Pro Se

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New York High Court Reverses 20-Year Precedent; Holds Inmates Entitled to Credit For Out-of-State Jail Time

In a unanimous decision, the Court of Appeals, New York's highest court, recently reversed a twenty-year-old precedent, and ordered both DOCS and local correctional facilities to grant inmates credit for out-of-state jail time. The decision, Matter of Guido v. Goord, 1 N.Y.3d 345, 774 N.Y.S.2d 113 (2004), means that many inmates will be entitled to additional jail time credit for which they have previously been ineligible. (The Appellate Division decision in the Guido case was reported in our Spring Issue, Vol. 13, No. 2, March 2003)

"Jail time" is time spent in custody in a local correctional facility prior to being incarcerated in a state facility. Penal Law §70.30(3) sets forth the conditions under which an inmate is entitled to jail time credit. It states, in part: "In any case where a person has been in custody due to a charge that culminated in a dismissal or an acquittal, the amount of time that would have been credited against a sentence for such charge, had one been imposed, shall be credited against any sentence that is based on a charge for which a warrant or commitment was lodged during the pendency of such custody." In short, Penal Law §70.30(3) requires that, in any case where an inmate is held in custody on a charge that is

article continued on page 2...

Also Inside...

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...article continued from page 1

ultimately dismissed or of which he is ultimately acquitted, the inmate should receive jail time credit for the time he was held in such custody toward a subsequent New York sentence if New York lodged a warrant while that inmate was in such custody and that warrant resulted in a subsequent sentence. Penal Law §70.30(3)(a) also requires that jail time served on charges which result in concurrent sentences shall be credited against all of the concurrent sentences.

In 1984, however, in the case of Matter of Peterson v. New York State Department of Correctional Services, 100 A.D.2d 73, 473 N.Y.S.2d 473 (2d. Dep't 1984), an intermediate appellate court held that jail time served outside of New York should be treated differently than jail time served within the state. In that case, the petitioner, Peterson, had been arrested by federal authorities and held in federal detention for approximately six months. After being sentenced on the federal charges, he was transferred to the custody of New York City, which had an outstanding warrant for his arrest. He eventually received a New York sentence which was ordered to run concurrently with his federal sentence. The question addressed by the court was whether he was entitled to credit his New York sentence with the six months of jail time he had served in federal detention.

Had Peterson's jail time been served in a jail in New York, there would have been no question that he would have been entitled to the credit pursuant to Penal Law §70.30(3)(a). Because the jail time was served in a federal facility, however, the court treated it differently. The court held that Peterson could only obtain credit for the time if he could prove three things: that bail had been set on the federal charges; that he had the financial means to make the bail; and that the only reason he failed to make bail or otherwise secure his release was the existence of the New York State detainer. The court reasoned that an inmate should be able to credit his New York sentence with out-of-state jail time only if he could show that New York was the sole cause of the detention.

The reasoning of Peterson proved influential. Over time, other intermediate appellate courts applied the same reasoning to all out-of-state jail time. Few inmates with out-of-state jail time were able to satisfy the 3-prong test set forth in Peterson. DOCS, for its part, took the position that it would award out-of-state jail time only if ordered to do so by a court. The net result has been that very few inmates have received credit for their out-of-state jail time, even though, had they served the time in a New York jail, they would have been entitled to such credit.

Guido has changed all this. In Guido, the petitioner was arrested in Florida on Florida charges. While in a local jail in Florida, New York lodged a warrant against him. After serving more than a year in Florida, he was acquitted of the majority of the charges facing him in that state and the rest of the charges were dismissed. He was then extradited to New York, where he was eventually convicted of charges outstanding in this state. After commencing his sentence in DOCS, he sought credit for his Florida jail time.

As was the case in Peterson, had Guido served the jail time in New York, there would have been no question of his eligibility for credit. Under Penal Law §70.30(3), if Guido had been in a New York jail, as long as Guido ultimately received a sentence based on a charge for which a warrant was lodged while he was in custody on the other charges, all the time Guido served on the charges which were dismissed or of which he was acquitted would be applied to that sentence. Because of Peterson, however, DOCS replied that it could not grant Guido credit for the

Florida time unless he could show that he had been eligible for bail in Florida and that the only reason he failed to make bail was because of the New York detainer. Both the local State Supreme Court and the Appellate Division agreed with DOCS.

The Court of Appeals reversed. The Court held that the Peterson court, and the courts that applied the Peterson analysis to subsequent cases, had erred. The Peterson case, the Court wrote, "established a rule that conflicts with the plain statutory language." "Penal Law §70.30(3) makes no distinction whatsoever between those who are detained by sister states or the federal government." With respect to the "dismissal/ aquittal clause" of Penal Law §70.30(3), the clause at issue in Guido's case, "the statute expressly provides that inmates should receive jail time credit 'in *any* case' where they were held in custody 'due to a charge that culminated in a dismissal or acquittal,' as long as the warrant giving rise to the New York sentence was 'lodged during the pendency of such custody.'" "'In any case'" the Court wrote, "means in *any* case, and we cannot conclude that by saying 'any' the Legislature meant some and not others." In short, the Court concluded, "Penal Law §70.30(3) does not contemplate the place of detention as a factor DOCS should consider when computing jail time credit."

What Guido Means

Guido overrules both the reasoning and the result of Peterson. Under Guido, out-of-state jail time must now be treated precisely the same as in-state jail time. Of course, not all persons with out-of-state jail time will automatically be entitled to credit the time against their New York sentence. If, for instance, your out-of-state jail time was previously credited to an out-of-state sentence which is not running concurrently with your New York sentence, you would not be entitled to apply the credit to your New York sentence. However, Guido means that the rules now apply equally to in-state and out-of-state jail time. If you would have been eligible to obtain jail time credit against your New York sentence had you served the jail time in New York, you cannot be denied the credit merely because you served the time outside of New York.

Persons most likely to be affected by Guido are those serving a New York sentence concurrently with a previously-imposed out-of-state sentence and those who had detainers filed against them by New York while serving jail time on out-of-state charges that were subsequently dismissed.

In addition, the duty to credit jail time is a "continuing, nondiscretionary, ministerial obligation" [Bottom v. Goord, 96 N.Y.2d 870, 730 N.Y.S.2d 767 (2001)]. It is therefore clear that Guido applies retroactively: any person who was previously denied out-of-state jail time credit may now be eligible for that credit, even if the jail time was served long before Guido was decided.

The procedure for actually obtaining the credit, however, is unlikely to be straightforward. Under Correction Law §600-a, county sheriffs have the responsibility for keeping track of and "certifying" jail time to DOCS; in New York City, the New York City Department of Corrections has this responsibility. DOCS has long argued that it may not independently either add to or subtract from the jail time that is certified to it by the local facilities. Most courts agree with this position. Consequently, in order to obtain credit for any out-of-state jail time you think may be owed you, you will have to obtain an "amended" jail time certificate from the local jail that originally certified your jail time to DOCS. Here is where

the difficulty may set in. Left unclear by Guido is the extent to which local facilities will be obliged to investigate your incarceration in a foreign jurisdiction to determine whether you are entitled to out-of-state jail time. The Correction Law requires local facilities to keep a record "of *all* jail time to which the defendant is entitled." Prior to Guido, however, it was unclear whether a person who had served out-of-state jail time would be "entitled" to credit for that time. It is thus unclear whether local facilities had the obligation to maintain records, or, if so, whether they did. Many of these issues will have to be worked out on a case-by-case basis in the future. In the meantime, if you believe you are entitled to out-of-state credit, you would be well advised to request certifications from the out-of-state jailer and submit that proof to the New York jail from which you are seeking certification.

If you write to a local jail seeking credit for out-of-state jail time, we suggest that you provide the jail administrator with as much evidence as possible regarding dates and circumstances of the time for which you are seeking the credit. It may be the case that, in order to obtain the credit due you under Guido, you will have to file an Article 78 proceeding against the local jail, but initially you should do all you can to obtain proof of your incarceration from the out-of-state jail and submit that proof to the New York jail from which you are requesting certification.

If you have questions about your eligibility for out-of-state jail time, write to Central Intake, Prisoners' Legal Services, 114 Prospect Street, Ithaca, New York 14850.

Sarah Betsy Fuller

A Message from Tom Terrizzi, Executive Director of PLS

Sarah Betsy Fuller, a PLS staff attorney known to many New York State prisoners as a dedicated advocate, died April 21 following a long battle with breast cancer.

While at PLS, Betsy represented hundreds of people in New York prisons on a wide variety of issues involving prison conditions. Several notable cases included Hurley v. Goord and Hughes v. Goord. Betsy was the lead attorney for monitoring in Hurley, which successfully challenged DOCS practice and procedure of conducting strip searches and strip frisks. Monitoring of the Consent Decree lasted over 15 years and resulted in several contempt motions, including one which challenged a practice at Albion in which women prisoners were videotaped by guards with hand held cameras, while they were strip searched. The settlement of several contempt motions brought about further protections for inmates during frisk and search procedures.

Hughes, a class action on behalf of Native American prisoners, ended in a settlement. Negotiations lasting over two years resulted in a comprehensive agreement to permit Native American inmates to conduct ceremonies, possess medicine bags and other religious items, and make daily prayers in the traditional way. It also resulted in DOCS hiring a Native American chaplain to ensure the observances continued and to assist in developing programs at various prisons. The lead plaintiff in the case, Kirk Hughes of Syracuse, New York., attended funeral services for Betsy and was a pall-bearer. Betsy was honored by the Onondaga Nation for her work.

At the time she left PLS, Betsy was the lead attorney challenging the use of the "loaf" diet as punishment. The litigation, in both state and federal courts, is being carried on by other PLS staff.

