of "Lockdown New York," the Correctional Association report, may be obtained by writing to The Correctional Association, 135 East 15th Street, New York, NY 10003. A copy of Commissioner Goord's October 21, 2003 press release, criticizing the report, can be obtained by directing a FOIL request to Records Access Officer, NYS Department of Correctional Services, Building 2, 1220 Washington Avenue, Albany, New York 12226-2050.

BOOT THE SHU

A Message from Tom Terrizzi, Executive Director of PLS

Over the past two decades, New York, like other states closed many large mental institutions in favor of a more community based system. The goal was to close big institutions which had become warehouses for people with mental illness, with people languishing, often heavily medicated, sometimes under deplorable conditions. The plan was to place people in less restrictive settings and provide more services to them where they lived.

Like many government initiatives, the plan was not fully funded. While the state proceeded with closing the large institutions, it did not fulfill its promise to adequately fund community based programs to provide services to people with mental illness. The result was the creation of smaller group homes, in which the conditions often were no better than the large institutions. Many people with mental illness chose the streets rather than shelters or group homes.

Many homeless people with mental illness got caught up in the criminal justice system, some ending up in state prison. Many of those ended up in SHU. Once again the state has created a system where people with serious mental illness are back in a highly restrictive setting, where the only real treatment and programing is medication, completing the circle.

There seems to be some real movement today to reform New York State's largest system of mental institutions, the SHUs in maximum security prisons. PLS and the Legal Aid Society have been involved in challenging aspects of DOCS' and OMH's system over the past fifteen years. The state has fought vigorously any outside scrutiny and attempt to reform what is a harmful and destructive system. It is only recently that it appears DOCS and OMH are willing to take the first steps to reform the way they look at and treat mental illness in prison.

Two decades and many lives have been wasted fighting reform efforts. To be fair, DOCS did not ask to take on the role of housing so many people with serious mental illness who should not be in the prison system to begin with. But like other problems dropped on its doorstep, like the AIDS crisis, DOCS was very slow to respond and allowed conditions to deteriorate beyond minimal constitutional and human rights standards. Instead of adopting a therapeutic treatment model, it chose to build, at great expense, new SHUs across the state to warehouse many who should be in less restrictive settings.

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Albany Times-Union Editorializes Against Use of SHU for Mentally Ill

In the Fall, 2003, edition of *Pro Se*, we reported the introduction in the legislature of a bill which would provide separate facilities for the treatment of inmates with serious mental illness. The following editorial in support of the bill appeared in the February 6, 2004, edition of the Albany Times-Union:

Torture in "The Box." Further confinement of mentally ill inmates is barbaric, and the Legislature must outlaw it

Will someone at the state Capitol please listen to Ray Ortiz. He is, after all, one of the relatively few people who actually knows the horrors of incarceration in The Box firsthand. And this is what he says. "The Box isn't treatment. It's torture." Mr. Ortiz is very fortunate to have survived the brutal ordeal of serving part of his prison time in what the prison bureaucrats call special housing units. Now he works for the New York Association of Psychiatric Rehabilitation Services, which is fighting to stop the barbaric practice of placing inmates with serious mental illnesses in The Box. It's such a difficult battle, though, trying to bring some humanity into the state prison system. A bill sponsored by Assemblyman Jeffrion Aubry, D-Queens, chairman of the Corrections Committee, doesn't even have a sponsor in the Senate. Instead the practice of subjecting mentally ill inmates, many of whom shouldn't be in prison at all, to 23 hours a day in confinement continues. Department of Correctional Services Commissioner Glenn Goord defends the use of The Box on the grounds that it's intended to change inmates' behavior. Perhaps it does, in a constructive sense, in certain cases. But the evidence suggests that confinement in The Box further damages mentally ill inmates, who are much more likely to be locked up there than other inmates. A report by the Correctional Association of New York, an organization specifically authorized by state law to visit prisons and interview inmates and employees, found last year that when inmates in The Box try to hurt or kill themselves, as they do with alarming frequency, the prison system punishes them with even longer stays. There are any number of injustices and inequities awaiting action, or, in many cases, perhaps, inaction by the Legislature this year. Few, if indeed any, would be as great an assertion of fundamental human rights as a ban on the incarceration of inmates with serious mental illnesses in The Box. Surely there's a senator who shares that view, isn't there? Someone will co-sponsor Mr. Aubry's bill, right? That would leave the next move up to Sen. Michael Nozzolio, R-Seneca Falls, chairman of the Crime and Correction Committee. Or Sen. Joseph Bruno, R-Brunswick, the majority leader. We'll look forward to hearing from them.

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PLS and the Legal Aid Society recently settled part of a class action with DOCS, reported in this issue of *Pro Se*, to reform the way inmates with serious mental illness are handled in the disciplinary process. This reform will only make a difference if DOCS shifts its focus from punishment to treatment when dealing with those who do not respond to lengthy box stays and bread and water diets. It will only work if more options other than SHUs exist in the system.

Public hearings on an Assembly bill to prohibit the housing of inmates with serious mental illness were completed in January. A broad coalition of community based mental health agencies, families of prisoners and former inmates joined in testifying about the problems in the current system. As visible elsewhere in this issue of *Pro Se*, newspapers have begun to editorialize in favor of the Assembly bill. Organizations such as the New York Chapter of the National Association for the Mentally Ill have made reform of the prison mental health system a top legislative priority. Even the guards' union testified in favor of reform, recognizing that their membership is not trained for nor equipped to be the front line staff interacting with those who are in crisis. Discovery in *Disability Advocates v. DOCS and OMH*, a statewide systemic action challenging the lack of treatment for those with serious mental illness in SHU brought by a coalition of reform advocates, including Prisoners' Legal Services, is moving forward at a brisk pace. The case will require the state to publicly defend this system which a growing list of newspaper editorials have called into question. As also reported in this issue of *Pro Se*, the Governor, in apparent response to this public pressure, has included some funds in the Executive Budget proposal to create several new mental health programs within DOCS, provide more OMH personnel and expand the Intermediate Care and Special Treatment programs. While the initiative is welcome, it is not enough to address the problem. Simply expanding existing programs while still using the SHU as housing will not break the cycle of neglect.

What we all want to see is real reform. Today we want to have people with serious mental illness receive treatment in a therapeutic setting and not locked away in solitary confinement, out of sight. We want a society and mental health system which recognizes and treats mental illness at an early stage so that large, unresponsive institutions do not become the dumping grounds for problems left untreated. We do not want to be back here in 20 years seeking to undo what has been created in the name of reform because society has lost interest in the issue and promised resources were never delivered.

