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SECOND CIRCUIT ISSUES: SEVEN LANDMARK DECISIONS IN FAVOR OF PRISONERS

Second Circuit Finds in Favor of Prisoners in Six PLRA Exhaustion Cases

The United States Court of Appeals for the Second Circuit recently decided six prisoner cases, all involving different aspects of the PLRA exhaustion requirement. All six cases were decided unanimously in favor of the prisoners. In five of the decisions, a single panel of three judges made it clear that there are limitations on DOCS' ability to use the PLRA exhaustion requirement as a defense to prisoner cases. In the sixth case, a different panel found that the prisoner-plaintiff had demonstrated sufficient justification for not exhausting.

Judges Calabresi, Sack, and District Judge Pauley, sitting by designation, decided the five cases, Judge Calabresi writing three decisions and Judges Sack and Pauley each writing one. Collectively, these cases reject the "strict compliance" and "total exhaustion" rules that have been embraced by some courts, acknowledge that threats of retaliation may estop DOCS from asserting a failure to exhaust defense, and hold that "available" administrative remedies have been exhausted if a prisoner receives a favorable resolution of a grievance at any level.

Johnson v. Testman,- - -F.3d- - -, 2004 WL 1842669 (2d Cir.) (August 18, 2004)

Plaintiff Johnson was incarcerated at the Metropolitan Detention Center (MDC) in Brooklyn, New York, when he was attacked by another inmate, who plunged a tile cutter into his neck and slashed his

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face and upper torso. The attack was allegedly incited by a correction officer, defendant Testman. Prior to the attack, Johnson was in the barber shop demonstrating a type of haircut to one of the barbers. When Officer Testman saw Johnson with the hair clippers, he asked Johnson what he was doing and, after hearing the reply, told the inmates that he was closing the barber shop for the day. Apparently, when Testman was asked by another inmate why the barber shop was closed and he couldn't get his hair cut, Testman said, "if you have a problem 'with not being able to get a haircut, take it up with Johnson.'" Soon thereafter, Johnson was attacked by this inmate. Later that same day, a second defendant, CO James, apparently cuffed Johnson behind his back and left him in a cell for seven hours.

Johnson was charged with fighting and placed in the SHU to await a disciplinary hearing. At the hearing, Johnson described the circumstances surrounding the attack, but nevertheless was found guilty and sentenced to an additional 21 days in SHU, 30 days loss of good conduct time, and one year's loss of visiting and commissary privileges. Johnson appealed the disciplinary disposition, again recounting Testman's conduct, and when his appeal was denied, he sought review by the Bureau of Prisons' (BOP) Central Office. The Central Office found in Johnson's favor and remanded the case to the MDC for a new hearing.

Johnson's claims against defendant James centered around the allegation that James had left him cuffed behind his back in his cell for seven hours. Johnson alleged that James then issued a misbehavior report charging him with refusing to obey a staff order, wherein James alleged that Johnson had refused to be rear-cuffed. After being found guilty of the charge and being given a penalty of a 30-day loss of visiting and commissary privileges, Johnson appealed. His appeal was denied by the facility warden, but when he sought review from the Northeast Regional Office, his appeal was granted to the extent that MDC was directed to conduct a further investigation. MDC failed to do so and Johnson subsequently filed another appeal with the Regional Office, which then elected to expunge the charges based, among other things, on lack of sufficient evidence.

Johnson sued both Testman and James, who responded by filing a motion to dismiss, or in the alternative, a motion for summary judgment, alleging the defense of qualified immunity and that Johnson did not exhaust his administrative remedies with respect to his claim against Testman. The district court dismissed Johnson's entire complaint without prejudice, finding that he had failed to meet the PLRA exhaustion requirement. Johnson had argued that defendant James had waived the exhaustion issue by failing to raise it, but the court, adopting a rule of "total exhaustion," found that "Johnson's failure to exhaust his claim against Officer Testman requires that I dismiss the entire case."

On appeal, the Second Circuit addressed the following issues:

1) whether Johnson's appeal to the BOP exhausted his claims against Testman;
2) whether Johnson's appeal to the regional office was sufficient to exhaust his claims against James;
3) whether James waived the affirmative defense of failure to exhaust; and
4) whether the PLRA mandates a rule of "total exhaustion."

Arguing for the plaintiff, Mary Lynne Werlwas of the Legal Aid Society, Prisoners' Rights Project, asserted that if a prisoner reasonably believes he has properly pursued his complaint, the "exhaustion" requirement should not automatically doom his case. The Court agreed, holding that a prisoner who may not have followed the prison procedure precisely may still meet the exhaustion requirement if he

"reasonably believed" he could proceed as he did. The question of whether Johnson was justified in believing that he properly pursued the grievance process was remanded to the district court for a fact-finding hearing.

With respect to the question of whether Johnson's appeal to the regional office was sufficient, the Court responded by holding that an uncounseled inmate's appeal should be held to no higher a standard than that which is required in the Rules of Notice Pleadings, which mandate "that a complaint 'must contain allegations sufficient to alert the defendants to the nature of the claim and to allow them to defend against it.'" The Court set the standard to be used in determining if the substance of an inmate's submissions are sufficient in order to exhaust by stating that "[i]n order to exhaust, inmates must provide enough information about the conduct of which they complain to allow prison officials to take appropriate responsive measures." Judge Calabresi reasoned that a grievance raises an issue sufficiently to exhaust it as long as the prisoner "object[s] intelligibly to some asserted shortcoming." The Court remanded the case to the district court on this issue also, finding that the question of whether Johnson's disciplinary appeals were enough to advise the prison administration as to the substance of his complaints was a question of fact that is appropriately addressed by the district court. The Court also held that the exhaustion defense is an affirmative defense which can be waived, and that defendant James waived the defense by failing to raise it. Since the question of whether Johnson exhausted was remanded to the district court, the Court did not have to address the issue of "total exhaustion," but it noted in a footnote that it had held in the Ortiz case (see below) "that a rule of total exhaustion is not required by the PLRA, and that exhausted claims may be allowed to proceed while unexhausted claims are dismissed."