Betsy was also a faculty member at Cornell University Law School's Legal Aid Clinic, starting in 1978, and had taught courses in trial advocacy and other subjects for many years. In 1998, when PLS was temporarily shut down, she directed one of Syracuse University College of Law's public interest law clinics. Prior to coming back to PLS in 2001, she was a Fulbright scholar at the Technical University of El Salvador in 2000-01, where she developed a clinical legal program for the university's law school. Early in her career, she worked at the U. S. Justice Department, Civil Rights Division in the Fair Housing Section, and for several years represented Navajo and Hopi tribal members out of a small office in Tuba City, Az. In 1997, a book she co-authored, *Brown vs. Board of Education: Equal Schooling for All*, was published in a Landmark Supreme Court Cases series for teenage readers, schools and libraries.

Betsy was tenacious and persistent in her work, qualities which are needed to make systemic change happen. Prison conditions in New York have changed for the better as a result of her efforts. She was often creative in her approach and moved others to do their best work. We will all miss her.

News and Briefs

STATE SUPREME COURT UPHOLDS DOCS' POLICY REQUIRING PRISONERS TO SERVE KEEPLOCK DISCIPLINARY CONFINEMENT IN SHU

On April 18, 2004, the State Supreme Court, Franklin County, in a nine-page ruling by Acting Justice S. Peter Feldstein, upheld DOCS' policy and practice of requiring prisoners to serve previously-imposed tier hearing penalties of keeplock (KL) confinement in a Special Housing Unit (SHU).

In 2002, David Torres, a prisoner at Upstate, completed a period of disciplinary SHU confinement. Upon completion of the SHU penalties, however, he still had to serve approximately 18 months of previously imposed penalties of KL confinement. Instead of being transferred to a non-SHU facility to serve the KL time, Torres was informed that he would remain at Upstate to serve the KL penalties. Unlike the privileges and other amenities prisoners enjoy in most KL settings, pursuant to 7 NYCRR §301.6(c)-(h), inmates assigned to KL confinement but placed in SHU are expressly subjected to the property, visitation, packages, commissary, telephone, and correspondence limitations placed on inmates assigned to SHU confinement. Inmates at Upstate are subjected to even greater restrictions than prisoners confined at most other SHU's. Because of this, Torres filed a grievance challenging DOCS' decision to force him to serve his KL time in Upstate's SHU. His grievance was denied at both the facility level and on appeal to the Central Office Review Committee (CORC). Having exhausted his administrative remedies, PLS then filed an Article 78 proceeding on Torres' behalf.

In the Article 78, PLS argued that Torres and other prisoners have a constitutional and regulatory due process right to have a hearing officer make a reasoned decision based upon the evidence presented at a tier hearing, to know what the penalty is and the reasons such penalty was imposed, and, in turn, to serve a penalty no harsher or more severe than either that imposed by the hearing officer or that imposed as a result

of the tier hearing appeal process. Therefore, PLS argued, DOCS' determination to essentially convert Torres' KL confinement dispositions into SHU confinement, and to further require that he serve that penalty under the particularly restrictive conditions of Upstate, forced him to serve penalties more severe than those originally imposed by the hearing officers.

DOCS argued that it gave itself authority to impose the challenged policy by enacting 7 NYCRR §301.6, entitled "Keeplock Admission," which provides, in pertinent part:

> (a) An inmate in a medium or minimum security correctional facility or Upstate Correctional Facility may be housed in a special housing unit for reasons such as, but not limited to ... (2) for confinement pursuant to a disposition of a disciplinary (Tier II) or superintendent's (Tier III) hearing; ...

PLS argued, however, that 7 NYCRR §301.6 is unconstitutional, in that it violates Torres' constitutional and regulatory rights to a hearing disposition based upon the considered judgment of a hearing officer who had heard relevant evidence. PLS also asserted that Torres, like all prisoners, has a right to be free from arbitrary and capricious decisions in the context of prison disciplinary proceedings, and that DOCS determination to enact 7 NYCRR §301.6 and enforce it against Torres so as to require him to serve his KL dispositions in SHU in general, and at Upstate in particular, was arbitrary and capricious.

It was also noted in the Article 78 papers that DOCS' policy of forcing inmates in keeplock status to serve that keeplock disciplinary confinement in an SHU, and at Upstate, in particular, appears to be driven by cost considerations and the apparent desire to fill empty beds or cells at Upstate. PLS provided the court with a DOCS press release, in which Commissioner Goord stated that the security cost is only $5,213 per inmate per year at Upstate, compared to $20,000-$35,000 per year at other SHU facilities. The Commissioner had also indicated that there were some 200 empty beds at Upstate at the time.

PLS has filed a notice of appeal.

DOCS IMPLEMENTS NEW DRUG AND EXPLOSIVE SCREENING DEVISE WITH MIXED REVIEWS

In the fall, DOCS began using a new drug/contraband screening devise which is designed to detect the presence of drugs or explosive residue on visitors. The Ion Scanner, which is now being used in at least 15 prisons across the state, was put into use in an attempt to reduce the amount of illegal drugs or explosives that are smuggled into the prisons by visitors.

DOCS procedures require all visitors selected for ion scanning to submit to a scan; those who refuse to be scanned are prohibited from entering the facility. The officer operating the ion scanner takes the hand-held scanning device and passes it over at least three areas including, but not limited to, the individual's hands, shoes, areas of clothing such as pant pockets and the waistband area, personal items, handbags, and packages. An alarm alerts the ion scanner operator when the device detects even microscopic traces of certain basic chemicals.

The ion scanners work by detecting minute amounts of vapors given off by narcotics particles. Apparently, even though a person may test negative for drugs during a blood or urine test, the ion scanner can detect drugs if that person had contact with someone else using drugs, or if the person unknowingly was in

contact with drugs. DOCS has indicated that a positive test result "may occur in any case where a person has come into contact with an illicit substance, whether the person has used that substance or not."

Pursuant to a Freedom of Information Law (FOIL) request, PLS received two different notices that DOCS apparently posts to provide visitors with information regarding the ion scanner. One visitor notice reads: "The Ion Scanner is designed to detect particles/residue that exist if an individual is using or trafficking drugs or explosives." However, the other notice, which appears to be more accurate, discloses that the ion scanner can result in a positive test result, not because someone has used or been involved with trafficking drugs or explosives, but rather, simply because they have come into contact with such substances. It states: "Anyone testing positive for illegal substances which could result from usage, handling and/or contact, will be denied entry into this correctional facility."

If a positive reading results, a second scan is performed on the same area that elicited the positive result. If the second test is positive, then DOCS bars the visitor from visitation for two consecutive days. No further investigation is conducted into whether the individual actually possesses illegal drugs, even though the machine can only detect contact with traces of chemicals that may or may not have come from controlled substances. Visitors are not allowed the opportunity to receive a pat frisk or any other type of search after a positive test result. Neither is an opportunity for non-contact visits provided. If the visitor testing positive is a minor child, that child's parent, or other escort, is also denied visitation.

After a positive test result or a refusal to be scanned, DOCS takes a photograph of the visitor and copies the visitor's drivers' license or other identification card. These documents are attached to the positive ion scanner results and distributed to members of the ion scan team. The results, without the photographs, are also distributed to prison superintendents and the Inspector General.

The Ion Scanner has had both good and bad reviews. DOCS claims that the use of the ion scanner has dramatically reduced the number of inmates testing positive for illegal drugs at the prisons where the scanner is in use. Yet, DOCS' admits in their posted visitor notices, that the mere contact (even unknowing contact) with drugs or explosives could produce a positive result and deny a visitor entrance into a prison facility. Opponents of the ion scanner assert that it is so sensitive it detects the slightest trace of drugs or explosive residue, so even though a person may not have illegal drugs or explosives in their possession, if they have had any contact with an illegal drug or an explosive recently, they will test positive. Visitors have contacted the New York Civil Liberties Union (NYCLU) and PLS, claiming that they have been turned away from the prisons after long journeys to visit a relative because of an erroneous ion scanner reading. In turn, PLS and the NYCLU have contacted DOCS, alleging, that in some cases, the ion scanner has unfairly kept some prisoners' relatives from visiting their loved ones at the prison. They have asked DOCS to suspend the use of the ion scanner pending further investigation, arguing that denying a visit because of a microscopic trace of a drug's residue on clothing or property is not rationally related to preventing smuggling of drugs or explosives.

The NYCLU states that "[t]he problem with using ion scanners as the sole basis for excluding a prison visitor is not new. In fact, a 2001 U.S. Department of Justice Report cautioned on the use of the technology. Specifically, the report

noted that because the scanners cannot distinguish between two different substances composed of same size ions - even an innocuous substance can be identified as illegal contraband. These 'false positives' can be triggered by medicines, perfumes and even chlorine baby wipes." The NYCLU also notes that: "Unlike New York, the Florida Department of Correction uses ion scanners as a basis for further inquiry and not as the sole grounds for denying visitation. And in Massachusetts, the state corrections agency stopped using ion scanners to settle a lawsuit."

In response to complaints, DOCS admits that there were a number of complaints about the ion scanner program after it was initially implemented, but recently there have been no complaints from visitors and only one complaint from an inmate. DOCS has indicated that it believes that visitor awareness of the testing protocols coupled with refinement of the program has led to a decrease in attempts to introduce drugs during prison visits, a decrease in use of drugs before prison visits, and hence a decrease in complaints about the ion scanner program.

At the time of the writing of this article, ion scanners were being used at the following prison facilities: Auburn, Cayuga, Elmira, Five Points, Monterey, Southport, Willard, Beacon, Bedford Hills, Downstate, Fishkill, Green Haven, Taconic, and two separate facilities at Butler.