News and Briefs

Claims Settled in Case Involving Rights of Inmates With Mental Illness at Disciplinary Hearings: DOCS to Improve Procedures

Inmates have reached an agreement with DOCS to settle part of a class action lawsuit, Anderson et al. v. Goord et al. (87-CV-141, N.D.N.Y), concerning the rights of inmates with mental illness at disciplinary hearings. The plaintiffs are a class of inmates with mental illness serving disciplinary confinement in the SHUs at Auburn and Green Haven Correctional Facilities. They claim that the prison disciplinary process as applied to them constitutes cruel and unusual punishment and denies inmates due process of law in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

Under the settlement, DOCS has agreed to amend the regulations that apply to Tier III disciplinary hearings to set forth new procedures to be followed in disciplinary hearings involving inmates with mental illness and/or limited intellectual capacity. Under the new regulations, the hearing officer will be required to consider evidence of the inmate's mental condition and/or intellectual capacity both at the time of the incident and at the time of the hearing. In addition, the hearing officer will be required to consider the inmate's mental health and/or intellectual capacity in determining an appropriate penalty if there is a finding of guilt. The new regulations will also establish "Special Housing Unit Case Management Committees." These committees are to be formed in each maximum security prison that houses OMH level 1 inmates (this means all maximum security prisons, except Southport and Upstate). The purpose of the committee is to review and monitor SHU inmates on the OMH caseload and any other SHU inmate referred to the committee. In addition, the committees will review the status of all inmates newly assigned to SHU following a Tier III disciplinary hearing in which the inmate's mental health or intellectual capacity is at issue. The committees may also recommend restoration of privileges, suspension or reduction of SHU time, or a housing reassignment; or recommend to OMH that the inmate's medication be reevaluated or that the inmate be examined by two physicians for possible commitment to Central New York Psychiatric Center (CNYPC).

The settlement further requires that when an Office of Mental Health (OMH) clinician testifies at a Tier III disciplinary hearing, that clinician will be familiar with the inmate's mental health status or will review the inmate's mental health records prior to providing any information to the Hearing Officer. The testimony of the OMH clinician at a Tier III hearing will include, behaviors associated with the diagnosis, medication, purpose of medication, side effects and medication compliance, and the inmate's psychiatric history including whether the inmate has ever been in a psychiatric hospital. The OMH testimony will be taken outside of the inmate's presence and treated as confidential.

Finally, the settlement requires that training be provided to various DOCS staff at Green Haven and Auburn Correctional Facilities. The training will include: how to recognize when an inmate may be mentally impaired at the time of the hearing; the significance of mental impairment at the time of the incident in determining whether there should be a penalty and what the penalty should be; the nature of the mental illness; techniques for managing the behavior of inmates suffering from mental illness; psychological needs of SHU inmates and recognizing when an inmate should be referred to OMH.

The settlement agreement will stay in effect for at least a five year period from the date the regulations are adopted. Plaintiffs' counsel will actively monitor the agreement for at least three years from that date. The settlement requires that certain records be provided to Plaintiffs' counsel during the monitoring period. In addition, the settlement permits Plaintiffs' counsel to review OMH records, disciplinary hearing records and tapes (including the OMH confidential taped testimony) of hearings that occur at Green Haven and Auburn Correctional Facilities. Although the litigation and settlement agreement pertain to Auburn and Green Haven Correctional Facilities only, the new regulations will apply to all prisons throughout New York State.

Another claim in the Anderson lawsuit alleges that housing inmates with mental illness in Special Housing Units (SHU) at Auburn and Green Haven Correctional Facilities is cruel

and unusual punishment in violation of the Eighth Amendment to the United States Constitution. This claim is still pending before the court.

Plaintiffs in Anderson were represented by Prisoners' Legal Services of New York and the Prisoners' Rights Project of the Legal Aid Society.

State Announces Financing for New Facilities/Programs for Inmates With Mental Illness

Faced with mounting criticism of its treatment of inmates with mental illness, the State of New York recently announced plans to open two new mental health units within the Department of Correctional Services. The two new units will serve inmates with mental illness who would otherwise be confined in Special Housing Units.

Inmate advocates have long charged that many inmates are confined to SHU because of misbehavior that stems from their mental health problems, and that their mental problems are, in turn, exacerbated by the harsh conditions of SHU. According to some advocates, this creates a downward cycle in which inmates with mental illness initially act out as a result of their illness and are then punished by being placed in SHU, which causes them to misbehave further as their mental health deteriorates, which results in yet more punishment. The two units, one at Sullivan Correctional Facility, the other at Great Meadow, will have a total of 102 beds. According to the Office of Mental Health, approximately 11%, or 473, of the 4,300 inmates serving time in SHUs are suffering from a serious mental illness.

The new units are intended to be an alternative to SHU, according to Sharon Carpinello, Commissioner of the Office of Mental Health. They would consist of behavioral cells clustered together, with space nearby for inmates to participate in programs, but they would not be allowed to mingle with the general prison population. Current cell space would be adapted for the new units. "This sort of behavior [by the state] will provide inmates with more humane care and create a safer prison environment," said Harvey Rosenthal, Executive Director of the New York Association of Psychiatric Rehabilitation Services.

In addition to the new units, the state also plans to spend an additional $13 million on mental health care in the state prisons in the fiscal year beginning April 1, 2004. Part of that money will be used to hire 66 new nurses and psychiatrists to work in the prison system. According to recent legislative testimony by Commissioner Carpinello, the State also plans to expand both the Special Treatment Program, which provides mental health services to inmates in SHU, and the Intermediate Care Program, which provides services to inmates with mental illness to help them transition to general population.

Federal Cases

Deliberate Indifference: Court Vacates Jury Award; Finds No Deliberate Indifference to Inmate's Serious Medical Need

Hernandez v. Keane, 341 F.3d 137 (2d Cir. 2003)

When an inmate sues over the quality of his medical care in the State Court of Claims he will win if he can show that his care was either negligent or constituted medical malpractice. In addition, since the defendant is the State, the inmate need not show that a particular

doctor or nurse provided inadequate care, only that his care in general was inadequate.

In federal court, however, an inmate must show not only that the care was negligent, but that it was so bad that it violated his constitutional right to be free of "cruel and unusual punishment." To do this, he must prove that prison officials were "deliberately indifferent" to his "serious medical needs." "Deliberate indifference" is a higher standard than mere negligence or medical malpractice, equivalent to criminal recklessness. *See* Hathaway v. Coughlin, 99 F.3d 550 (2d Cir. 1996). In addition, because the states are immune from suit in federal court, it is not sufficient to prove that the medical care *in general* was inadequate. Rather, an inmate must show that a particular person or persons were "deliberately indifferent" to his "serious" medical needs.

This case, decided last quarter, illustrates how much more difficult it can be to meet the federal standard than the state standard.

Inmate Hernandez sustained multiple gunshot wounds prior to his incarceration. He was treated at Bellevue Hospital but, for medical reasons, several bullet fragments in his hand were not removed. He left Bellevue against the advice of his doctors and lived on his own for several months, during which he sought no treatment because he could not afford it. He was then arrested and spent the next fifteen months at Rikers Island – where, for reasons unexplained, he also received no treatment. He arrived at Downstate in July of 1994. After complaining about pain in his hand he was told he would receive no treatment until he arrived at his "next facility." In August of 1994, he arrived at Sing Sing, still complaining about pain. Sing Sing medical staff referred him to an outside specialist who scheduled an operation, however, the operation was cancelled when the specialist became unavailable.