Giano v. Goord, ---F.3d.---, 2004 WL 1842652 (2d Cir.) (Aug. 18, 2004)

The lawsuit in Giano v. Goord centered around Giano's allegations that certain guards tampered with his urine tests in retaliation for his success in a prior lawsuit and his success in defeating a prior disciplinary charge. Because of the alleged tampering, Giano was charged with, and ultimately found guilty of, a drug-related disciplinary charge. He appealed his hearing, alleging that the charges were retaliatory, but the hearing was affirmed. He never filed a grievance regarding the alleged retaliation.

Initially, Giano's case was dismissed by the district court, which found that he had failed to exhaust his administrative remedies by failing to address complaints of retaliation through the inmate grievance system. The Second Circuit vacated the district court's decision, holding that the PLRA did not require Giano to exhaust his claim of retaliation because such a claim involved "individualized retaliatory actions against an inmate" and did not constitute a claim brought "'with respect to prison conditions.'" However, the Supreme Court then decided Porter v. Nussle, 534 U.S. 12 (2002), holding that retaliation claims were subject to the PLRA exhaustion requirement. Thus, when Giano's case came before the district court for the second time, it was again dismissed for failure to exhaust.

Elena Paraskevas -Thadani of Katten, Muchin, Zavis, & Rosenman (Arthur Linkler, also on the brief) presented oral argument on behalf of Giano, and asserted that Giano had properly raised his complaints in the context of an appeal from a disciplinary proceeding rather than by filing a separate grievance. The Court found that there are certain "special circumstances" in which a prisoner's failure to comply with administrative procedural requirements may be justified. The

court did not provide a broad statement as to what constitutes such a justification, but Judge Calabresi, in applying what he called a "reasonably believed" standard, found that the rules governing what issues had to be appealed in a disciplinary hearing versus what issues should be grieved were so unclear that Giano was justified in pursuing his issue through the disciplinary process and not filing a grievance. The Court found that unless, on remand, DOCS indicates that it will allow him to file a late grievance, his case should go forward.

Ortiz v. McBride, - - - F.3d - - -, 2004 WL 1842644 (2d Cir.) (Aug. 18, 2004)

In Ortiz v. McBride, Ortiz, who was incarcerated at the time at Arthur Kill Correctional Facility, was charged with drug smuggling and sale, based solely on confidential information. He was sentenced to 90-days SHU confinement, the first three weeks of which, Ortiz alleged, he was confined in his cell for twenty-four hours a day and subject to harsher SHU conditions than those imposed upon other inmates. Ortiz' disciplinary disposition was ultimately reversed by Donald Selsky, without explanation. Ortiz sued, alleging a violation of his due process and Eighth Amendment rights.

The defendants moved to dismiss for failure to state a claim and the district court granted the motion holding that, although there may have been an issue with respect to the veracity of the informant, since Ortiz' administrative proceeding had been reversed, he "obtained all that could be obtained on that issue." The court went onto hold that, with respect to Ortiz' complaint regarding the conditions of his confinement, since his confinement was only for 90 days, it did not rise to the level of "atypical and significant hardship." Finally, the court held that although Ortiz appeared to have exhausted his "main issue," the evidence before the court was unclear as to whether he had exhausted "with respect to these other issues."

The questions before the Second Circuit were:

1) whether Ortiz sufficiently pled a supervisory liability claim;
2) whether Ortiz' factual allegations concerning SHU stated a cognizable due process claim;
3) whether Ortiz exhausted his Eighth Amendment claim; and
4) whether the PLRA requires "total exhaustion."

Initially, Ortiz conceded that he had not sufficiently pled a supervisory claim, and thus the Court limited its review to the remaining questions. As to the question of whether Ortiz had set forth sufficient allegations to establish a due process claim, the Court noted that to do so, Ortiz had to establish two things: first, "that he possessed a liberty interest" and second, "that the defendant(s) deprived him of that interest as a result of insufficient process." Ortiz was confined to SHU for 90 days. Although the Court acknowledged that it has held that "with respect to 'normal' SHU confinement," 101-days does not meet the Sandin "atypical and significant hardship" test, the Court pointed to a number of cases where it has held that the duration of confinement is not the only factor to be considered, "'since especially harsh conditions endured for a brief interval...might...be atypical.'" **The Court went on to hold that since Ortiz alleged that he was subjected to conditions in SHU which were not "normal," (*i.e.*, for at least part of his confinement, he was kept in SHU for 24 hours a day, not permitted his one-hour daily exercise, and was prevented from showering for "'weeks at a time'"), he had sufficiently alleged that the 90-day SHU sentence was "atypical and significant."** The Court also found that Ortiz adequately alleged that the SHU sentence was imposed without sufficient process by asserting that the "some evidence" standard was not met.

With respect to his Eighth Amendment claim, the Court found that there was no evidence in the record

that he had exhausted. Although he had complained once orally and alleged that when he did complain he was threatened, the Court held that, unlike the plaintiff in Hemphill, he did "not contend that the threats from guards prevented him from filing a grievance or otherwise rendered DOCS grievance procedures unavailable," and thus, he did not exhaust.

Because the finding of the Court on the Eighth Amendment claim resulted in a determination that Ortiz exhausted one claim but not the other, the Court then addressed the issue of "total exhaustion." John Boston of the Legal Aid Society, Prisoners' Rights Project, represented Ortiz, and argued that the "total exhaustion" rule which is applicable to habeas corpus proceedings should not be extended to PLRA exhaustion cases. The Court agreed. In rejecting the "total exhaustion" rule, under which a prisoner's complaint that contains any unexhausted claim has to be dismissed in its entirety, Judge Sack wrote, "[s]ection 1997e(a) clearly instructs that an action such as Ortiz's containing exhausted and unexhausted claims should not have been 'brought.' But we do not think it follows that the only possible response to the impermissibility of the bringing of the action is to dismiss it in its entirety-- to kill it rather than cure it."