Note: The NYCLU is continuing to investigate complaints about administration of the ion scanner program. Letters detailing complaints should be sent to Dawn Yuster, Staff Attorney, either by email, dyuster@nyclu.org, fax (212-344-3318) or regular mail: New York Civil Liberties Union, 125 Broad St. 17th Floor, New York, NY 10004.

The **Osborne Association's Family Resource Center** in Brooklyn runs a statewide hotline for questions and concerns from prisoners' families and persons formerly incarcerated. All calls are confidential. 800-344-3314

Roadblocks to Reentry: A Report by the Legal Action Center

Recently, the Legal Action Center released a report summarizing their findings regarding obstacles that people with criminal records encounter when they are released from prison and attempt to reenter society. The report, based upon an exhaustive two-year study, covers reentry roadblocks regarding employment, housing, benefits, voting, access to criminal records, parenting, and driving. The report also grades each state on how its laws and policies affect those attempting to reenter society. Finally, the report outlines ways in which policymakers can help with reintegrating people with criminal records into society. The complete report can be found at their website, www.lac.org/roadblocks.html., or you can write to the Legal Action Center with specific requests for information. The address is: Legal Action Center, 153 Waverly Place, NY, NY 10014.

Federal Cases

Second Circuit Reinstates Prisoners' 1st Amendment "Free Exercise" of Religion Claims

Ford v. McGinnis, 352 F3d 582 (2d Cir. 2003) McEachin v. McGuinnis, 357 F3d 197 (2d Cir. 2004)

The Second Circuit has reversed two district court decisions involving the First Amendment as it relates to the rights of prisoners to freely exercise their religion. In Ford, the Second Circuit reversed the district court's decision to grant summary judgment to the defendants, finding that there were material questions of fact which precluded summary judgment. In McEachin, the prisoner sued, alleging violations of his 1st, 8th, and 14th Amendment rights. The lower court dismissed McEachin's complaint, finding that it failed to state a claim. The Second Circuit reversed the portion of the district court's decision which dismissed McEachin's 1st Amendment claims, finding that he alleged sufficient facts to state a cause of action.

In Ford, plaintiff Wayne Ford, a Muslim inmate, sued DOCS officials, alleging infringement of his religious rights because they refused to serve Ford the Muslim holiday feast of Eid-ul-Fitr. The district court granted defendants' motion for summary judgment mainly on the ground that the meal, which was eventually served to other Muslims over a week after the period prescribed by Muslim law and tradition, "had lost all objective religious significance due to its postponement and, therefore, did not warrant free exercise protection."

According to the Muslim religion, there are two major religious observances in Islam, the Eid ul Adha and the Eid ul Fitr. The Eid ul Fitr is the time when the Muslims celebrate the completion of the holy month of Ramadan. During the month of Ramadan, Muslim inmates fast from sun up to sun down. The sighting of a new moon signals the end of Ramadan, and Muslim law and tradition require that within three days of the sighting, the Eid ul Fitr Feast be served. "Celebration of the Eid ul Fitr typically begins with a sweet breakfast, followed by prayer and later the Eid ul Fitr Feast." At Downstate C.F., on January 6, 2000, the new moon was sighted, Ramadan was called to an end, and Eid ul Fitr was celebrated the next day. The traditional sweet breakfast was served and congregate prayer was permitted, but the actual feast was not held on that day but postponed until January 15. The Downstate Imam authorized the postponement because the feast day had fallen on a weekday, and in order to accommodate the families who wished to participate in the feast, the feast day was moved to the weekend.

Ford, the plaintiff, arrived at Downstate on January 7, 2000, and learned that the feast had been postponed. Ford was in SHU at Downstate but, nevertheless, contacted the Imam on January 10, and, although most of the Eid ul Fitr celebration had already been observed, Ford requested that his name be placed on the list for the Eid ul Fitr feast to be held on January 15, 2000. The Ministerial Program Coordinator for Islamic Affairs had, only months earlier, issued a memorandum indicating that all SHU inmates should "receive their evening meals in time for properly breaking the fast. They should also be able to receive the Id meals," referring to the two special meals, the Eid ul Fitr and the Eid ul Adha. However, Ford was advised that SHU prisoners were not allowed to receive the Eid ul Fitr feast. Although Ford grieved the issue, he was never served the Eid ul Fitr for Ramadan that season.

Ford sued, claiming that "the refusal to serve him the Eid ul Fitr feast denied him rights guaranteed under the Free Exercise Clause of the First Amendment." The district court, in granting summary judgment to defendants, relied on the fact that, although DOCS Directive 4202 sets forth DOCS obligation to accommodate a prisoner's religious practices, the postponed

feast was not held pursuant to Directive 4202 but was held pursuant to Directive 4022, which governs "Family Day Events." Since there is no religious significance to "Family Day Events" and since none of the Muslim clerics required Muslim inmates to attend this DOCS sponsored "Family Day Event," the court held the defendant's "'did not violate Ford's First Amendment rights when they refused to provide him with the January 15 Family Day Event meal.'" (citation omitted) The district court also relied on the testimony of three DOCS religious authorities, one of whom testified that the religious urgency of the feast was within the three-day window after the sighting of the new moon, and beyond that, the feast became a family event. Another religious official testified that "'[o]nce you move it, it's no longer a religious day,'" and another testified that attendance at the feast was not mandated by Muslim law.

The district court concluded that, despite the fact that "'Ford sincerely believes that celebration of the Eid ul Fitr–including the Eid ul Fitr prayer and the Eid ul Fitr feast–is critical to his observance as a practicing Muslim,'" the defendants did not violate Ford's First Amendment rights. The court held that summary judgment was also appropriate because the denial of the one meal was "a constitutionally de minimis burden on Ford's free exercise of religion" and that, regardless, "defendants were entitled to qualified immunity" because they relied on DOCS religious authorities, and it was "objectively reasonable for them to believe that their refusal to provide Ford the Eid ul Fitr feast did not violate his constitutional rights."

The Second Circuit reversed. It considered three factors in analyzing Ford's Free Exercise claim: 1)whether the beliefs asserted were religious and sincerely held; 2)whether the challenged practice of the prison officials infringed upon those religious beliefs; and 3) whether the challenged practice of the prison officials furthered some legitimate penological interest.

Sincerity of Religious Belief

The Court first focused on the district court's error in applying an "objective reasonableness" test to Ford's religious beliefs. The district court initially found that Ford's religious beliefs were sincerely held; however, the district court "nevertheless held that Ford's 'individualized subjective' beliefs [were] not entitled to First Amendment protection in light of the testimony of the DOCS religious authorities that Ford's belief did not comport with 'Islam's actual requirements.'" The Second Circuit stated: "By looking behind Ford's sincerely held belief, the district court impermissibly confronted what is, in essence, the 'ecclesiastical question' of whether, under Islam, the postponed meal retained religious meaning." Finding that "the opinions of the DOCS religious authorities cannot trump the plaintiff's sincere and religious belief," the Court held that "[f]or purposes of summary judgment, we must accept the district court's finding that Ford 'sincerely believes that celebration of the Eid ul Fitr–including the Eid ul Fitr prayer and the Eid ul Fitr feast–[were] critical to his observances as a practicing Muslim.'"

Substantial Burden

With respect to the second factor, whether the challenged practice of the prison officials infringed upon Ford's religious beliefs, the defendants argued on appeal that even if Ford's religious beliefs were found to be sincerely held, Ford's claim should still fail since the denial of one meal was not a "substantial burden" on his First Amendment rights. The Court held: "Insofar as the district court implied that in order

for a burden to be substantial the burdened practice must be mandated by an adherent's religion we disagree. Whether a particular practice is religiously mandated is surely relevant to resolving whether a particular burden is substantial ... Neither the Supreme Court nor we, however, have ever held that a burdened practice must be mandated in order to sustain a prisoner's free exercise claim. Nor do we believe that substantial burden can or should be so narrowly defined." The Court elaborated: "To confine the protection of the First Amendment to only those religious practices that are mandatory would necessarily lead us down the unnavigable road of attempting to resolve intra-faith disputes over religious law and doctrine." Ford claimed that he believed that the celebration of the Eid ul Fitr feast was "'critical to his observance as a practicing Muslim.'" Although DOCS officials testified that, under Muslim law, "the feast is not religious once it is postponed," the Court held that such testimony was not determinative because, "[r]egardless of some religious authorities' interpretation of Muslim law on the issue ... the mere postponement of the feast" does not render "Ford's insistence that the feast [was] critical to his religious beliefs 'so bizarre ... as not to be entitled to protection under the Free Exercise Clause.'" Thus, the Court concluded the issue of whether Ford's beliefs were "substantially burdened" was a material question of fact which precluded summary judgment.

Legitimate Penological Goals

On appeal, the defendants raised, for the first time, the argument that their conduct was reasonably related to some legitimate penological goal and thus, the fact that they may have violated Ford's free exercise rights would not amount to a constitutional violation. However, the Court found that although the defendants set forth various rationales for denying Ford the meal, since none of those arguments were made to the district court, "the record [was] insufficient to resolve this fact- and context- specific dispute." The Court determined, "[i]n order to facilitate the necessary findings of fact and to give Ford an adequate opportunity to prove that the proffered interests lack a rational relationship to the defendants' conduct, the proper course [was] to remand."