In December he filed a grievance, complaining that no follow-up appointment had been made. He was then referred to a second specialist who told him to return the following month for a further consultation. Over the next several months he was treated for a seizure disorder but was not sent back to the outside specialist. In March, 1995, he was transferred to Elmira – no one at Sing Sing had thought to place him on a medical hold. At Elmira he was sent to a new specialist, but that specialist recommended against surgery on the ground that it could worsen Hernandez's condition. Finally, in January of 1996, Hernandez was transferred back to Sing Sing where, after several additional months of consultations and examinations, surgery was performed. The hand, however, did not improve as hoped. Hernandez then filed a federal lawsuit claiming that the failure of his hand to heal properly was due to DOCS' delay in treating him as well as to several errors committed in the post-operative period: pins and wires in his hand were not timely removed, causing infection; prescribed physical therapy was not provided; and "feed up" passes, allowing him to receive food in his cell (because he had difficulty carrying a food tray) were cancelled.

A jury awarded Hernandez more than $100,000 in damages. The Second Circuit Court of Appeals, however, reversed. That court found that the evidence had simply failed to show that any of the specific doctors or nurses whom Hernandez had sued had acted with "deliberate indifference" to his serious medical needs. The evidence, the court held, "[might] support findings of negligence or malpractice as to one or more of the defendants, or as to certain prison personnel as a group; it might support findings that the system of treatment (as a whole) broke down or misfired in some way in the particular instance of this inmate's hand; it might even

support findings that someone involved in Hernandez's care (other than the defendants [named by Hernandez]) was deliberately indifferent." In other words, the court found, the evidence might have been sufficient to support a claim in state court, but it was insufficient to support the higher "deliberate indifference" standard in federal court. The court therefore vacated the jury award.

Retaliation Claims Survive in the 2nd Circuit

Scott v. Coughlin, 344 F.3d 282 (2d Cir. 2003)
Bennett v. Goord, 343 F.3d 133 (2d Cir. 2003)

The Second Circuit recently reinstated two retaliation claims that had been dismissed by the district courts. The court found that since genuine issues of material fact existed which could only be resolved by a jury, the district courts had erred in granting summary judgment to the defendants. In both cases, the court focused on the fact that the plaintiffs had provided detailed affidavits and other documentary evidence in support of their allegations of retaliation while DOCS merely relied upon the misbehavior reports that were generated by the officers involved and the subsequent disciplinary hearings.

A retaliation claim is a claim that prison officials took adverse action against an inmate in retaliation for the inmate's exercise of some protected right. To establish a *prima facie* claim of retaliation – and survive summary judgment – the inmate must show that (1) the conduct at issue was protected, (2) the defendant took adverse action against him, and (3) there was a causal connection between the protected speech and the adverse action. Defendants may still prevail, however, if they can show that the adverse action would have been taken despite the retaliatory motive.

Scott involved a claim by an inmate that he had been retaliated against by COs Rando and DeLuke. Specifically, Scott complained that Rando retaliated against him after he filed a complaint about an earlier incident in which Rando had allegedly confiscated some of Scott's legal papers. According to Scott, Rando later struck him with his baton during a strip frisk and then filed a false misbehavior report about the incident, which resulted in Scott serving 180 days in SHU. Regarding officer DeLuke, Scott complained that the officer had retaliated against him after he acted as a witness in support of another inmate's allegations of assault. According to Scott, DeLuke assaulted him in his cell, and also filed a false misbehavior report against him alleging that he had refused to submit to a strip frisk.

A district court dismissed Scott's claim against Rando because medical records showed no significant injuries to Scott and he failed to submit any additional evidence in support of his claim. The 2nd Circuit was disturbed by this analysis. "[T]he records standing alone are inconclusive," wrote the court. "[P]laintiff submitted an affidavit describing the extent of his injuries. These sworn statements are more than mere conclusory allegations subject to disregard,... they are specific and detailed allegations of fact, made under penalty of perjury and should be treated as evidence in deciding a summary judgment motion....By finding against Scott on the basis of the disparity between some of Scott's medical records and statements in his affidavit, the district court made an impermissible credibility determination and weighed contradictory proof. The credibility of Scott's statements and the weight of contradictory evidence may only be evaluated by a finder of fact" – i.e., a jury.

The defendants also argued that Scott's claim should be dismissed because, they

asserted, disciplinary action would have been taken against him regardless of Rando's allegedly retaliatory motive since another C.O. also wrote a report which substantiated the charges. The 2nd Circuit was not convinced. The Court held that, "[w]hile it may be true that Scott would have been punished in any event, it is not at all clear that Scott would have been punished to the same extent absent defendant Rando's report." Since the Court found that an issue of fact existed as to whether Scott would have been given the same punishment regardless of Rando's retaliatory motive it reversed the lower court's decision granting summary judgment to defendant Rando.

With respect to Scott's claims against C.O. DeLuke the district court found that the alleged physical assault and the subsequent disciplinary hearing would have occurred regardless of DeLuke's possible retaliatory motive. Specifically, it concluded that various statements Scott made at his disciplinary hearing constituted an admission that he had refused to submit to the strip frisk. The 2nd Circuit disagreed, stating, "[w]e are unable to concur with the district court because its interpretation of plaintiff's statements impermissibly drew an inference against plaintiff, the non-moving party, and awarded summary judgment to defendant on the basis of that inference. It is not at all clear that Scott's statements can be taken as an admission of wrongdoing. A reasonable juror could just as easily find that Scott denied disobeying DeLuke's orders, given that his initial response to the hearing officer's inquiry as to whether he had disobeyed the order was 'No the officer kicked me'."

Bennett involved an inmate who had previously brought a retaliation lawsuit against DOCS in 1995. DOCS eventually settled the case, paying Bennett $3,000.00 and promising to consider him for a transfer. Bennett alleged that this settlement ignited a series of retaliatory actions by DOCS.

Prior to the settlement, Bennett had been deemed eligible for a transfer to a medium security facility and was transferred from Attica C. F. to Collins C.F. In the midst of finalizing the settlement, however, Collins attempted to transfer him back to Attica. The initial request for a transfer was denied due to "insufficient reasons for placement." However, three days later he was served with two disciplinary charges, accusing him of "working to consolidate unauthorized groups to a common purpose to the detriment of the safety and security of the facility" and "defacing library books." Hearings were held and the charges were sustained. One day after the second hearing, Bennett was transferred to Attica. Bennett appealed the dispositions of both hearings and DOCS reversed both, finding, with respect to the first charge that it was "conclusory [and] without supporting details," and with respect to the second, that Bennett was improperly denied documentary evidence. The charges were ordered expunged from Bennett's records. Bennett requested a transfer back to a medium-security facility. DOCS denied his request stating that "he had been 'deemed unsuitable for reduced security,'. . .[b]ased both on recent information and [ ] past history."