The Court then turned to the legislative history, observing that nothing in the history indicates that Congress considered the question. The Court concluded that "[w]e do not think that a requirement that district courts dismiss 'mixed' actions in their entirety would help achieve Congress's goal of improving the quality of, or judicial efficiency in, disposing of prisoners' §1983 suits." First, such a requirement would create an incentive for prisoners to bring separate claims in separate lawsuits. Second, plaintiffs whose claims are dismissed would simply re-file their claims, omitting the unexhausted claims. Third, when the issue of exhaustion presents challenging questions for the courts to decide, efficiency would not be served by forcing the court to consider the issue and familiarize itself with the background of the case twice. The Court acknowledged that other courts, specifically the 10th Circuit, have held otherwise, but explained that it disagreed with that Circuit's habeas corpus analogy. **The Court concluded by rejecting a rule of total exhaustion saying, "[a]t the end of the day, then, we do not think that requiring district courts to dismiss the entirety of any prison-conditions action that contains exhausted and unexhausted claims, and thereby requiring prisoners to institute their actions containing only the exhausted claims in federal court all over again, is a meaningful way to 'reduce the quantity and improve the quality of prisoner suits,' or to 'help bring relief to a civil justice system overburdened by frivolous prisoner lawsuits.'"**

Abney v. McGinnis, - - - F.3d - - -, 2004 WL 1842647 (2d Cir.) (Aug. 18, 2004)

Abney v. McGinnis involved an inmate, Horace Abney, who, after having surgery on his feet, was prescribed orthopedic shoes and arch supports to help alleviate his pain. When he didn't receive the shoes and arch supports, he filed a formal grievance with the Inmate Grievance Resolution Committee (IGRC). The IGRC recommended that his grievance be granted and urged "expedited action." The Superintendent agreed. Over a year passed and Abney still had not been provided with proper fitting arch supports, and again he filed a grievance. Again, the IGRC recommended the grievance be granted and again, the Superintendent agreed. Two more months passed without the proper footwear being supplied and Abney filed a third grievance, which was granted by the IGRC and accepted by the Superintendent. Another two months passed and Abney had yet to receive the proper footwear. In response, he wrote a letter to DOCS Commissioner Goord and, on the same day, filed a §1983 complaint.

After the complaint was filed, Abney continued to complain about not being provided the proper footwear and DOCS continued to fail to provide it. In all, Abney filed four formal grievances over a 21-month period, all of which resulted in favorable rulings by both the IGRC and the Superintendent.

Abney's complaint was dismissed by the district court for failure to exhaust administrative remedies. The district court did not address the issue of whether any administrative remedies were "available" to Abney after he had received favorable decisions on his grievances but then learned, after the time to appeal such a grievance had passed, that the favorable decision would not be implemented. Rather, the district court simply held that "Abney's failure to appeal the Superintendent's favorable ruling immediately to the Central Office Review Committee (CORC) in Albany, New York, meant that his administrative remedies were unexhausted." Abney appealed.

The question before the Second Circuit was whether a prisoner is required to appeal a grievance to the CORC if his grievance has essentially been granted at the Superintendent's level, but the prison administration has failed to provide the granted relief. DOCS regulations give inmates only four days to appeal for noncompliance of a grievance decision. Therefore, by the time Abney received his favorable rulings and realized that the prison was, once again, not going to follow through on its promise, the time for appeal had expired. Michael Cassidy, of Prisoners' Legal Services, representing plaintiff Abney, argued that it would be "counterintuitive to require inmates who win during the grievance process to appeal their victories." Besides, the time for Abney to appeal had long since passed and thus there was no administrative remedy "available" to him. The Second Circuit agreed. Judge Pauley found that, **in some circumstances, the behavior of prison officials can render administrative remedies unavailable. Referring to Abney's situation as a "Catch-22," Judge Pauley found that "[w]here, as here prison regulations do not provide a viable mechanism for appealing implementation failures, prisoners in Abney's situation have fully exhausted their available remedies."**

Hemphill v. New York, - - - F.3d - - -, 2004 WL 1842658 (2d Cir.) (Aug. 18, 2004)

In Hemphill v. New York, 2004 WL 1842658, Hemphill claimed that he was subjected to excessive force by officers at Green Haven Correctional Facility and that he was denied adequate medical attention after the alleged use of force. Hemphill also alleged that officers had threatened him if he pursued the matter. The defendants moved to dismiss on the ground that Hemphill failed to exhaust his administrative remedies. He did write a letter to the Superintendent regarding the alleged assault but it was not a "formal grievance" and he did not submit it until five months after the incident. He never received any reply from the Superintendent to his letter.

In the district court, Hemphill argued that the court should deem the letter to have been a grievance for administrative exhaustion purposes. The district court judge, Judge McMahon, denied this request. Judge McMahon found that DOCS has a three-tier grievance process and, the court held, an inmate has not exhausted his administrative remedies until he follows through all three levels of the grievance procedure. Hemphill did not file a "Level 1" grievance. The court found that his letter to the Superintendent could not be considered a Level 2 appeal "because he had never filed a grievance that could be heard at the lowest level." The court concluded that, regardless of the fact that he sent a letter to the Superintendent, he never appealed anything to CORC.

In rejecting an estoppel-type argument, the lower court found that Hemphill could not be heard to

complain regarding the Superintendent's failure to respond to his letter because Hemphill himself "failed to follow the expedited grievance procedure that prisoners are afforded when they are alleging any form of harassment--including use of excessive force by a corrections officer. 7 N.Y.C.R.R. Sec. 701.11(a) and (b). Under this expedited procedure, a grievance is filed with both the Inmate Committee and the harassing employee's supervisor. If the grievance raises a bona fide harassment issue (as this one would have), Level 1 review is bypassed and the matter is sent directly to the Superintendent for review." Had Hemphill utilized this procedure, the court held, any failure by the Superintendent to "render a decision on the matter within twelve working days could have been appealed to Albany, thus completing the grievance cycle and exhausting his remedies in a matter of weeks." The lower court also held that, even if Hemphill's letter could be interpreted as a grievance, it was untimely, since he did not send it until almost five months after the incident.