Qualified Immunity

Finally, the Court addressed the issue of qualified immunity. "Summary judgment for defendants on grounds of qualified immunity is ... appropriate 'only if the court finds that the asserted rights were not clearly established or if the evidence is such that, even when it is viewed in the light most favorable to the plaintiff [ ] and with all permissible inferences drawn in [his] favor, no rational jury could fail to conclude that it was objectively reasonable for the defendants to believe that they were acting in a fashion that did not violate a clearly established right.'" (citations omitted)

Both the district court and the Second Circuit agreed that the right at issue was clearly established. The Court quickly dismissed defendants argument that the specific right at issue, the right for an inmate to be provided with an Eid ul Fitr meal, has never been addressed by the Court. "Defendants are correct that we have never had occasion to recognize a prisoner's right to the Eid ul Fitr feast in particular, but courts need not have ruled in favor of a prisoner under precisely the same factual circumstance in order for the right to be clearly established," the Court held. Prior decisions of the Court have clearly established that inmates have a right to diets consistent with their religious beliefs, and this case law makes it "sufficiently clear that absent a legitimate penological justification. . .

prison officials' conduct in denying Ford a feast imbued with religious import was unlawful." The Court, however, parted ways with the district court in its holding that it was reasonable for the defendants to believe that they were not violating Ford's constitutional rights. "Despite the fact that all the religious authorities testified to their belief that the postponed Ed ul Fitr was without religious significance, the proper inquiry was always whether Ford's belief was sincerely held and '*in his own scheme of things*, religious.'" The Court did not totally discount the value to correctional personnel of religious authorities' opinions, but cautioned that "the religious authorities' opinions that a particular practice is not religiously mandated under Muslim law, without more, cannot render defendants' conduct reasonable."

In McEachin, Mr. McEachin, a Muslim prisoner, claimed that prison officials violated his First Amendment right to free exercise of his religion when they punished him for refusing to respond while praying after breaking his Ramadan fast. McEachin also claimed that the punishment, placement on the restricted "loaf" diet, violated his religious beliefs because he was unable to break his Ramadan fast each day with properly blessed food. The district court dismissed McEachin's claim, holding that the complaint failed to state a cause of action because such action by prison officials was a "de minimis burden on his religion, rather than a burden of constitutional magnitude." The Second Circuit panel disagreed.

Judge Calabresi, writing for the court, stated: "First, McEachin asserts that the seven-day restrictive diet imposed upon him as discipline by the defendants impinged upon his observance of Ramadan by depriving him of properly blessed food with which to break his fast. In addition, McEachin alleges that this discipline was itself a product of religious discrimination by a corrections officer who intentionally ordered McEachin to return his tray and cup during McEachin's prayer, knowing that the plaintiff's beliefs would not permit him to respond to the command before he had finished making salat. If these allegations are true, an unconstitutional burden may have been placed on McEachin's free exercise rights." [Salat refers to the five times each day Muslims are obligated to pray.]

The Court found that McEachin's complaint sufficiently alleged that the prison officials had "significantly interfered" with his religious beliefs, although the Court did not go so far as to decide the issue of whether, on remand, McEachin would be required to show a "substantial" burden on his religious beliefs in order to state a constitutional claim. "Our cases and those of other circuits suggest that the First Amendment protects inmates' free exercise rights even when the infringement results from the imposition of legitimate disciplinary measures," Judge Calabresi wrote.

Practice Note: When a court awards summary judgment to a party it means that the court has determined that the moving party is entitled to judgment as a matter of law. In reviewing any district court's grant of summary judgment, the Court of Appeals must review the entire record, must draw all factual inferences in favor of the non-moving party, and must determine whether there are any genuine issues of material fact which would preclude the granting of summary judgment to the moving party. When a court dismisses an action either sua sponte (on its own) or pursuant to a motion made by the opposing party, it means that the court has decided that either the plaintiff has not complied with certain procedural requirements or that the complaint does not state a claim. When the Second Circuit reviewed the facts of the cases set forth above, it found that in Ford, numerous questions of fact existed which precluded awarding summary judgment to defendants, and that in McEachin, the plaintiff had set forth enough facts to support an allegation that his First Amendment rights were violated.

The Second Circuit Finds Hearsay Accusation From the Victim of An Assault, Without More, is Not "Some Evidence"

Luna v. Pico, 356 F.3d 481 (2d Cir. 2004)

Federal courts require that a prison disciplinary hearing be supported only by "some evidence." The "some evidence" standard is lower than that of the New York State courts, which requires that a disciplinary hearing be supported by "substantial evidence," and far lower than the evidentiary standard that prevails in a criminal case, proof "beyond a reasonable doubt." Indeed, the Supreme Court has held that the "some evidence" standard will be met if there is "*any evidence*" in the record which could support the conclusion of the hearing officer. Superintendent v. Hill, 472 U.S. 445 (1985).

The Second Circuit Court of Appeals has recently modified that standard, in a way favorable to inmates. It is not enough to affirm a disciplinary hearing that there be "some evidence" in the record to support the hearing officer's findings, the Court recently held; rather, there must be some *reliable* evidence. The mere accusation of the victim of an assault, who refuses to testify at a hearing, without more, is not sufficiently reliable to constitute "some evidence."

The facts of the case were these: In 1997, two inmates were involved in a fight at Fishkill Correctional Facility. A third, inmate Lopez, tried to separate them and was stabbed in the process. No corrections officer witnessed Lopez being stabbed. The next day inmate Luna was served with a misbehavior report which stated that Lopez had accused him of the stabbing. The report was written by officer Tucker.

A disciplinary hearing was held. At the hearing, a letter from inmate Lopez, accusing Luna of stabbing him, was introduced as evidence. Lopez himself, however, refused to testify, and there was no other evidence implicating Luna in the assault. The hearing officer, Officer Pico, found Luna guilty and sentenced him to two years of SHU and recommended that he lose two years of good time.

Luna appealed the disposition and DOCS reversed, finding that the evidence presented failed to support the charges, and noting that the hearing officer had failed to interview the author of the misbehavior report.

A second hearing was held. Lopez again refused to testify, but his letter was introduced as evidence. Tucker, the author of the misbehavior report, testified that an officer named Fisher had spoken with Lopez and had obtained Lopez's letter. Tucker testified that he himself had never personally spoken with Lopez and had "no idea" whether Lopez was telling the truth. Officer Fisher was not called to testify. Luna was again found guilty and this time sentenced to 18 months in SHU and 18 months recommended loss of good time.

Luna again appealed and DOCS again reversed. DOCS concluded that, since the misbehavior report was not based on first-hand observation from staff, further testimony from the staff who conducted the investigation was required. Luna was released from Southport SHU into general population in June 1998.

Luna then sued the hearing officers in federal court, arguing that they had convicted him without sufficient evidence to support the convictions, in violation of his right to due process of law. He sought damages for the time he had been confined in SHU.

The issue before the Court was whether there was sufficient evidence in the record to support the hearing officer's findings under the "some evidence" standard. The Court found that there was not. Although the Supreme Court had held in Hill that the "some evidence" standard is met when there is "any" evidence that "could"

support the hearing officer's conclusions, the Second Circuit concluded that the phrase "any evidence" should not be construed literally. Rather, the court found, reviewing its precedents, "we have looked to see whether there was 'reliable evidence' of the inmate's guilt." Applying that standard here, the Court found the evidence unreliable. It consisted of a "bare accusation by a victim who then refused to confirm his initial allegations."

> Although Lopez clearly had been stabbed, no apparent effort was made to verify the charge that Luna was the one who stabbed him, nor was any apparent effort even made to evaluate Lopez's credibility ... Nor does the record show that [the hearing officers] were presented with any evidence that Turner or Fisher or any other corrections official made any efforts to evaluate the truthfulness of Lopez's allegations.

The Court did not, however, go so far as to say that a victim must testify in a prison disciplinary proceeding before an accused inmate can be found guilty of assault. On the contrary, the Court noted that "[t]he reluctance of a victim to testify against his alleged assailant cannot be allowed to interfere with an institution's effort to maintain order and security." Nevertheless, the Court continued,

> prison officials would not be unduly burdened by the requirement that they engage in some examination of factors that may bear on a victim's credibility, just as they are required to independently assess information provided by a confidential informant.

Since that did not happen in this case, the Court concluded, Luna's right to due process had been violated. Nevertheless, the Court declined to grant damages, holding that the hearing officers were entitled to qualified immunity because they could not have known, prior to the Court's decision, that their actions had violated Luna's rights.

Second Circuit Takes Small Steps on PLRA

Richardson v. Goord, 347 F.3d 431 (2d Cir. 2003)
Mojias v. Johnson, 351 F.3d 606 (2d Cir. 2003)
DeLeon v. Doe, 361 F.3d 93 (2d Cir. 2004)
Ziemba v. Wezner et al., 2004 WL 870476 (2d Cir. April 23, 2004)

The Prison Litigation Reform Act, passed in 1995, has become, without doubt, the greatest single barrier to inmates trying to get their cases heard in Federal Court. The greatest barrier is the so-called "exhaustion requirement." This section of the PLRA requires inmates to exhaust "available" administrative remedies before they may bring a lawsuit in federal court concerning prison conditions. *See* 42 U.S.C. § 1997e(a). Questions abound about the requirement: What is an "available" administrative remedy? Must an inmate make use of the formal grievance procedure made available by DOCS, or are less formal means of putting a complaint before prison officials also acceptable, for exhaustion purposes? And if the former, who decides whether the grievance procedures have been properly carried out? DOCS or the courts? These and other questions concerning the exhaustion requirement have plagued inmates and the courts for several years now, with various district court judges offering a range of different answers, depending on the circumstances of each case. The Second Circuit Court of Appeals has not yet given a definitive answer to many of these questions.

Last Spring the Second Circuit consolidated five cases raising various exhaustion issues and asked Prisoners' Legal Services, the Prisoners' Rights Project of the Legal Aid Society, and a private firm to represent the inmates. The implication was that the Court would attempt to settle some of the many outstanding questions regarding exhaustion under the PLRA. Briefing of the cases was completed in the fall and oral argument occurred in May 2004. Hopefully there will be a decision resolving some of these exhaustion issues before the end of the summer.