Bennett sued, claiming that Collins and Attica prison officials had retaliated against him for winning his prior lawsuit by transferring him to Attica, by filing false disciplinary charges against him and by refusing to return him to a medium security facility after the charges were dismissed. DOCS moved for summary judgment. The district court ruled in DOCS' favor, (McAvoy, J) adopted a magistrate judge's report and recommendation which accepted DOCS' arguments and found that the first instance of alleged retaliation was unsupported because

"[t]he stipulation of settlement was not even submitted to the court until after [Bennett] was transferred to Attica," and the second claim of retaliation was inadequate.

The 2nd Circuit reversed. The Court noted that the defendants did not dispute that Bennett's lawsuit and subsequent settlement and the filing of grievances were protected activities. The issue defendants contested was whether there was a "casual connection between the protected activity and the disciplinary actions and transfers." The 2nd Circuit found that Bennett "met his initial burden of producing sufficient evidence to raise a question of material fact about whether retaliation was a substantial factor in the transfers and in the discipline." The court found that the "temporal proximity" between the settlement of Bennett's case and the alleged retaliatory actions provided "circumstantial evidence of retaliation." The court also held that Bennett's allegations were further supported by the fact that almost all of DOCS' adverse actions regarding Bennett were subsequently found to be unjustified.

Defendants argued that since the settlement was not entered at the time of the events in question, their actions could not have had a retaliatory motive. The 2nd Circuit disagreed. The court found that even though the settlement had not yet been entered with the court, settlement discussions had already begun. "Since these facts suggest a link between the settlement and the acts of alleged retaliation, it was error summarily to resolve this issue in DOCS' favor....Once Bennett produced evidence sufficient to raise a material question of fact as to retaliation, the burden shifted to DOCS to demonstrate through admissible evidence that the challenged actions would have occurred in any event. But none was produced. Instead, DOCS essentially treated its own motion for summary judgment as one to dismiss the complaint contesting only the sufficiency of Bennett's allegations. DOCS' motion was not accompanied by affidavits of knowledgeable correctional officers supplying their version of the relevant events or their explanations for the transfer attempts or disciplinary charges - or for that matter, by any evidence at all rebutting Bennett's evidence." Thus, the court held, granting summary judgment in favor of DOCS was improper.

State Cases

Disciplinary

In-absentia Hearings: Inconsistent Decisions Raise Questions

Matter of Pauljajoute v. Goord, 759 N.Y.S.2d 700 (3d Dep't 2003) *lv. den* 1 N.Y.3d 501 **(2003)**
Matter of Rush v. Goord, 770 N.Y.S.2d 191 (3d Dep't 2003)

It is settled law that an inmate has a fundamental right to be present at his or her own disciplinary hearing. *See* Matter of Al Jihad v. Mann, 159 A.D.2d 914 (3d Dep't 2000). If a hearing is held in an inmate's absence, the burden is on DOCS to prove that the inmate made a knowing, voluntary and intelligent waiver of that right. To meet this burden, DOCS must be able to show that the inmate has been informed of the right and of the consequences of failing to appear at the hearing. *See* Matter of Spirles v Wilcox, 302 A.D.2d 426 (3d Dep't 2003). Two apparently inconsistent decisions from the Appellate Division, Third Department, however, raise the question of what, exactly, DOCS must show to meet this burden.

Pauljajoute involved an inmate, Pauljajoute, charged with assaulting several officers. Prior to the incident, corrections officials had observed him behaving in a bizarre manner. At his subsequent disciplinary hearing, a C.O. testified that he went to Pauljajoute's cell twice to tell him that he would be escorting him to the Tier III hearing, but that on both occasions Pauljajoute refused to come out of his cell. The hearing officer asked the C.O. if the inmate had been advised that if he didn't attend the hearing it would be held without him and the C.O. responded affirmatively. The hearing officer then asked the C.O. whether he had concluded that the inmate was oriented, awake and understood, and once again the C.O. responded yes. The hearing officer then concluded that Pauljajoute had waived his right to attend, held the hearing *in-absentia*, and found the inmate guilty of the charges

In court, Pauljajoute argued that the hearing officer's brief interview with the C.O. was not a sufficient basis upon which to conclude that he had made a knowing and voluntary waiver of his right to attend the hearing. Specifically, he argued, DOCS had failed to show that he understood the consequences of his failure to attend. This was particularly significant because there was some evidence in the record that he was suffering from a serious mental illness at the time the incident occurred, and thus might not have understood what he was waiving.

The court, however, felt that the hearing officer had done enough: "There is no requirement that a Hearing Officer personally interview an inmate before concluding that such inmate has made a knowing, voluntary and intelligent waiver of his or her right to attend a disciplinary hearing." The record before the court demonstrated that the C.O. attempted "to persuade [the inmate] to attend the hearing." The court was thus satisfied that "the Hearing Officer conducted a sufficient inquiry prior to determining that petitioner had made a valid waiver of his right to attend...."

In Rush v. Goord, as in Pauljajoute, a CO testified that he had gone to inmate Rush's cell to bring him to the hearing, but that the inmate had refused to come out. Unlike Pauljajoute, the hearing officer in Rush stated that he, *too*, had gone to inmate Rush's cell and told him he was holding a Tier III hearing on the charges but "Rush refused to come out of his cell to attend his hearing."

The court found for Rush, holding: "Even assuming that a correction officer and the Hearing Officer advised petitioner that his disciplinary hearing was about to commence and that petitioner indeed refused to attend, there is absolutely no indication in the record that petitioner was advised of his right to attend such hearing and of the consequences of his failure to do so."

It is hard to square these two results. The court's finding in Rush that the record contained no indication that the inmate was advised of his right to attend the hearing or of the consequences of his failure to attend was certainly correct. However, there was also no such indication in the record in the Pauljajoute case. Further, it appears that the hearing officer in Rush, by personally going to the inmate's cell, made more of an effort to bring the inmate to the hearing than did the hearing officer in Pauljajoute. Finally, in the Pauljajoute case, unlike the Rush case, there was a serious question as to whether the inmate would have been capable of understanding the consequences of his refusal to attend even if it had been explained to him. It is thus difficult to understand why the court ruled for the inmate in Rush, but against the inmate in Pauljajoute. These inconsistent decisions leave a significant question in their wake concerning exactly what it is DOCS

must do to establish that an inmate has genuinely waived his right to attend a hearing.

Note: The inmates in both of these cases were represented by PLS. In Pauljajoute, PLS filed a Motion for Leave to Appeal to the Court of Appeals. The motion was denied.

Employee Assistance: Required In Some Cases, Not All

Matter of Miller v. Goord, 767 N.Y.S.2d 704 (3d Dep't 2003)
Matter of Krall v. Inmate Disciplinary Programs, 766 N.Y.S.2d 153 (3d Dep't 2003)

In Wolff v. McDonnell, 418 U.S. 539 (1974) the Supreme Court held that prisons are not required to provide attorneys to inmates facing prison disciplinary proceedings, even when additional prison time may result. The Court went on to say, however, that where the inmate is illiterate, or where "the complexity of the issue makes it unlikely that the inmate will be able to collect and present the evidence necessary for an adequate comprehension of the case," he should be allowed to have assistance from staff. DOCS' regulations provide that an inmate shall be given an employee assistant if he is illiterate, non-English speaking, sensorially disabled, charged with drug use as a result of a urinalysis test, or confined pending his hearing. Beyond that, the question of whether to grant an assistant is within the discretion of the hearing officer. 7 NYCRR §251-4.1. Two recent cases emphasize that the "right to assistance" is not absolute.