The issue before the Second Circuit was whether a letter, which Hemphill sent to the facility Superintendent concerning the assault, to which he received no reply, constituted exhaustion. Michael Cassidy, of Prisoners' Legal Services (Joel Landau and Karen Murtagh-Monks, on the brief) presented oral argument on behalf of plaintiff Hemphill, asserting that defendants should be estopped from asserting exhaustion by either their threats of retaliation or the Superintendent's failure to investigate. In addressing these issues, **Judge Calabresi found that a prisoner who did not file a grievance because he was threatened by staff would be deemed to have no available remedy if a person of "ordinary firmness" would be deterred from using the grievance process, and that such threats may also justify a prisoner's complaining in some other fashion rather than using the formal prison grievance system.** Expanding on their decision in Ziemba v. Wezner, 366 F.3d 161 (2d Cir. 2004) (reported in the last issue of *Pro Se*), Judge Calabresi wrote: "threats made by prison officials allegedly made against the plaintiff may in some instances be sufficient to estop the government from asserting the affirmative defense of non-exhaustion."

In directing that the case be remanded for further proceedings in the Southern District, where the claim had been dismissed, Judge Calabresi wrote that "we cannot say at this time that the remedies that Hemphill failed to pursue were actually available to him." **Hemphill also made the argument that he should not be penalized for failing to follow DOCS expedited grievance procedures since the procedures were extremely confusing. In response, the Second Circuit instructed the lower court to examine on remand "this possible justification for Hemphill's failure to follow normal grievance procedure."**

The five cases were argued together on May 27, 2004 and all five decisions were issued on August 18, 2004.

Rodriguez v. Westchester County Jail Correctional Dep't., 372 F.3d 485 (2d Cir. 2004)

The sixth PLRA case, decided by a different panel of judges on June 24, 2004, found that, although the plaintiff had indeed not exhausted, he had demonstrated a sufficient justification for failing to do so. **"The issue is whether justifiable circumstances may sometimes excuse a prisoner's failure to exhaust administrative remedies when challenging conditions of confinement. We conclude that exhaustion may sometimes be excused and should be excused in this case."**

In this case, Rodriguez did not exhaust his excessive force claim because he didn't think he had to. He argued that he did not believe that the PLRA covered excessive force claims. The Second Circuit noted that it was under the same impression when it

decided the case of Nussle v. Willette, 224 F.3d 95 (2d Cir. 2000). Although Nussle was later overturned by the Supreme Court, Porter v. Nussle, 536 U.S. 516 (2002), the Second Circuit noted that Rodriguez's belief was "reasonable because it was thereafter entertained by a panel of this Court (until later rejected by the Supreme Court)." Though exhaustion would have been required by the Supreme Court's decision in Porter, Rodriguez was out of the jail by that time and administrative remedies were no longer available to him. Because the Second Circuit's decision in Nussle came after Rodriguez filed his case, he did not argue that he actually relied on the decision, but rather that he was under the impression that excessive force was not a "prison condition," as set forth in the PLRA. **Thus, it appears as if the Court, in this case, effectively holds that a reasonable mistake of law excuses exhaustion.**

Second Circuit Denies Qualified Immunity to DOCS on Due Process Issue of Inadequate Notice and Non-Disclosure of Evidence

Sira v. Morton, - - -F.3d- - -, 2004 WL 18327779 (2d Cir.) (Aug. 17, 2004)

In another unanimous decision, the Second Circuit Court of Appeals recently held that DOCS was not entitled to the defense of qualified immunity in a case where the plaintiff, Rubin Sira, was given inadequate notice of the disciplinary charges against him. In addition, the Court held that DOCS improperly withheld certain evidence from inmate Sira which prevented him from being able to defend himself from the charges. The Court did, however, grant DOCS qualified immunity on inmate Sira's challenge regarding the sufficiency of the evidence presented against him. In doing so, the Court has now clarified the law in the area of the use of confidential information and, most probably, precluded DOCS from using the defense of qualified immunity on this issue in the future.

Background

The incident at issue dates back to January 2000, when inmate Sira, together with many other inmates who were housed at Green Haven, was suspected of being involved in a planned work stoppage, also referred to as the "Y2K strike." Many inmates were written up, transferred, or otherwise disciplined for their suspected involvement in planning the alleged strike. Rubin Sira was one of those inmates. Sira received one of the rather generic misbehavior reports which were issued to inmates suspected of being involved in planning the strike. The report alleged that "during the course of an investigation into a planned inmate demonstration at [Green Haven] in which inmates would conduct a work/program stoppage on or about January 1, 2000, Inmate Sira has been identified through confidential sources as having urged other inmates to participate, organized inmates to participate and threatened inmates to participate." The author of the report, Lt. Schneider, in response to specific questions concerning the details of the incident, stated that

" (1) the date of the charged incident was January 19, 2000;
(2) the incident time was 10:15 a.m.;
(3) the incident location was Green Haven Correctional Facility; and
(4) no persons other than Sira were involved in the incident."

The Hearing

At his subsequent disciplinary hearing, Sira pled not guilty and requested dismissal of the charges because the misbehavior report did not provide him with adequate notice of the alleged misbehavior. Sira

claimed that the report failed:

" (1) to identify any person whom he had threatened or organized;
(2) to indicate where in Green Haven the alleged misconduct had occurred; and
(3) to provide clear notice of the date of his alleged misconduct, since the incident date on the report was marked January 19, while the body of the report suggested that the strike had occurred sometime earlier, possibly before January 1."

Sira noted that he had no disciplinary history and offered an alibi that, on the alleged date of the incident, January 19, he was in the Health Services Unit.

The Hearing Officer, Capt. Morton, although admitting that the charges were "very vague," in that the report could have meant that Sira actually engaged in the alleged misconduct on January 19, or that he was merely identified on January 19, refused to dismiss the charges. Morton stated he would call Lt. Schneider in order to allow Sira to ask questions concerning the report, and that he would interview the confidential sources outside of Sira's presence.