In the meantime, however, the Court has addressed several less significant questions about the PLRA which had previously been undecided in this Circuit. We address those questions below.

In Richardson v. Goord, the Court held that the exhaustion requirement was not jurisdictional. This is important for several reasons. "Jurisdiction" refers to the ability of a court to hear a case. The jurisdiction of courts is usually established by statutes. Some courts are limited in jurisdiction to particular territories, others are limited in jurisdiction to particular types of claims. Federal Court jurisdiction, for example, is limited, in part, to suits that raise claims that arise under the laws or Constitution of the United States. If the exhaustion requirement were jurisdictional, it would mean that federal courts could not entertain a lawsuit absent initial proof of exhaustion. However, Richardson now establishes that exhaustion is not jurisdictional, which means that the courts may consider a number of defenses to non-exhaustion, including, for example, that various acts of the prison officials prevented the inmate from exhausting administrative remedies, or that the defendants failed to raise exhaustion as an "affirmative defense" in their complaint.

In Mojias v. Johnson, the court reiterated a point that it had made in a previous case: before dismissing a prisoner's case for failure to exhaust administrative remedies, a district court must first determine, from a "legally sufficient source," whether an administrative remedy was actually "available." The plaintiff in Mojias was a New York City inmate who alleged that excessive force was used against him by guards. On the form provided to him by the court to submit with his lawsuit, Mojias wrote "Yes" next to a question asking him whether his institution had a grievance procedure. He then wrote "No" next to another question asking whether he had presented the facts of his complaints "in the state prisoner grievance procedure." The district court dismissed his complaint without giving him notice or an opportunity to be heard, holding that the complaint "on its face states that there are administrative remedies that the plaintiff failed to exhaust."

On appeal, Mojias pointed out that he was a New York City inmate, and the question on the form had asked him if he had made a complaint in the *state* prisoner's grievance procedure. Moreover, he pointed out, *city* regulations specifically list excessive force as one type of complaint that is "non-grievable." Thus, his answers on the form were correct. Had the district court given him notice and an opportunity to respond, he would have demonstrated that there was no "available" grievance procedure for his type of complaint in New York City system.

The Second Circuit agreed, and repeated its admonishment to the district courts that they must determine whether an administrative remedy was available from a *legally sufficient source*, such as the institution's directives or regulations. The Court held that *a pro se* complaint form like the one filled out by Mojias is not a "legally sufficient source." The court also held that, unless it is "unmistakably clear" that a district court lacks jurisdiction or that the complaint lacks merit or is otherwise defective,

it is "bad practice" for the court to dismiss a complaint without affording the plaintiff an opportunity to be heard in opposition.

In DeLeon v. Carpenter, the court addressed another aspect of the PLRA, the so-called "three-strikes" rule. The "three-strikes" rule refers to a provision of the PLRA which provides that, if a prisoner has "on three or more prior occasions ... brought a federal action ... that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim," he may not bring any future federal action *in forma pauperis,* that is, as a poor person. In other words, he would have to pay the full filing fee for his action up front. (See 28 U.S.C. § 1915(g)) The question before the court in DeLeon was, who decides whether an action is frivolous or malicious or fails to state a claim? In Deleon, the inmate had brought a claim arguing that prison officials had deliberately delayed mailing various submissions in an ongoing federal action, causing him to miss a court deadline, and that they had sent to the wrong city a birthday card he had written to relatives. The district court dismissed his claim as frivolous and also entered a "strike" against him under the "three strikes" rule.

The Second Circuit agreed with the district court that the inmate's claim was frivolous, but disagreed that the court had the right to impose a "strike." The Court pointed out that the designation of a strike has no practical consequence until some future defendant, in a suit brought by the inmate, argues that the prisoner's suit may not be maintained *in forma pauperis* because he has accumulated three or more prior strikes. It should be at that time, the Second Circuit held, that the court hearing the new suit should review the prior cases to determine whether the prisoner should be charged with strikes. District courts should not issue strikes "one-by-one" as they dispose of suits that may ultimately – upon a determination at an appropriate time – qualify as strikes.

Finally, in Ziemba v. Wezner, et. al., the court addressed the issue of whether "estoppel" may be asserted as a defense to the exhaustion requirement of the PLRA. The plaintiff, Ziemba, alleged that the state of Connecticut failed to protect him and as a result he was stabbed by another inmate. After being stabbed, he was allegedly denied medical care, threatened by prison officials, intimidated with police dogs, beaten, sprayed with pepper spray, placed in four-point restraints, and again denied medical care. After he filed his complaint, the State made a motion to dismiss, claiming that Ziemba had failed to exhaust his administrative remedies. Ziemba responded by claiming that the State should be precluded from raising the exhaustion defense because the State had prevented Ziemba from exhausting by "beating him, threatening him, denying him grievance forms and writing implements, and transferring him to another prison." The lower court granted the state's motion and dismissed Ziemba's complaint. Ziemba appealed.

Prior to Ziemba, the Second Circuit had not had the opportunity to address the issue of whether estoppel should be a permissible affirmative defense to exhaustion. The court looked to the Fifth Circuit decision in Wright v. Hollingsworth, 260 F. 3d 357 (5th Cir. 2001) for guidance. In Wright, the Fifth Circuit held that the PLRA exhaustion requirement "may be subject to certain defenses such as [] estoppel." In his appeal, Ziemba claimed that his inability to exhaust his administrative remedies "was a direct result of the defendants' actions." The Second Circuit found such a claim amounted to a claim of estoppel and that "[a]s a matter of first impression in this circuit we hereby adopt the holding of Wright [] and hold that the affirmative defense of exhaustion is subject to estoppel."(citation omitted) The Court ordered

that the case be sent back to the district court, where it "must allow factual development and address the estoppel claim at the summary judgment stage."

Interestingly, Ziemba also argued that, in the alternative, he did exhaust because his family made numerous complaints to the FBI and there was a subsequent FBI investigation. The Court refused to decide this issue, but noted that "we have recently appointed counsel in a group of cases to test the limits of unconventional exhaustion, which, when decided, may prove relevant to the district court's analysis of exhaustion on remand." The Court was referring to the five cases referenced above which will be argued in May 2004.

While each of these cases represents a small step, they are at least steps in the right direction: they suggest that the Second Circuit Court of Appeals is paying close attention to various provisions of the PLRA and is willing to prevent some of its harsher implications.

State Cases

Disciplinary

Contraband: Photographs, Approved at One Facility, Found to Constitute Gang-Related Material at Another

Matter of DeLos Santos v. Goord, 772 N.Y.S.2d 615 (3d Dep't 2004)

Petitioner Jose DeLos Santos was found guilty in a Tier III hearing of possessing unauthorized gang-related material. The misbehavior report stated that, while processing DeLos Santos' property upon his transfer from another facility, prison officials confiscated various photographs from his photo album containing gang-related hand gestures and statements written on the back. The court found that the photographs, in combination with the testimony of a sergeant trained in such matters who identified the signs and statements as gang-related, provided substantial evidence of the petitioner's guilt. DeLos Santos argued that the material could not constitute contraband because the photos had either been taken by prison officials at his prior facility or had been passed through the facility's mailroom before being given to him. The court rejected this argument, stating simply, "such gang-related material is clearly prohibited by the prison disciplinary rule."

Drug Testing: No Right to Submit Results of Polygraph or DNA tests in Disciplinary Hearing

Matter of Jackson v. Smith, 775 N.Y.S.2d 611 (3d Dep't 2004)

Petitioner, Jackson, an inmate, was charged with and found guilty of using controlled substances after his urine sample tested positive. After an unsuccessful administrative challenge, Jackson filed an Article 78 alleging, among other things, that DOCS erred in failing to allow him to submit the results of outside tests that apparently might have proved his innocence. The court found that "[t]here is no provision in the law or in the pertinent regulations giving an inmate the right to submit the results of polygraph tests or outside DNA laboratory tests in a prison disciplinary hearing." Jackson also objected to being denied the opportunity to submit testimony by his wife and an outside DNA specialist that related to this testing. The court found that "[t]o the extent that the proposed testimony of petitioner's wife and the DNA specialist related to this evidence, such testimony was irrelevant and properly excluded."

Grooming Standards: Inmate Allowed to Wear Braids Below Hairline

Matter of Uhura Allah v. Goord, Index No. 3150-03 (Sup. Ct. Alb. Co., November 7, 2003) (Lamont, J.)

Petitioner, an inmate, who wears his hair in braids, was charged with violating a direct order based upon his refusal to remove his braids. That charged was dismissed. Two months later, he was charged again, based upon his refusal to remove his braids when ordered to do so. That charge resulted in a guilty finding. Petitioner filed a grievance regarding DOCS' interpretation of Directive 4914, Inmate Grooming Standards. The grievance was ultimately denied. Petitioner sued, requesting that his disciplinary disposition be vacated and annulled, and challenging the decision of the Central Office Review Committee (CORC) on his grievance.

Directive 4919 sets forth basic hair grooming standards and states, in pertinent part, that "[h]air may be permitted to grow over the ears to any length desired by the inmate. The cornrow style is allowed." Petitioner claimed that Directive 4914 does not explicitly prohibit cornrows braided below the hairline. His argument was supported to some degree by the fact that, at his first disciplinary hearing, the hearing officer, in dismissing the charges, found: "The reason for this disposition is that from Directive 4914 and a Franklin Correctional Facility CORC decision, it is not clear that inmate Allah's two braids are in any violation whatsoever. Until this issue is resolved, I cannot find inmate Allah guilty of not taking what may be a legitimate hairstyle apart."