In Krall v. Selsky, the inmate was charged with violating prison rules prohibiting the use of controlled substances after a urine test turned up positive. At the disciplinary hearing he complained that he had not received employee assistance. Instead of adjourning the hearing to provide the assistance, the hearing officer continued the hearing and provided the inmate with some of the documentation he had requested. The court found this to be insufficient. "[G]iven the total lack of employee assistance and the nature of the charges, we find that the hearing should have been adjourned in order to provide [the inmate] with the assistance to which he was entitled in order to aide in the preparation of his defense."

In Miller v. Goord, however, the court reached a different result. Miller involved charges that the inmate had failed to follow various direct orders. Nothing in the record indicated that he was either illiterate, non-English speaking or sensorially disabled. He was not charged with drug use based on a urinalysis test nor was he confined to his cell. The court concluded that the charges were not complex and the inmate had not been prejudiced by the lack of an assistant. Under those circumstances, the court held, there was no error in the hearing officer's decision not to grant the inmate's request for an assistant.

Confidential Information: Hearing Officer Fails to Assess Reliability of Confidential Informant

Matter of Gantt v. Girdich, 766 N.Y.S.2d 615 (3d Dep't 2003)

Inmate Gantt was found guilty of destroying state property after a correction officer discovered sand in the oil pans of several facility lawnmowers. The charges were based solely on the testimony of a confidential informant. Courts have held that the testimony of a confidential informant will support a determination in a prison disciplinary hearing so long as the record shows that the hearing officer had some basis for determining that the

informant was credible and reliable. Here the court found that, although the hearing officer personally interviewed the informant, he failed to adequately assess his credibility and reliability. The informant's allegations were "insufficiently detailed," held the court, and the circumstances in which they were made "raise[d] serious suspicions regarding [the informant's] reliability." Further, the hearing officer "fail[ed] to ask general questions reflecting on credibility [or] to address possible motives for false testimony which were raised by another witness." Under those circumstances, held the court, the informant's evidence was insufficient to support the determination of guilt.

Contraband: Chopstick Not Contraband, But Weapon

Matter of Zhang v. Murphy, 766 N.Y.S.2d 633 (3d Dep't 2003)

Inmate Zhang was found guilty of violating disciplinary rules prohibiting the possession of contraband or of weapons after a sharpened chopstick was found in his cell. On review, the court found that the chopstick was not contraband – nothing in DOCS' regulations prohibits the possession of chopsticks – but that there was substantial evidence that, because it had been sharpened, it was intended to be used as a weapon. The court also rejected petitioner's assertion that he should have been provided with a Chinese interpreter at his disciplinary hearing, holding that he was "sufficiently fluent in English to understand and knowledgeably participate in the disciplinary hearing."

Religion Held No Excuse For Contraband

Matter of Rivera v. Goord, 767 N.Y.S.2d 701 (3d Dep't 2003)

Petitioner in this case was found in violation of disciplinary rules prohibiting the possession of alcohol. After a strong odor of fermentation was detected emanating from his locker, a search disclosed two hollowed-out apples in a styrofoam cup, each containing an amber liquid that smelled strongly of alcohol. At his disciplinary hearing, petitioner conceded that the apples were his but asserted that he had hollowed them out and filled them with honey as part of a religious ritual that he practiced as a member of the Santeria faith. Neither the hearing officer nor the court bought the defense. The court first held that the petitioner's claims merely presented an issue of credibility which the hearing officer was free to reject. It then went on to point out that an alleged infringement upon an inmate's religious practices would not, in any event, be sufficient in and of itself to excuse the violation of a prison disciplinary rule.

Where Contraband Not in Inmate's "Substantial Control," Court Finds Insufficient Evidence

Matter of Price v. Phillips, 770 N.Y.S. 882 (2d Dep't 2003)

A prison disciplinary hearing must be supported by "substantial evidence." In order to sustain a determination of guilt, a court must find that the disciplinary authorities offered "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact" (*see* People ex rel. Vega v. Smith, 66 N.Y.2d 130, 139).

In this case, inmate Price was charged with possession of a controlled substance and the unauthorized possession of money after both items were found in a pill case adjacent to his cell. While the pill case was accessible to Price, it was also accessible to other inmates on the cell block. The court concluded that under these circumstances there was insufficient evidence in the record to connect the petitioner to the contraband, or upon which the hearing officer could conclude that the petitioner "substantially controlled" the area in which the contraband was found. Consequently, the court vacated the disciplinary hearing.

Substantial Evidence: Circumstantial Evidence Is Enough in Assault Case

Matter of Hernandez v. Selsky, 764 N.Y.S.2d 663 (3d Dep't 2003)

Inmate Hernandez was charged with violating prison disciplinary rules prohibiting fighting, violent conduct and assault, following an investigation of an incident in which he was found with severe lacerations and wounds, staggering down a walkway leading to the law library. A search of the area uncovered weapons consistent with both Hernandez's injuries and those of another inmate in the law library. At the hearing, the hearing officer refused to credit Hernandez's assertions that he did not recognize his attacker and that he was acting in self-defense, and found him guilty. Hernandez filed an Article 78 proceeding to challenge the hearing result. The court ruled that there was sufficient circumstantial evidence to support the hearing officer's conclusion that Hernandez was guilty: both inmates were in the same hallway at the time of the assault, they were each assaulted at approximately the same time, each suffered slashing type injuries, no other inmates in the area were wounded, weapons found in the area were consistent with the injuries and, finally, a confidential informant provided a motive for contention between the two inmates.

Other State Cases

F.O.I.L.

DOCS Ordered to Give Inmate Records Of I.G. Investigation

Matter of Beyah v. Goord, 766 N.Y.S.2d 222 (3d Dep't 2003)

In a significant win for inmates, New York's intermediate appellate court held recently, in a 5 - 0 decision, that substantial portions of the Inspector General's (IG) file of an investigation of an inmate's allegations of brutality should be available for inspection by inmates and the public under the state's Freedom of Information Law, or "FOIL" (Public Officer's Law Art. 6). DOCS has long resisted such disclosure, arguing that the IG's file should be exempt from disclosure under one or more of the exemptions to disclosure set forth in Public Officer's Law § 87(2).