The Confidential Information

Lt. Schneider testified, in Sira's presence, that prison officials had been investigating the alleged Y2K strike for the past month and had received confidential information that Sira had a leadership role in enforcing participation in the strike. Schneider admitted that no one had indicated that Sira had threatened any specific inmate but rather, sources had stated that Sira made "open threats to any one who would go against the strike." Schneider did not give any details as to when the threats were allegedly made or what they encompassed. "Lt. Schneider did, however, clarify that the report's reference to January 19 at 10:15 a.m. alluded to the date and time she filed the disciplinary charges, not the date and time of any misconduct."

The Hearing Officer then heard testimony from various correctional officials regarding the confidential testimony they had obtained regarding Sira's alleged involvement in the Y2K strike. The first confidential informant had apparently attended a meeting where he was told that Sira would force others to be involved in the strike on C-Block, but this informant did not place Sira at the meeting nor did he report ever seeing Sira participate in any strike-related activities.

The second confidential informant reported "that Sira, who was housed in Block C, was one of the strike coordinators and that he met with other gang leaders at night in Building 12 and in the morning in the pre-release center to organize strike activities." However, this informant "did not have personal knowledge of these facts, nor had he ever personally witnessed Sira engaging in any strike-related activities."

The third piece of confidential information was an unsigned letter in which the author claimed to have overheard one unidentified prisoner telling another that an inmate named "Ruben" was going to "take over" the Dominicans.

The fourth piece of confidential information was an undated letter that had been passed on to Lt. Schneider from the Superintendent, identifying "Ruben Cira" as one of the strike's organizers. Lt. Schneider did not know who authored the letter. The Hearing Officer did not ask Lt. Schneider to inquire how this fourth informant had learned the information disclosed in the letter, or "even if it was based on direct knowledge or hearsay."

Finally, the fifth piece of confidential testimony was a statement by an inmate that he had witnessed Sira coercing other inmates into participating in the demonstration. However, the record disclosed that "no effort was made to identify the inmates

purportedly threatened by Sira." Nor did the Hearing Officer inquire as to whether this informant could "detail what he heard or saw that led him to characterize Sira's conduct as coercive or threatening." The Hearing Officer did ask the officers involved whether any of the informants would appear before him to testify and was told that none of them would agree to do so for fear of their safety.

The Disposition

Although he understood that the identity of the confidential informants could not be disclosed to him, Sira requested that the substance of the confidential information be disclosed in order to allow him to present a defense. The Hearing Officer denied his request and found him guilty of demonstrating but not guilty of making threats. He sentenced Sira to six months SHU, together with loss of privileges and six months recommended loss of good time.

Sira appealed the disposition on numerous grounds, including inadequate notice and lack of substantial evidence. The disposition was reversed on administrative appeal because "confidential evidence failed to support [the] charge," but by the time of the reversal, Sira had served the entire six month SHU sentence.

The Federal Complaint

Sira sued, claiming that the defendants had violated his rights to due process, in that:

(1) the disposition was based upon insuf-ficient evidence;
(2) the defendants failed to provide him with adequate notice of the charges;
(3) the defendants denied him access to confidential evidence relevant to his defense;
(4) the defendants failed to assess the reliability of various sources of confidential information; and
(5) the defendants failed to disclose the confidential documentary evidence against him.

The defendants responded by asking for judgment on the pleadings based upon the defense of qualified immunity. The district court converted the defendants' request to one for summary judgment and denied it, finding that Sira had established a due process violation and that no reasonable officer could have thought otherwise. Defendants appealed.

The Second Circuit Decision

Initially, the defendants challenged the district court's decision to convert their motion for judgment on the pleadings to one for summary judgment. The Second Circuit found that the lower court properly converted the defendants motion. Unless there is a showing of prejudice, if a motion for judgment on the pleadings includes materials "outside the pleadings" and those materials are not "excluded" by the court, then the court is required to convert the motion to one for summary judgment. In this case, the defendants attached a number of documents to their motion that were not incorporated into the complaint, including the hearing transcript. Since the district court did not exclude those documents and since defendants could not demonstrate any prejudice, the Court found that it was proper, indeed mandated, that the court convert the defendants' motion to one for summary judgment.

In analyzing whether a defendant is entitled to qualified immunity, a court must answer two questions: first, "whether the facts, viewed in the light most favorable to the plaintiff, establish a constitutional violation. If they do not, the plaintiff may not recover because he has suffered no wrong cognizable under §1983." If, however, the facts do establish a constitutional violation, the court must then ask "'whether it would be clear to a reasonable officer that his conduct was unlawful in the situation

he confronted.'" The Court found that Sira presented three due process violations:

" (1) inadequate notice;
(2) non-disclosure of confidential evidence relied on to support the disciplinary ruling, and;
(3) insufficient evidence of misconduct,"

each of which had to be addressed in terms of whether the defense of qualified immunity applied.

Inadequate Notice Is a Clearly Established Constitutional Violation

Relying on Wolff v. McDonnell, 418 U.S. 564 (1974), the Court initially found that the law is clearly established that due process requires that the accused receive adequate notice of the charges. Quoting from one of its recent cases, the Court stated that notice serves to "compel 'the charging officer to be [sufficiently] specific as to the misconduct with which the inmate is charged, to inform the inmate of what he is accused of doing so that he can prepare a defense to those charges, and not be made to explain away vague charges set out in a misbehavior report.'" Taylor v. Rodriguez, 238 F.3d 188, 192-93 (2d Cir. 2001). The Court highlighted the importance of such notice in a case such as this one, where a large portion of the disciplinary hearing was held outside Sira's presence. **The Court noted that the charges needed to include some "factual specificity" regarding the alleged misbehavior, rather than setting forth "vague or conclusory" charges.** In assessing the misbehavior report issued against Sira, the Court found that there were no specific facts to support the conclusory allegation that Sira was guilty of urging others to participate in the Y2K strike. Although the defendants argued that the error with respect to the actual date and time of the incident was of "no import," the Court disagreed, finding that a reasonable person could have believed that, since the date of the incident was listed as January 19, this indicated the time of the alleged misbehavior.