The Inmate Grievance Resolution Committee (IGRC) was unable to come to a unanimous decision on petitioner's grievance; the staff members found that the grievance should be denied because "Directive 4919 makes no provisions for inmates to wear braided hair except for corn rows," and stated that inmates must possess a "valid court order" to wear their hair in braids. The inmate representative members of the IGRC came to a different conclusion. They found that "[g]rievant's hair is neat and in a cornrow style but there appears to be a discrepancy regarding whether African Americans can wear their hair in the cornrow style when their hair exceeds the hairline." The Superintendent accepted the staff recommendation and the Central Office Review Committee (CORC) agreed with the Superintendent, finding that braids are not listed as an allowable hairstyle in Directive #4914 ..."

The court found for petitioner. The court noted: "The right to wear one's hair at any length or in any distinctive manner has been recognized as a right of personal freedom protected by the United States Constitution, however, such right may be limited by reasonable regulations created by prison authorities." The court then looked to the dictionary definition for "cornrow" and found the following: "cornrow: To style (hair) by dividing into sections and braiding close to the scalp in rows." The court granted the petition,holding that: "Directive 4914 does not explicitly and specifically prohibit cornrows below the hairline (and can be reasonably and rationally interpreted to implicitly allow such a hairstyle." The court found that to hold otherwise "would mean that inmates who wear their hair in the cornrow style and who permit their hair 'to grow over their ear to any length desired' are required to have their cornrow braids end at their hairline and transition into natural unbraided hair."

Inadequate Employee Assistance and Denial of Witness: Claims Dismissed

Matter of Claudio v. Selsky, 772 N.Y.S.2d 424 (3d Dep't 2004)

Petitioner Claudio was found guilty of refusing to obey a direct order, based on charges that he refused an order to keep his hands in his pockets while being escorted from his cell. The evidence consisted of the misbehavior report and the testimony of two corrections officers who witnessed the incident. Claudio filed an Article 78 proceeding, arguing that he had been denied adequate employee assistance and improperly denied the right to present several witnesses. The court rejected both arguments.

With respect to Claudio's claim that he was denied adequate employee assistance, the court found that he was freely provided access to all relevant witnesses and documents to which he was entitled and he failed to show any prejudice that resulted because of the alleged inadequate assistance. His attempts to present a defense that he was assaulted by the officers was, the court found, irrelevant to the question of whether he had obeyed lawful orders.

Nor, according to the court, was he improperly denied witnesses. Although some witnesses refused to testify, the court was unpersuaded by Claudio's claim that the hearing officer should have personally authenticated the reasons given by the inmates who refused. Each signed a witness refusal form which, the court found, adequately explained their absence.

Insufficiency of Misbehavior Report

Matter of Sabater v. Selsky, 772 N.Y.S.2d 733 (3d Dep't 2004)

Petitioner Sabeter was found guilty of unauthorized use of a controlled substance after his urine twice tested positive for cannabinoids. In his Article 78 proceeding, he argued that the misbehavior report was deficient because the reporting officer failed to write the word "cannabinoids" when indicating the results of the second test. The court noted that the misbehavior report stated that the first test was positive for cannabinoids and the second test "also proved positive." Furthermore, the testing result forms, which were served on petitioner at the same time as the misbehavior report, specifically stated that both tests had been positive for cannabinoids. Thus "inasmuch as the results of the second ... test could be gleaned from the misbehavior report and attached forms," its omission from the report itself did "not require annulment of the determination, particularly where . . . petitioner failed to demonstrate any prejudice therefrom."

Off-The-Record Conversation: Not Error When Sole Purpose Was to Determine if Testimony Would be Relevant

Matter of Gilchrist v. Poole, 771 N.Y.S.2d 451 (4th Dep't 2004)

Title 7 NYCRR §254.5(b) provides that, in a Tier III hearing, "any witness shall be allowed to testify at the hearing in the presence of the inmate unless the hearing officer determines that so doing will jeopardize institutional safety or correctional goals."

In this case, the hearing officer held an off-the-record conversation with one of the petitioner's prospective witnesses to determine whether he had any relevant testimony. After being found guilty, the petitioner challenged the hearing, arguing that the hearing officer's conversation with his witness had violated §254.5(b) and his right to have the witness testify in his presence. A lower court agreed with the petitioner and the state appealed.

The Appellate Division reversed. The court found that §254.5(b) only concerns witnesses who are called to testify at a hearing. Here, the court found, "the Hearing Officer was merely making a preliminary determination whether the testimony of the prospective witness was relevant." So long as the record adequately demonstrates that the witness did not have relevant testimony, there was no need for the hearing officer to make that determination in the inmate's presence.

Off-The-Record Conversation: Error When Hearing Officer Speaks With Drug Testing Company's Technical Expert

Matter of Lopez v. Selsky, 772 N.Y.S.2d 884 (3d Dep't 2004)

In this case, the petitioner challenged a disciplinary hearing in which he had been found guilty, after a urine test, of using a controlled substance. He claimed in his defense that the test-result was a false positive due to his use of prescription and over-the-counter medications, and he submitted documentary evidence in support of his claim. The hearing officer called a technical expert from the company that made the urine testing kit and, after speaking with the expert, rejected petitioner's claim and found him guilty. The court reversed and ordered a new hearing, for two reasons.

First, the court found, the hearing officer had prevented the court from reviewing the petitioner's documentary evidence by failing to preserve it as part of the record. Moreover, the hearing officer's conversation with the technical expert was not recorded, and the petitioner was excluded from the room during the conversation in violation both of 7 NYCRR §254.5(b) and the petitioner's due process rights. "Because the determination was clearly based in part on this off-the-record information," wrote the court, " a new hearing is required."

Res Judicata: Prohibits New Disciplinary Charges When Original Charges Are Dismissed

Matter of Hernandez v. Selsky, 773 N.Y.S.2d 178 (3d Dep't 2004)

Res Judicata is a Latin phrase which means "the matter has already been decided." In the law, it is a legal doctrine which prohibits a party from litigating the same issue over and over again. In this case, the court held that DOCS was prohibited by *res judicata* from bringing a second set of disciplinary charges against an inmate over an incident for which the inmate had been found "not guilty" in an earlier hearing.

Following an incident at Sullivan Correctional Facility in November of 2000, petitioner Hernandez was charged with assaulting an inmate and possession of a weapon. Evidence at the hearing included a statement from the victim of the assault, saying that Hernandez was not the assailant. Hernandez was found not guilty and the charges were reversed. Approximately one year later, prison personnel intercepted a letter from the victim which they interpreted as implicating Hernandez in the assault. They then filed a second misbehavior report against him, charging him with the same rule violations for which he had previously been found not guilty. At the new hearing, the victim again denied that Hernandez was the assailant and stated that DOCS was mis-interpreting his letter. Hernandez was found guilty nonetheless. He then challenged the hearing on the ground that it violated the principle of *res judicata*.

In court, DOCS argued that the second hearing was permissible under an exception to the *res judicata* rule, which allows for new

hearings when there is newly discovered evidence. The Court disagreed. The exception to the doctrine should be narrowly construed, held the Court, and should apply only where the new evidence is of such "important, material" sort that a departure from the general application of *res judicata* is justified. In this case, the victim's letter was ambiguous and the victim offered an explanation of the letter that was consistent with his statements at both hearings that Hernandez did not assault him. While the letter may have provided some evidence impeaching the victim's credibility or may have been otherwise relevant to the charges against Hernandez, it was not the sort of "important, material" new evidence to justify overriding the principle of *res judicata*.

Substantial Evidence: Reasonable Inference of Possession When Contraband is Found In Area Within Inmate's Control

Matter of Alston v. Goord, 771 N.Y.S.2d 919 (3d Dep't 2004)

In our last issue, we reported the case of Matter of Price v. Phillips, 770 N.Y.S.2d 882 (2d Dep't 2003), where the court found that there was insufficient evidence to connect the petitioner to contraband found in a pill case adjacent to the petitioner's cell because, although accessible to the petitioner, the pill case was also accessible to other inmates. (See *Pro Se* Vol. 14, No. 1, p. 15). In Alston, the Court came to a different conclusion. Petitioner Alston was charged with possession of a weapon, contraband, and unauthorized exchange of property. The contraband was found inside of petitioner's cell, inside a locker. The Court found that "[a]lthough other inmates had access to petitioner's locker, a reasonable inference of possession arises when contraband is found in an area within an inmate's control" and Alston's "assertion that the weapon could have been planted by another inmate" merely raised a question of credibility properly determined by the hearing officer.

Substantial Evidence: Absent More, Hearsay Allegations Are Not Substantial Evidence

Matter of Luna v. Department of Correctional Services, 772 N.Y.S.2d 417 (3d Dep't 2004)

"Hearsay" is a legal term which refers to statements made outside of a hearing or trial which are repeated by someone else at the hearing. For example, if a correction officer testifies at a hearing that Inmate X told him that Inmate Y assaulted him, but X refuses to appear at Y's disciplinary hearing, the correction officer's statement is considered hearsay. Hearsay is considered less reliable than actual testimony, largely because the "hearsay declarant" - the person who's statement is being reported - is unavailable to be cross-examined or confronted about the statement. Nevertheless, it is well-settled that hearsay is admissible in a prison disciplinary proceeding, provided that the record contains some basis upon which the hearing officer can determine that the statement is credible and reliable. In some cases, this may mean that the hearsay is corroborated by other direct evidence. In other cases, it may be enough if the hearsay is sufficiently "detailed and specific" that it is unlikely to be false. Whatever the case, the record must contain *some* basis upon which the hearing officer could reasonably rely on the hearsay statement.