The petitioner, inmate Abdul Beyah, was involved in an altercation with COs at Auburn Correctional Facility as a result of which he suffered renal failure, fractures of his eye orbits, and other severe injuries. The Inspector General's office investigated the incident. Beyah subsequently requested the record of the I.G.'s investigation under FOIL. DOCS denied the request and Beyah filed an Article 78 proceeding challenging the denial. The lower court upheld DOCS' denial, but Beyah appealed. The state Appellate Division

reversed the lower court and held that the majority of the documents Beyah requested should be disclosed. The court held that state agencies should operate under the presumption that their records are available for public scrutiny and that the exceptions in FOIL are to be "narrowly construed." The court specifically held that the following documents should be released:

Employee Accident Reports. These are reports of injuries suffered by correctional officers in an incident. DOCS argued that they should be exempt from disclosure because they were either "medical histories" or because their disclosure would constitute an "unwarranted invasion of personal privacy." The Court disagreed. "[N]otations contained within the accident reports. . . which describe the general nature of the correction officers' injuries sustained in the incident, if any, do not reveal details of any existing medical condition and, therefore cannot reasonably be considered a relevant and material part of each officer's medical history."

Employee Interviews: These are notes – or sometimes verbatim transcripts – of the IG's interviews with DOCS employees regarding an incident. DOCS argued that these notes should be exempt from disclosure under Civil Rights Law § 50-a(1). That statute deems "personnel records used to evaluate performance toward continued employment or promotion. . . .of correction officers" confidential and thus, DOCS argued, prohibits their disclosure. The court disagreed. According to the court, DOCS "offered no evidence establishing that the interviews are relied upon in evaluating employee performance...." DOCS also argued that disclosure of employee interviews should be prohibited because "they were compiled for law enforcement purposes and, if disclosed, would reveal confidential information or confidential investigative techniques or procedures. The court's *in camera* review led it to conclude otherwise. It found that there was nothing in the information which was confidential or which revealed "any non-routine criminal investigative techniques or procedures."

Report of Complaint Progress and Index Sheets and Receipt of Complaint: These documents detail the steps the IG has taken in his investigation. DOCS again argued that disclosure of these documents would reveal non-routine criminal investigative techniques or procedures. The court explained that in determining whether an investigative technique is non-routine one must consider "whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel." The court found that none of the documents in question in this case set forth methods of inquiry beyond what is typical in a routine investigation.

Employee Training Records: The court accepted DOCS' argument that employee training records are personnel records within the meaning of Civil Rights Law §50-a(1), but ordered them disclosed nonetheless, on the ground that DOCS had failed to adequately demonstrate that there was a "substantial and realistic potential... for [their] abusive use" against the officers.

Prison Directive No. 4901: The Court ordered disclosure of this Directive, which relates to the maintenance of log books, since DOCS was unable to demonstrate that such disclosure posed any chance of danger to the safety and security of DOCS personnel.

The court did reject disclosure of one set of documents, those that would have shown the job assignments of COs throughout the facility. DOCS argued that disclosure of these records could threaten institutional

security, and the court agreed. The court also ordered that, in all disclosures, DOCS would be required to redact personal information, such as home addresses and social security numbers.

The court did not discuss whether DOCS should be required to disclose the IG's investigatory conclusions under FOIL. It appears that the inmate did not request the IG's conclusions in this case.

Parole

Crime Victim Lacks Standing to Challenge Grant of Parole

In the Matter of John Hancher v. Travis, 1 Misc. 3d 903 (Supreme Ct., Westchester Co., 2003)

When an inmate challenges a parole denial he typically argues that the Parole Board failed to properly consider the statutory guidelines for parole set forth in Executive Law § 259-i, that the conduct of the hearing violated lawful procedures and/or that the decision was "irrational bordering on impropriety." This case presents an ironic twist on that pattern: In this case, a crime victim sued the Parole Board arguing that it had failed to properly consider the statutory guidelines and acted irrationally when it *granted* parole.

The case is a spin off of the ongoing saga of Kathy Boudin. Ms. Boudin, a member of the radical Weather Underground in the Sixties, was convicted of participating in a 1981 robbery in which two police officers were killed. She became eligible for parole in 2001. Despite an unblemished prison record, her parole was politically contentious: Governor Pataki and the Police Benevolent Association, among others, opposed it. After being first denied parole in 2001 she filed a successful Article 78 proceeding challenging the denial: The court concluded that the Board's denial of parole was irrational and improper. Ms. Boudin was granted parole by a subsequent Board in the summer of 2003.

John Hancher, a relative of one of deceased police officers, then sued the Board, arguing that the Board's *grant* of parole was irrational and improper. The court rejected the suit, holding that crime victims do not have standing to challenge the parole board's actions.

"Standing" is a legal concept referring to the right to bring a lawsuit in the first place. In order to have standing to sue, a litigant must show that the action over which he is suing will have a harmful effect upon him which is different from that suffered by the public at large. Here, the court found, while a crime victim may be more emotionally affected by the crime than a member of the general public, that increased emotional effect is not sufficient to confer standing to challenge the Parole Board's actions.

Moreover, the court found, even if Mr. Hancher did have standing, there was no merit to his suit. The court found that all of the statutory factors set forth in Executive Law § 259-i had been properly considered by the Board. Further, while Hancher argued that Boudin had failed to admit her guilt at the hearing and attempted to justify her acts, the transcript of the hearing proved otherwise: Boudin explicitly accepted her responsibility for the deaths of the two police officers and expressed profound remorse.

Family Reunion Program

Courts Side With DOCS On Denial of Family Reunion Visits

Matter of Rosas v. Baker, 766 N.Y.S.2d 612 (3d Dep't 2003)
Matter of Couser v. Goord, 766 N.Y.S.2d 461 (3d Dep't 2003)

DOCS' Family Reunion Program (FRP) permits inmates to spend extended periods of time with family members in private trailers on prison grounds. Courts have historically granted DOCS wide discretion to decide who can and cannot participate in the FRP, as these two cases demonstrate.

In Rosas v. Baker, inmate Rosas applied to participate in the FRP with his wife. His application was supported by both his guidance counselor and by the superintendent of his facility. The Family Reunion Coordinator, however, recommended that the application be denied because he felt Rosas should complete sex offender counseling prior to being permitted to participate in the FRP. Rosas appealed, but DOCS' central office upheld the decision of the Family Reunion Coordinator citing, among other things, the nature of Rosas' crime as well as the "[s]ensitive nature of the [FRP] to the participation of sex offenders." Rosas then brought an Article 78 proceeding to challenge the denial. The lower court ruled in his favor. That court held that DOCS had failed to articulate an adequate connection between his status as a sex offender and his application to visit with his wife "such that valid security or other identifiable concerns militate[d] against [its] approval." DOCS appealed, however, and the Appellate Division reversed. Participation in the Family Reunion Program is not a constitutionally protected right, the court stated: "As long as [the program] is implemented in a reasonable manner, consistent with the inmate's status as a prisoner and the legitimate operational considerations of the institution, it will withstand judicial scrutiny." Here, the court noted, one of the FRP's regulations specifically cautions that "active participation [or] completion" of a program may be required as a precondition to participation. See 7 NYCRR §220.2(a)(3)(iii). Since that was precisely one of the reasons given by DOCS for refusing to allow the inmate to participate, and since the decision was not otherwise irrational, the court upheld the denial.