The Court went on to say that not only did the misbehavior report misidentify the time and date of the incident, "[i]t provide[d] no notice as to the specific site or sites of his misconduct; it [did] not indicate the words or actions he employed in purportedly urging, organizing, or threatening inmates to participate in the Y2K strike; and it identifie[d] no inmates toward whom his actions were directed." The Court concluded, "[f]rom the notice he was given, Sira could only guess whether he was being charged with making a single objectionable statement to one inmate or a host of statements to groups of inmates; whether his conduct allegedly occurred on a specific day in January or over the course of several weeks; and whether he had to defend against misconduct in the mess, the prison yard, his cell block, or some other location."

The Court cautioned that its decision did not mean that every single detail has to be laid out in a misbehavior report and that **officials will not be expected to provide notice of facts that are beyond their own knowledge, but that "there must be sufficient factual specificity to permit a reasonable person to understand what conduct is at issue so that he may identify relevant evidence and present a defense."**

The defendants argued that any notice errors were cured by the testimony from Lt. Schneider at the hearing, which identified some of the substance of the confidential information. The Court rejected this argument, finding that **it is doubtful "that inadequate written notice can be cured merely through oral disclosures at the disciplinary hearing.** Certainly such curative disclosures would be insufficient unless the inmate was also afforded the meaningful opportunity to prepare a response to the new information."

A Reasonable Officer Would Have Known That Failing to Provide Adequate Notice of the Charges Was Unconstitutional

The Court rejected the defendants' assertion that, even though the law may have been clearly established in this area, a reasonable officer could have believed that it would satisfy the notice requirement to provide a misbehavior report which simply tracked the language of the alleged rule violation. **The Court noted that the law in this area has been settled for over two decades. "No reasonable officer could have thought that such a misbehavior report, devoid of any factual detail and containing an inaccurate incident date, was adequate to permit Sira to identify and marshal the facts pertinent to a defense."** The Court went on to hold that "[i]ndeed, such a conclusion is particularly warranted in this case because Sira persistently challenged the adequacy of the notice he received with respect to place, date, and victims."

Sira Adequately Stated a Claim for Failing to Disclose Evidence

Relying once again on Wolff v. McDonnell, the Court noted that an inmate's right to know the evidence relied upon is well established. Although this right is not absolute, "the discretion to withhold evidence is not unreviewable." In reviewing the rationale set forth by defendants in refusing to disclose the confidential information, **the Court found that although there may have been some security risk if the confidential informants themselves had been identified, there was nothing in the record to suggest that disclosure of the "substance" of the confidential information would have presented security risks.** Thus, the Court denied the defendants qualified immunity on this issue, holding that: "[i]t is possible that on further development of the record defendants will be able to justify withholding the substance of the informants' disclosures from Sira. (citations omitted) But because no reasons are now before the court and because we review the record in the light most favorable to Sira, we must conclude that he presents a viable due process claim based on non-disclosure of evidence and that there is no basis to hold that any reasonable officer could have thought otherwise."

Defendants Are Entitled to Qualified Immunity Regarding Sira's Sufficiency of the Evidence Claim

Sira's final claim was that he was denied due process because the decision finding him guilty was not supported by sufficient evidence. In analyzing this claim, the Court addressed three questions:

1) what evidence is required to support a prison disciplinary disposition;
2) what is the obligation of the hearing officer with respect to assessing confidential information; and
3) how is reliability of confidential information established.

With respect to the third question, the Court explained how hearing officers should assess both confidential information, which is hearsay, and conclusory assertions by informants.

In answering the first question, the Court relied on the Supreme Court's decision in Superintendent v. Hill, which held that a disciplinary decision must be "supported by some evidence in the record." 472 U.S. 445,455. (In New York State Courts, the standard for review of the sufficiency of evidence of a Tier III disposition is whether the record contains "substantial evidence." When you are suing in Federal Court, however, the standard regarding the sufficiency of the evidence is lower.) However, **the Court noted that "only 'reliable' evidence can constitute 'some evidence.' The principle is not new. A reliability inquiry has long been required**

when confidential source information is relied on to satisfy the 'some evidence' standard."

In addressing the obligation of the hearing officer with respect to assessing confidential information, the Court explored the history of some of its decisions on this issue, admitting that there had been some ambiguity in the case law as to whether a hearing officer had to make an independent assessment of an informant's credibility, or whether he could rely on the opinions of others who had dealt with the informants. **However, the Court noted that its recent decision of Taylor v. Rodriguez, 238 F.3d at 194, made it clear that hearing officers must make an independent assessment of an informant's credibility.**

The Court then focused on how a credibility assessment should be made when dealing with hearsay information. **The Court noted that, when dealing with multiple levels of hearsay, "a hearing officer cannot determine the reliability of that information simply by reference to the informant's past record for credibility." Rather, the hearing officer must "consider the totality of the circumstances to determine if the hearsay information is, in fact, reliable." The Court provided a list of factors that a hearing officer might rely on in considering the "totality of the circumstances," which included: the identity and reputation of the original informant; his motive for making the statement; his willingness to testify or his reasons for not doing so; and the consequences he would face if his information proved to be false.** The Court also noted that if the confidential informant's identity were unknown to the hearing officer, he could still make a totality assessment by considering factors such as the "specificity of the information, the circumstances under which it was disclosed, and the degree to which it is corroborated by other evidence." In addition, the Court held, the hearing officer should consider challenges to the informants reliability raised by the accused.

In Sira's case, the defendants argued that the internal consistency of the confidential information should have been sufficient to establish its reliability, but the Court disagreed. The defendants cited to the fact that several of the informants placed Sira in the same locations at specific times. However, Sira was assigned to be in these locations. "Corroboration of facts generally known or easily obtained do not necessarily establish a source's reliability with respect to other incriminating matters," held the Court.

Finally, **the Court held, in assessing the reliability of conclusory assertions made by credible informants, that the hearing officer should determine whether there is a factual basis for the witness's conclusions by inquiring as to what the informant heard and/or saw, when and where he made his observations, and whether there were any other witnesses to the alleged conduct.** The Court stated, "although 'a thorough articulation of the actual basis for particular information may not be necessary in every case, especially where other circumstances weigh heavily in favor of reliability,'" in this case, the hearing officer failed to make any inquiry whatsoever into the informant's conclusory allegations.