In this case, petitioner Luna was charged with having assaulted another inmate. The misbehavior report was based upon a correction officer's interview with the victim of the assault, during which, according to the correction officer, the victim identified Luna as his assailant. At the hearing, however, the victim refused to testify; an earlier memorandum stated

that he didn't know who had assaulted him. Luna was nevertheless found guilty, based solely on the hearsay allegation in the misbehavior report.

The court reversed the hearing. In general, the court acknowledged, "a hearsay misbehavior report can constitute substantial evidence ... so long as the evidence has sufficient relevance and probative value," and, moreover, "the author of a misbehavior report need not personally witness the misbehavior, provided he or she has investigated the incident and ascertained the facts ..." In this case, however, neither the correction officer who authored the report, nor the victim, testified at Luna's hearing. Thus, the court was "left with a three-sentence misbehavior report reciting nothing more than [the victim's] accusation that [Luna] struck him – an assertion contradicted by other documentary evidence in the record and entirely unsupported by any testimonial evidence." Under such circumstances, the court concluded, the misbehavior report "does not constitute substantial evidence of petitioner's guilt." Accordingly, the hearing was reversed.

Waiver: Failure to Object Results in Inmate's Waiver of Procedural Errors

Matter of Blackwell v. Goord, 772 N.Y.S.2d 761 (3d Dep't 2004)

Petitioner Blackwell challenged the disposition of two disciplinary determinations alleging various procedural errors. With respect to the first hearing, petitioner Blackwell claimed that he was provided ineffective employee assistance and denied his right to call witness and present documentary evidence. The Court found that, with regard to the employee assistance issue, when the hearing officer became aware of Blackwell's allegations, he adjourned the hearing until such interviews could take place. After this happened, the hearing officer asked Blackwell if his assistance was complete, to which he replied, "Yes, it is." The Court found that the hearing officer's actions "remedied whatever defects existed in the prehearing assistance," and furthermore that the petitioner failed to demonstrate that he suffered any prejudice. The Court then noted that "by failing to raise appropriate objections at the hearing, petitioner waived his claims of error" in regard to the denial of witness and documentary evidence claims.

Petitioner claimed that, in the second disciplinary hearing, the misbehavior report was insufficient and thus failed to provide him with adequate notice of the charges. The Court summarily rejected this claim, finding that "[p]etitioner raised no objection in this regard at the disciplinary hearing." With respect to both hearings, however, the Court held that were it to reach the issues raised by petitioner Blackwell, it would have found them to be without merit.

Practice Note: It is important to place your objections on the record and to repeat them on your administrative appeal in order to preserve such issues for later court review, should you decide to challenge your hearing.

Other State Cases

Criminal Court

Court Challenge Results in Criminal Court Judge Withdrawing Impermissible Sanction

Briggs v. Grosso, Index No. 2003-10275 (2d Dep't 2003)

Mr. Briggs, an inmate, filed a *pro se* motion to vacate the judgment of his conviction pursuant to Criminal Procedure Law (CPL) §440.10. Criminal Court Judge Grosso denied

Brigg's motion, and finding it to be "baseless and frivolous," imposed a one hundred dollar sanction. Judge Grosso ordered that this sanction be withdrawn from Mr. Brigg's inmate account on a monthly basis.

While the imposition of sanctions for frivolous litigation is permissible in various civil actions, there is no authority that permits them in criminal proceedings. It has long been held that "costs are not awarded in actions or proceedings conducted under the criminal code," People v. Three Barrels Full et al., 236 N.Y. 175, 177(1923), and this has been more recently affirmed in People v. Vonwerne, 155 Misc.2d 311, 588 N.Y.S.2d 533 (N.Y. Co. Crim. Ct., 1992). Because the imposition of the sanction on Mr. Briggs was impermissible, PLS attempted to resolve the matter through letters and phone calls to Judge Grosso and the District Attorney's office. When these attempts were unsuccessful, PLS filed an Article 78 petition in the Appellate Division, Second Department, on Mr. Briggs' behalf. The Article 78 petition alleged that the respondent, Judge Grosso, had exceeded his authority in imposing the sanction. Subsequently, the respondent agreed to withdraw the illegal sanction and the case was dismissed.

Practice Note: Pursuant to CPLR §7804 and §506(b), this case was brought in the Appellate Division because the proceeding was against a justice of the Supreme Court.

Guilty Plea Forfeits Alleged Pre-Plea Error

People v. Ross, 2004 WL 962913 (3d Dep't May 6, 2004)

Defendant Ross, an inmate at Elmira Correctional Facility, after being found with a single-edged razor blade and charged criminally, served a written notice on the District Attorney's office of his intent to testify before the grand jury. Although defendant Ross was assigned an attorney and was present in the courthouse the day the grand jury convened, he did not testify. At his arraignment, he argued that defense counsel had prevented him from testifying before the grand jury because his counsel refused to procure a letter from Ross' disciplinary file, which Ross claimed was critical to his testimony. Defendant Ross was assigned new counsel, who made a motion to dismiss the indictment based upon insufficient evidence, failure to provide adequate grand jury notice, and ineffective assistance of counsel. The motion was denied and defendant Ross entered a plea of guilty to attempting to promote prison contraband; he was sentenced to 1½ to 3 years in prison. Defendant Ross then moved unsuccessfully pursuant to CPL §440.10, seeking to vacate the conviction on the grounds of ineffective assistance of counsel and denial of due process.

On appeal, the court found that "[t]o the extent that defendant's argument can be construed to be that the alleged failure [of counsel to obtain the requested letter] undermined the voluntariness of his guilty plea, it survives that plea." However, the court rejected that argument, finding that the defendant had "entered a knowing, voluntary and advantageous guilty plea after County Court entertained and denied his motion to dismiss the indictment, which was based in part on counsel's failure to procure the letter." The court went on to add that the defendant failed to meet his burden of demonstrating that this single error was significant enough to deprive him of meaningful representation in any way which would "cast any doubt on the voluntariness of his plea" because he did not produce the letter or "describe its content," and thus made no showing as to the impact it might have had on his indictment. Finally, the court held that the defendant forfeited any claims he may have had

concerning "preplea error" when he entered his guilty plea.

Court of Claims

Jurisdiction: Notice of Claim Must be Filed Within 90 Days of Incident

Matter of Rivera v. State of New York, Claim No. 105785, Motion No. M-65806 (Lebous, J.)

In order to file a Claim against the State for money damages in the Court of Claims, you must serve a "Notice of Intention" to sue upon the Attorney General within 90 days of the incident about which you wish to sue. Failure to do so will likely result in dismissal of your claim, as happened in this case.

Here, it was uncontested that the claimant had failed to serve his Notice of Intention within 90 days of the date of the incident. The claimant argued that his failure to timely serve his Notice of Intention was due to the facility's mailroom's delay in processing his legal mail. The court rejected this claim. Although misfeasance or malfeasance on the part of facility officials may be a proper excused for failure to timely file, in this case, the claimant (according to the court) "failed to demonstrate that the mailroom delay arose out of any omissions or malfeasance on the part of the facility's mailroom personnel." Consequently, the claim was dismissed.

Practice Note: Often inmates do not know about this 90-day deadline and so they do not get their Notice of Intention to File a Claim served in time. As a result, they are not permitted to file their claim or have their case heard by the Court of Claims. If you have missed the 90-day service date, you can apply to the Court for permission to file a late claim. The Court often grants permission when it believes the claim to be meritorious. However, there are various deadlines involved in making the application for permission to file a late claim. If you are claiming medical and/or dental malpractice, you must make this application within two and one-half years of the date of the accrual of your claim. If you are claiming personal injury based upon a theory of simple negligence, you must make this application within three years of the incident about which you are filing the claim. False imprisonment claims, intentional personal injury claims, and constitutional torts must be filed within one year from the date of the incident. With regard to all property claims against DOCS, all administrative remedies must be exhausted before a claim can be filed in the Court of Claim. A property claim must be filed and served within 120 days after the date on which administrative remedies were exhausted. You must be prepared to submit the Claim itself at the same time you make your request for permission to file late.

For more information on how to file an action in the State Court of Claims, request PLS's manual "How to File a Claim in the Court of Claims." For further information on how to seek permission to file a Late Claim, request PLS's "Late Claim" memo.

Unlawful Imprisonment: Inmate Wins Claim After DOCS Refuses to Implement Willard Sentence

Bratton v. State of New York, Claim No. 107763 (Collins, J)

A number of courts have chastised DOCS over the past several months for failing to follow the terms of commitment orders, the orders of the sentencing court specifying the sentence to be imposed on an inmate. In such cases, DOCS concluded that the sentence imposed by the sentencing court was illegal and subsequently imposed what it believed was the correct sentence; in most instances, DOCS imposed a sentence harsher than the original sentence. For instance, in Murray v. Goord, 769 N.Y.S. 2d 165 (2003), (previously reported on in *Pro Se* Vol. 14 No. 1), the inmate received a concurrent sentence, but DOCS felt that the law required it to run the sentence consecutively. The Court of Appeals, reversing DOCS, reminded DOCS that it is "conclusively bound" by a commitment order, regardless of whether it feels the order is illegal. The proper remedy for an illegal sentence is for DOCS to file a 440 motion. In Murray, the Court of Appeals made it clear that DOCS' only

valid option is to comply with the commitment order as written.

In Bratton v. State of New York, the Court of Claims granted an inmate's claim that he had been subjected to unlawful imprisonment by DOCS when DOCS refused to impose a "Willard" sentence, as specified in the inmate's commitment order. A "Willard" sentence is an alternative sentence available to certain drug offenders under Criminal Procedure Law § 410.91. Under such a sentence the offender receives an indeterminate term of incarceration and is sent to a DOCS reception center; but, instead of serving the term, he is then remanded to the custody of the Division of Parole to complete an intensive drug treatment program. If the inmate successfully completes the program, he becomes eligible for early parole. It is known as a "Willard" sentence because the Division of Parole's drug treatment program is located at the Willard Drug Treatment campus.