The inmate in Couser v. Goord had been convicted of murder and sentenced to life without parole. He married while incarcerated and subsequently applied to participate in the FRP with his wife. DOCS denied the application on the grounds that his crime was of a "heinous nature" and the inmate sued. The court upheld DOCS' decision. The FRP regulations specify that one of the factors DOCS must consider in deciding whether to grant an FRP application is whether the inmate has been convicted of "heinous or unusual crimes." 7 NYCRR §220.2(c)(1)(iii). Here, the court found that the inmate's crimes were "egregious." Moreover, the court found, his participation in FRP could not further the program's goals of "sustaining family ties that have been disrupted as a result of incarceration" because his marriage occurred after he had been incarcerated and, in view of his sentence, he will never return to society. Under those circumstances, the court held, DOCS' decision was not irrational and would therefore be sustained.

Sentencing

New York High Court Affirms Appellate Division : DOCS Not Free to Disregard Commitment Order In Computing Inmate's Sentence

Matter of Murray v. Goord, 1 N.Y.3d 29, 769 N.Y.S.165 (2003)

In a decision issued last year, the Appellate Division held that DOCS was wrong in concluding that a new sentence under which

petitioner Murray was incarcerated was illegal and, even if it was not wrong, it was not free to simply ignore a lawfully issued commitment order. Murray v. Goord, 701 N.Y.S.2d 426 (3d Dep't 2003). (*Pro Se* reported on this decision in our Winter, 2003 edition.) Since we reported on this decision DOCS appealed to the Court of Appeals, the State's highest court. That Court has now upheld the Appellate Division, holding: "DOCS is not free to disregard a commitment order. [P]rison officials are conclusively bound by the contents of commitment papers accompanying a prisoner....DOCS's only valid option in circumstances such as these is to comply with the plain terms of the last commitment order received."

This is a significant win for inmates on an issue that has been debated for many years. Ordinarily, when a person is sentenced to prison, the sentencing court drafts a "commitment order" specifying how the sentence is to run. For example, if the sentence is to run concurrently with an earlier sentence, the commitment order will say so. DOCS is required to carry out the terms of the commitment order. From time to time, however, DOCS will receive a commitment order which, for one reason or another, it concludes is illegal. Frequently, in such cases, DOCS will simply disregard the commitment order and calculate the sentence in the manner it believes the law requires – often to the detriment of the inmate whose sentence is being recalculated. For example, DOCS may run sentences consecutively which the sentencing court has ordered be run concurrently. That is essentially what happened in this case.

The facts in Murray were these: inmate Murray received a sentence of 7 ½ to 15 years for criminal sale of a controlled substance. One year later, he received a second sentence of 7 ½ to 15 for manslaughter, which the judge ordered to run consecutively to the controlled substance charge. On appeal, the drug conviction was reversed and remanded for a new trial, but the manslaughter conviction was upheld. Murray then pled guilty to the drug charges in exchange for a sentence of 7 ½ to 15 years to run concurrent to, rather than consecutive to, the manslaughter sentence. He thus had two contrary commitment orders, one from the judge on his manslaughter case ordering that the sentences run consecutively, and a second, later order, from another judge, that the sentences run concurrently.

Once in State custody he learned that DOCS had concluded that the second commitment order – the one ordering the sentences to run concurrently – was illegal. DOCS felt that the judge did not have the legal authority to essentially overrule the commitment order of the earlier judge. It therefore ignored that judge's commitment order and calculated the sentences consecutively, not concurrently.

The Court of Appeals has now rejected both DOCS' substantive position on the sentence and its tactics. Regarding the substance, the Court held that the latest commitment order controls the sentences. Regarding tactics, the Court held that DOCS is not free to simply decide for itself which commitment order controls.

Court of Claims

Medical Malpractice: Court Orders State to Pay Inmate $800,000 After DOCS Fails to Diagnose Cancer

Zacchi v. State of New York, N.Y. Ct. Cl. (Claim No. 102854)

Inmate Ronald Zacchi was serving a 2 to 6 year sentence at Governeur Correctional Facility when, in 1998, he began experiencing discomfort in his throat. Between April of 1998 and August of 1999 he was seen by facility nursing staff 26 times, staff physicians 10 times and other physicians 24 times. He was routinely treated with throat lozenges, antibiotics and other remedies directed to address his sore throat. This treatment, although ineffective, was continued for seven

months. It was not until a mass in Zacchi's throat became obvious that a correct diagnosis – cancer of the larynx – was rendered. By that time, the only remedy was to remove the larynx, a radical and life-altering surgery. Zaachi sued DOCS, claiming medical malpractice.

The court found that DOCS' treatment of Zacchi was negligent. "It is clear from the medical records that the staff at Governeur believed [Zacchi] to be a chronic complainer, and they may have given little weight to some of his complaints for that reason....Even true hypochondriacs can become ill, however, and [Zacchi's] many significant warning signs of cancer should not have been ignored," held the court. Of particular concern to the court was the conduct of a nurse, Denise Congleton, whose "testimony was not always consistent," and the testimony of Doctor Robert Kasulke, which the court found "particularly troubling" for its "calm acceptance of the fact that he never used a pharyngoscope to investigate any possible abnormality" in Zacchi's throat. A medical expert testified that if Zacchi's cancer had been detected at least a year earlier, the laryngectomy would not have been necessary. "This case," held the court, "is analogous to the fable of a boy who cried wolf too many times and then was disbelieved when the wolf was present," wrote the court. "Unfortunately for the defendant, the wolf has always been there." The court held DOCS wholly liable for the medical malpractice and awarded Zacchi $400,000 for past pain and suffering and $400,000 for future pain and suffering.

This case has not been reported in the state reporter system.

DOCS Found Liable for Unauthorized Disclosure of Medical Records

Davidson v. State of New York, ___ N.Y.S.2d ___ (3d Dep't 2004)

Inmate Davidson brought a medical malpractice claim against the State in the Court of Claims, claiming that he had been given incorrect medication by prison staff. During discovery he learned that DOCS had released his medical records to the Attorney General's office, which was representing the State in his claim. He then brought a separate action in the Court of Claims claiming that the State had violated the physician-patient privilege by releasing his medical records without either his authorization or a court order.

DOCS argued that the release of Davidson's medical records was authorized by 7 NYCRR § 5.24[b]. That section provides that medical records may be released to certain categories of persons, including "a judicial or administrative body or officer before which the physical or mental health of an inmate is in issue" but "only if a court has issued a subpoena or other court order...specifically demanding the production of medical records." The Court of Claims concluded, however, that the medical records DOCS had released included records that were unrelated to the malpractice claim and, moreover, the Attorney General had not obtained a court order directing their release. The court therefore concluded that the release of the records had violated Davidson's rights and it awarded him $500.00.

DOCS appealed. On appeal, DOCS argued that the release was authorized by Public Health Law § 18. That section permits health care providers to disclose "personal notes and observations" regarding a patient to an attorney consulted by the health care professional, without them becoming accessible to the patient. *See* Public Health Law § 18(1)(e)(ii). The appellate court disagreed. The court concluded that that provision "does not constitute a blanket authorization for the release of patient medical records to a health care provider's attorney." Accordingly, the court affirmed the award of the lower court.