However, with respect to the defendants' qualified immunity defense on this issue, the Court found that the defendants were entitled to qualified immunity because, prior to this decision, "the law had not clearly established the need to look beyond the credibility records of confidential informants when evaluating the reliability of conclusions or third-party hearsay evidence supplied by them."

Joel Landau, of Prisoners' Legal Services, represented plaintiff Sira on appeal.

A Message From Tom Terrizzi, Executive Director of PLS

This is an unusual edition of *Pro Se*. I can't remember an issue that we have published which contains so many decisions in which prisoners have prevailed. The recent Second Circuit Court of Appeals cases regarding "exhaustion of administrative remedies" under the PLRA were a breath of fresh air for inmates struggling just to get their claims filed. The struggle to keep the court house door open was as a result of a combined effort among Prisoners' Legal Services of New York, the Prisoners' Rights Project at the Legal Aid Society, private pro bono counsel, and some persistent *pro se* plaintiffs. Congratulations to all.

We have to keep in mind, however, that getting in the court house door will continue to be a challenge. It is extremely important that prisoners educate themselves on the basics of raising a complaint. Everyone, whenever possible, must promptly file a grievance regarding a decision or incident they object to, and appeal that decision through all stages of the grievance process, in order to preserve the right to go to court later. If there is a grievance process other than the IGRC process, for example, for Tier III appeals or property claims, those processes must be followed all the way through the final appeal stage.

The courts will eventually establish a clearer direction regarding what constitutes exhaustion of administrative remedies. But who wants to spend years fighting over these issues when it is the underlying claim which is important? Educating yourselves and others regarding exhaustion is the best way to avoid future problems. Then, perhaps, we at *Pro Se* can spend more time reporting on positive decisions on the *merits* of claims.

News and Briefs

Voting Rights: Second Circuit Upholds New York State Statute Prohibiting Voting by Incarcerated Felons and Parolees

Muntaqim v. Coombe, 366 F.3d 102 (2d Cir. 2004)

On April 30, 2004, the Second Circuit decided the issue of whether the Voting Rights Act (VRA), which prohibits voting qualifications that result in the abridgment of the right to vote on account of race, could be applied to a New York State statute that disenfranchises currently incarcerated felons and parolees. Initially, the Court noted that this issue is a difficult one which "can ultimately be resolved only by a determination of the United States Supreme Court." Nonetheless, the Court concluded that the VRA, which is silent on the topic of state felon disenfranchisement statutes, cannot be applied to draw into question the validity of New York's disenfranchisement statute. The Court held: "[I]n light of recent Supreme Court decisions that have clarified the scope of Congress's enforcement power under the Reconstruction Amendments, the application of the Voting Rights Act to felon disenfranchisement statutes such as that of New York would infringe upon the states' well-established discretion to deprive felons of the right to vote. Because the Supreme Court has instructed us that statutes should not be construed to alter the constitutional balance between the states and the federal government unless Congress makes its intent to do so unmistakably clear, we will not construe the Voting Rights Act to extend to New York's felon disenfranchisement statute."

New York City Plans To Place Housing Restrictions on Convicted Sex and Drug Offenders

This past June, the Bloomberg administration in New York City reported on its plan to crack down on drug and sex offenders, banning all those who are arrested for such offenses on public grounds from all public housing except their own home and its common areas. The new policy requires that people arrested for the felony sale of drugs on public grounds be notified that they are banned from all public housing outside of their own home and its common areas. If the person who commits the crime does not live in the development where the crime is committed, she/he will be banned from the premises entirely. Violators will be arrested for trespassing, being identified by a database which will be maintained by the police. The city was unable to answer any questions concerning how long a drug offender might be banned from moving into public housing.

In addition, the city plans to use the New York State Sex Offender Registry Act to monitor convicted sex offenders living in public housing within the city. Police are planning to visit the homes of convicted sex offenders who claim to be living in public housing, in order to verify their address. If the person is not living at the address provided to the registry, they will be arrested.

Federal Cases

DNA: District Court Upholds Constitutionality of DNA statute

Nicholas v. Goord, 2004 WL 1432533 (S.D.N.Y.) (June 24, 2004)

The plaintiffs in this case were either current or former incarcerated felons who refused to submit their DNA, or individuals who had allowed their blood to be taken but were seeking to have the results expunged. The plaintiffs' claim was that New York State's DNA statute violated their Fourth Amendment right to be free from unreasonable searches and seizures.

The court applied a simple balancing test to determine the constitutionality of the statute, weighing an "individual's Fourth Amendment interest against the government's interest in conducting the search." Admitting that there is no precise formula for the application of the balancing test, the court focused on three factors: "the strength of plaintiff's privacy interest; the nature and scope of the intrusion; and the government interest at stake."

The court first found that "plaintiff's interest in their DNA is minimal," noting that the information obtained from DNA is similar to fingerprinting, in that it simply provides a unique identifying marker, and the use of such information has become universally accepted. As to the scope of the intrusion, the court found that also was minimal, in that the use of DNA provides "no information of any apparent utility to law enforcement other than identification; nor is any additional usage permitted by the statute." The fact that DNA requires the gathering of blood was also dismissed by the court, as it found that inmates "are required to undergo physical examinations, including blood tests," and noting that Supreme Court cases have found that the drawing of blood is "minimally intrusive." The court explained that the reason behind the warrant requirement for certain "searches" is to protect against "random or arbitrary acts," and since the DNA statute is "universally applied," it ensures that DNA samples will not be ordered "randomly or for illegitimate purposes," thus fulfilling a "principle purpose of the warrant requirement."

Finally, the court addressed the government's interest and found that, "compared to the nature and

the invasion of privacy, there is a significant government interest" in "having information readily available to aid criminal investigations." The court granted the defendants' motion to dismiss, concluding that "taking blood and analyzing it for DNA constitutes a reasonable search" within the meaning of the Fourth Amendment.