Larry Bratton pled guilty to a drug offense in exchange for the promise of a Willard sentence. In accordance with his plea agreement, the court sentenced him to an indeterminate term of 3½ to 7 years, "replaced by Willard Supervision." Upon his receipt in DOCS, however, DOCS concluded he was ineligible for Willard because he had previously been convicted of a violent felony. Consequently, instead of remanding him to the Division of Parole, as required for a Willard sentence, DOCS imposed the 3½ to 7 indeterminate sentence.

Bratton filed a habeas corpus proceeding. The court concluded that DOCS had no authority "to conduct its own review of a trial court's sentencing order and to simply decline to abide by such portions of the order that DOCS finds to have been imposed in excess of the trial court's authority," and ordered Bratton released to the Division of Parole to carry out the Willard sentence. By the time he was released, however, he had served approximately four months in DOCS facilities.

Bratton therefore filed a second claim, this time in the Court of Claims. He argued that his imprisonment in DOCS for four months had been unlawful and that he was entitled to damages. The Court of Claims agreed. DOCS had never appealed the decision of the judge in Bratton's habeas case, so those findings constituted binding law and conclusively established that Bratton's incarceration had been unlawful. A separate trial to determine damages will be scheduled.

Parole

Appellate Division Declines to Reverse Favorable Parole Case; Finds Issues Moot

Matter of Chan v. Travis, 770 N.Y.S.2d 896 (3d Dep't 2004)

This case involved an inmate, Denny Chan, who had been serving a manslaughter sentence. While in prison, he accumulated an exceptional record: he earned a bachelor's degree, was admitted into a national honor society, earned a certification as a computer programmer, worked as a teacher's aid, and received no disciplinary infractions. Despite this record, he was denied parole. Chan sued, arguing that the Parole Board had abused it's discretion. The State Supreme Court agreed, finding that the Board's heavy emphasis on his crime, to the near exclusion of the strong evidence of rehabilitation – and, particularly, its finding that Chan's crime "precluded" early release – constituted an abuse of discretion. The court ordered that Chan receive a new hearing. By the time the court acted, however, Chan had already been granted parole at his next regularly-scheduled appearance.

A case is considered moot if the issues that gave rise to it have been resolved. Here, the fact that Chan was released would normally have meant that his case against the Board was moot. The Division of Parole, however, did not see things that way: concerned that the Supreme Court decision would create unfavorable precedent, it decided to appeal the judge's decision. The Board argued that the Appellate Division should reverse the lower court decision, even though Chan had been released by a subsequent Board, because the legal reasoning, - *i.e.*, that the Board could not conclude that the seriousness of inmate's crime "precluded" a grant of parole, notwithstanding the merits of his rehabilitative accomplishments - was so erroneous that allowing the decision to stand would have adverse consequences for the law.

The Appellate Division disagreed. Without commenting on the merits of the Board's arguments, it allowed the lower court decision to stand, finding the Board's appeal moot due to Chan's release. The result is that the lower court decision, Chan v. Travis, Index No. 3045-02 (Sup. Ct., Albany Co. 2002) (Sheridan J.) may still be cited as persuasive authority in future parole cases.

Prisoners' Legal Services submitted an amicus brief in this case.

Temporary Release

Appellate Division Upholds Decision Finding Arrest and Conviction on New Charge While on Temporary Release Constitutes Absconding

Maccio v. Goord, 772 N.Y.S.2d 745 (3d Dep't 2004)

In Pro Se Vol. 13, No. 3, we reported the decision of Matter of Maccio v. Goord, 756 N.Y.S.2d 412 (Sup. Ct. Alb. Co. 2003), which held that an inmate, who failed to return from his temporary release program after being arrested and subsequently sentenced to eight months in a county jail, was deemed to have absconded from temporary release. The result was that his state sentence was interrupted for the period of time he spent detained in the county jail. In February, the Appellate Division upheld that decision, finding that Penal Law §70.30(7), which governs calculations of sentences for those absconding from temporary release, allows for the interruption of an inmate's sentence if he fails to return to the facility while on temporary release, and that interruption continues until the inmate is returned to the institution where his original sentence is being served. Maccio, the petitioner, had argued that Penal Law §70.30(7) should not apply to his case, since he was found not not guilty of "absconding." The court disagreed. "Penal Law §70.30(7) unambiguously provides for sentence interruption *whenever* a person on temporary release fails to return *regardless of whether the failure is intentional*," the court held.

Pro Se Practice

Select Issues in Sentence Calculation

New York State has some of the most complicated sentencing laws in the nation: determinate, indeterminate, and definite sentences; concurrent and consecutive sentences; "shock" sentences and "Willard" sentences; and delinquent dates, jail time, and parole jail time. All these and more can come into play when trying to determine the correct legal dates of any individual sentence. Many inmates write to Prisoners' Legal Services, doubtful that their sentence has been correctly computed and confused as to how to go about correcting any errors.

A single article cannot address the many possible sentence issues. In this practice piece, we take a closer look at two situations which are a common source of confusion among inmates: how to calculate two concurrent indeterminate sentences imposed at different times; and how to calculate a determinate sentence when it runs consecutively to a previously-imposed indeterminate sentence.

First, some basics: The principal rules for the calculation of sentences are contained in Penal Law §70.30. The very first rule, Penal Law §70.30(1), provides: "An indeterminate or determinate sentence of imprisonment commences when the prisoner is received in an institution under the jurisdiction of the state department of correctional services." Thus, any time served prior to your arrival in DOCS is not "sentence time." The time may be credited against your sentence, as either jail time or parole jail time, but it is not, strictly speaking, part of your sentence. In addition, once a sentence has commenced, it may not be interrupted except by escape, absconding, or a parole delinquency. Also, when calculating parole eligibility dates and conditional release dates, different rules apply to different types of sentences.

If you are given an indeterminate sentence, you must serve the minimum period of imprisonment (MPI) before you are eligible for parole release (PE date), and you become eligible for conditional release after serving two-thirds of the maximum term (CR date). However, if you are given a determinate sentence, you are not eligible for discretionary parole release and you must serve six-sevenths of the term before becoming eligible for conditional release to parole supervision. Bear these principles in mind while we consider the following:

Concurrent Indeterminate Sentences Imposed at Different Times

Concurrent sentences are two or more sentences not necessarily imposed at the same time but ordered to run at the same time. Penal Law §70.30. If you receive multiple concurrent indeterminate sentences and they are imposed at the same time, the rule is simple: You must satisfy the one which has the longest unexpired term to run. For example, if you receive a 2-6 year sentence and a 3-9 year sentence and they are ordered to be run concurrently, the 2-6 year sentence would merge into the longer 3-9 year sentence. This would mean that you would have to serve three years before you became eligible for parole and six years before you became eligible for conditional release. You would "max-out" after serving nine years.

If you receive concurrent indeterminate sentences but they are imposed at different times, Penal Law §70.30(1)(a) states that "the time served under imprisonment on any of the sentences shall be credited against the minimum periods of all the concurrent indeterminate sentences ..." This means that if you received a 2-6 year sentence and you served two years and then were sentenced to a 3-9, concurrent to the 2-6, you would receive two years credit toward the minimum on your 3-9 year sentence, making you eligible for parole again in just one year. Since a sentence does not begin to run until a person is received in an institution under DOCS' jurisdiction, you would not receive credit for the two years you had already served off the subsequent nine-year maximum. Penal Law simply mandates that "[t]he maximum term or terms of the indeterminate sentences ... shall merge in and be satisfied by discharge of the term which has the longest unexpired time to run." Penal Law §70.30(1)(a). Thus, based upon the above scenario, although you would be eligible for parole after serving only one year of

your 3-9, you would have to serve six years before you became eligible for conditional release (the six years being computed from the date you were sentenced on your 3-9) and your maximum release date would be nine years from the date your were sentenced on the 3-9.

Determinate Sentence Running Consecutively To Previously Imposed Indeterminate Sentence

If you receive an indeterminate sentence and then a determinate sentence is imposed and ordered to run consecutively to your previously-imposed indeterminate sentence, the determinate sentence is added to the minimum of the indeterminate sentence to calculate the aggregate maximum term of imprisonment. Penal Law §70.30(1)(d). For example, if you received a 6-12 year, indeterminate sentence, and then were sentenced to an 8-year determinate sentence, the minimum of the indeterminate sentence (6 years) would be added to the determinate sentence (8 years), resulting in an aggregate maximum term of 14 years. Your parole eligiblity date would be computed by taking 6/7 of your determinate sentence and adding that to the minimum of your indeterminate sentence. Thus, in this case, you would be required to serve 12 years 10 months before you would become eligible for parole release (6 years 10 months [6/7 of 8] plus 6 years [the minimum of your indeterminate sentence]). (Penal Law §70.30(1)(d) does provide for limitations on the aggregate maximum term of imprisonment which can be imposed in these types of cases, the conditions of which are set forth in Penal Law §70.30(1)(e) and (f).)

However, to further complicate matters, the law also provides that the aggregate maximum term of imprisonment cannot be less than the maximum term of the indeterminate term(s). Thus, if you were sentenced to a 4-year determinate term and a consecutive indeterminate term of 4-12 years, the aggregate maximum term of imprisonment would be 12 years, not 8 years (4+4). You would be eligible for parole release after serving 7 years, 5 months (6/7 of 4 [determinate] plus 4 [indeterminate], and you would be eligible for conditional release after serving 8 years (2/3 of 12).

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