No citation was available for this case at the time of publication.

Family Court

Failure to Maintain Contact With Children Results In Loss of Parental Rights

Matter of Doral B., Erie County Department of Social Services v. Anthony R., Sr., 769 N.Y.S.2d 805 (4th Dep't 2003)
Annette B., Orange County Department of Social Services v. Joseph B., 769 N.Y.S.2d 587 (2d Dep't 2003)

These two cases, both decided in the last quarter of 2003, illustrate the consequences that incarcerated parents risk when they fail to maintain contact with their children. In both cases the court upheld decisions of the Department of Social Services (DSS) to terminate the parental rights of an incarcerated father.

In Doral B., DSS petitioned to terminate the parental rights of both parents after the mother voluntarily surrendered her rights. DSS argued that the consent of the father was unnecessary because, it said, he had not maintained sufficient contact with the child while he was incarcerated. After the father was released from prison he sought custody of his child. He argued that the prior termination of his parental rights was invalid. The court disagreed. Because the father had failed to maintain "substantial and continuous or repeated contact with his child" during his incarceration, termination of his parental rights was appropriate. The court noted that the father had never paid child support and had failed to establish that he was in regular communication either with the child or the person or the agency having care or custody of the child. It held that the father's incarceration was not an excuse for his failure to maintain communication.

The Annette B. case is somewhat more complicated. In this case, the father was in regular contact with his daughter from at least the time of her birth, in 1991, until he was incarcerated, in 1996. While he was in prison, however, the mother moved, taking the child with her, and failed to tell either the father or anyone related to him of her whereabouts. She subsequently surrendered the child to the Orange County office of the DSS. Although DSS knew that the father was incarcerated, it did not notify him that the child had been placed in foster care or that the mother had surrendered custodial rights. The agency subsequently petitioned to terminate the father's parental rights on the ground of abandonment.

The law requires that in order to establish abandonment DSS must show that in the six months prior to the filing of the petition the parent has "evidenced an intent to forego his...parental rights ...as manifested by his...failure to visit the child and communicate with the child or agency, although able to do so and not prevented or discouraged from doing so by the agency." Social Services Law § 384-b(5)(a). At a hearing on DSS's motion, the father testified that he had tried to locate his child by asking the child's maternal grandmother to tell him where the mother had moved to, but that she told him that she did not know. He also stated that he had asked his own mother to make inquiries with the DSS office in Suffolk County, where the child's mother had last lived, but that DSS refused to cooperate, apparently on grounds of confidentiality. The majority of the court found these efforts on the father's part were insufficient. They were "sporadic and minimal," according to the court, and not adequate to excuse the father's failure to maintain contact.

One judge dissented. That judge argued that, as a practical matter, there was little more that the father could do from prison. He did not know where the child's mother had taken her. The child's maternal grandmother either could not or would not help him find her. The Suffolk County office of DSS would not cooperate with inmate's mother's efforts to obtain information, and the Orange County office had failed to notify the inmate when the child was placed in foster care – which failure, according to the

dissenting judge, constituted a violation of DSS's legal obligations. In light of these facts, the dissent felt, it was primarily DSS's fault that the inmate had been unable to maintain contact with his daughter. DSS had "effectively prevent[ed] him from communicating with [the child]" by failing to notify him when she was placed in foster care. That argument, however, was not sufficient to sway the majority of the court, which found that the father should have done more.

Pro Se Practice

Article 78 Proceedings : Don't Forget to Serve the Order to Show Cause

The Article 78 proceeding is the principal means by which inmates bring lawsuits in state court when they want to challenge some decision or action of the Department of Correctional Services. The proceeding gets its name from the place where its uses and procedures are spelled out in New York's Civil Practice Law and Rules, or "CPLR." Thus, it can be found at Article 78 of the CPLR. Prisoners' Legal Services has a memo, with forms, on how to file an Article 78 proceeding and inmates contemplating filing such an action should request a copy of our form memo. This article addresses one **common mistake** made by inmates in *pro se* Article 78 proceedings that can result in confusion, delays, and even a risk that the proceeding will be dismissed. This mistake occurs in connection with the **service** of what is called the **Order To Show Cause.**

A *pro se* inmate Article 78 is commenced by filing an Order To Show Cause, or OSC, with the court, together with a Petition and other supporting documents. The OSC that you send to the court, however, is not an actual OSC, but only a proposed OSC. That is, the OSC that you send to the court does not become an actual order of the court until and unless it is accepted, completed, and then signed by the judge. Remember, only a judge can issue an order, including an OSC.

An OSC is addressed to the respondent(s) – the person or persons you are bringing the Article 78 against – telling them that they have been sued, briefly what they have been sued about, and ordering them to "show cause" at a specific time and place (called the "return date") as to why the relief you are seeking should not be granted. Since the OSC is addressed to respondents, it must be served upon them, as well as upon the Attorney General who will represent them.

The proposed OSC that you send to the the court will have blank spaces for the court to fill in both the return date and the date by when you must serve copies of that OSC, along with the Petition and other supporting papers, upon the respondent(s) and the Attorney General. If the court accepts your papers, the judge will fill in the blanks on the OSC, sign it and then return it to you for service. **Be aware that many courts often will not even use the proposed OSC you send them, and instead have and will use their own OSC form.**

Once the court sends you the signed OSC, it is then your responsibility to serve copies of it as directed by the court which typically requires serving the papers (by mail) upon the respondent(s) and the Attorney General. You must do this by the deadline given to you by the court in the OSC. Finally, after service you must then file with the court proof of such service (called an "affidavit of service").

The common mistake occurs where an inmate serves respondent(s) and the Attorney General with copies of the *proposed* OSC, instead of with copies of the *actual* OSC signed by the judge.

This usually occurs where inmates simply serve respondent(s) and the Attorney General with copies of everything they file with the court, at the same time they file them with the court. Serving copies of a proposed OSC serves no purpose at all. Any failure to serve the respondent(s) and the Attorney General with copies of the **actual signed OSC** and/or to file an Affidavit of Service swearing that you served copies of the actual signed OSC means you have not properly complied with the rules.

It is easy to avoid this mistake if you just always remember that you do **not** need to serve anything upon the respondent(s) and the Attorney General at the time you first send your papers to the court. Instead, always wait until the court accepts your papers, signs the OSC, and sends that signed OSC back to you for service.

If you follow these four basic steps you should not have a problem:

(1) File your papers with the court, which includes a proposed OSC;
(2) Wait for the court to send you an actual completed and signed OSC, directing you to serve the respondent(s) and the Attorney General by a certain date;
(3) Comply with the OSC by following the directions on the signed OSC which typically require serving (by mail) copies of the actual signed OSC, along with copies of your Petition and other supporting papers, upon the respondent(s) and the Attorney General; and
(4) File an Affidavit of Service with the Court, to prove that you properly complied with the above, that you completed service in a timely manner.

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