"Restricted Diet" Case: Prisoner Substantially Prevails on Opposition to Summary Judgment Motion

Rodriguez v. McGinnis, Alves & Morse, 2004 WL 1145911 (W.D.N.Y.) (May 18, 2004)

In yet another victory for prisoners' rights, District Court Judge Siragusa recently denied, in part, the defendants' motion for summary judgment in the "restricted diet" case of Rodriguez v. McGinnis, et. al. Defendants McGinnis, Alves and Morse made their motions claiming that Rodriguez could not prove facts sufficient to prove deliberate indifference on the part of the named defendants and that even if he could, they should be shielded from liability as a result of qualified immunity. The defendants also requested permission to amend their answers to raise the defense of exhaustion.

In 1998, Rodriguez sued the Superintendent, the retired Deputy Superintendent of Security, and the Director of Medical Services of the Southport Correctional Facility, alleging that he was subjected to cruel and unusual punishment while incarcerated at Southport between June 1995 and June 1998. During this time period, Rodriguez accumulated over a year's worth of days on a restricted diet, a "nutritional loaf, food he could not stomach, which caused him to lose an average of ten pounds a week. His weight dropped from his regular 140 pounds until at one point, he weighed only 114 pounds. In addition, during this time, he suffered from several medical conditions, including epilepsy, gastritis, and negligently undiagnosed Hepatitis C, all of which were affected by the weight loss."

Rodriguez alleged in his complaint that defendants Morse and McGinnis knew that Rodriguez either could not or would not eat the diet, and if they placed him on the diet, he would starve. Rodriguez also claimed that defendant Alves removed him from the "special diet" only until his weight increased; at which point, Alves ordered that the diet be resumed. It is alleged that defendant Alves engaged in this conduct 24 times over a three-year period. Rodriguez asserted in his papers that the American Correctional Association (ACA) standards prohibit using food as punishment, and yet this is a practice which DOCS not only permits, but has increased the use of, over the years. Further, although DOCS claims the diet to be nutritious, Rodriguez asserted that current knowledge about nutrition indicates that variety is critical in a diet. Finally, Rodriguez claimed that, in order to obtain the full nutritional value of the diet, a person would have to ingest three 18-ounce loaves per day, which would result in an excess caloric intake.

In his complaint, Rodriguez also asserted that while at Southport, he suffered from a rotator cuff injury. Despite this injury, he was frequently placed on a back cuff and waist chain order. At Southport, back cuffs are applied with the backs of the hands together and thumbs up; a chain is then attached to the cuff and placed around the waist. Inmates remain in cuffs throughout recreation, and whenever escorted from their cell, during disciplinary hearings, medical visits to the infirmary, etc. Rodriguez alleged that, although DOCS regulations and ACA guidelines prohibit the use of mechanical restraints as punishment, back cuff orders were triggered by nearly any misbehavior, and were constantly renewed for four to six weeks at a time, regardless of present behavior or any apparent security threat.

Initially, the district court denied the defendants' motion to amend their answers to raise the

affirmative defense of exhaustion, finding that granting such a motion would unduly prejudice the plaintiff. The court noted, however, that if it were to address the issue of exhaustion, it would determine that Rodriguez did, indeed exhaust his administrative remedies. The court then held that, with respect to defendant Alves, there were triable issues of material facts as to whether he was deliberately indifferent to the health and safety of Rodriguez.

With respect to defendants Morse and McGinnis, the court found that there was a question of fact as to whether the use of the restricted diet and behind-the-back cuffing was used to restore prison discipline and security because, although defendants argued that this was the case, the plaintiff submitted expert testimony indicating otherwise.

The court then addressed the issue of personal liability on behalf of Morse and McGinnis. The court found that the evidence presented failed to demonstrate a triable issue of fact as to whether Morse was deliberately indifferent to the plaintiff's shoulder condition or his medical condition while on the diet. The court also found that it was not unreasonable for Morse to rely on defendant Alves to provide adequate medical care, and thus, Morse would be protected by qualified immunity.

The court had the same opinion with respect to defendant McGinnis, but only on the issue of the use of the restraints. With respect to the imposition of the diet, the court found that defendant McGinnis had received letters from Rodriguez setting forth his complaints regarding his medical condition while on the diet, had affirmed the dismissal of grievances concerning the diet, and suspended the diet on 31 occasions, checking with defendant Alves as to when Rodriguez had gained enough weight so that the diet could be reimposed. On the qualified immunity issue, the court found that there was a triable issue of fact as to whether it was reasonable for defendant McGinnis to believe he was not violating plaintiff's constitutional rights by imposing the restricted diet.

Rodriguez is presently being represented by Prisoners' Legal Services.

Sex Offender Treatment Programs and the Fifth Amendment

Aquilera v. Conway, 2004 WL 1773394 (W.D.N.Y.) (August 5, 2004)
Donhauser v. Goord, 314 F. Supp.2d 139 (N.D.N.Y. 2004) *see also* amended decision at 371 F. Supp. 2d 160 (N.D.N.Y. 2004)

In decisions dealing with the requirement that prisoners enrolled in the Sex Offender Counseling Program (SOCP) discuss not only the conduct that resulted in their current convictions, but also conduct which could lead to criminal charges, the United States District Courts for the Northern and Western Districts of New York give a very instructive lesson on how to craft a successful Fifth Amendment challenge.

The Fifth Amendment states that "no person shall be compelled in any criminal case to be a witness against himself." This rule prevents the government from requiring a person to answer questions put to him/her in any civil or criminal proceeding, whether formal or informal, where the answers might incriminate him/her in future criminal proceedings. The SOCP rules not only required that a prisoner discuss prior conduct that could be the basis of criminal proceedings, but also required that the counselors running the program report any information they learned about an individual's possibly criminal, but as yet uncharged, conduct to law enforcement agencies. Adding to the pressure on prisoners to enroll in SOCP and discuss their prior sexual misconduct is a DOCS' policy that prisoners who refuse to enroll in the program, or who enroll but refuse to discuss potentially criminal conduct, will be deprived of all of their good time credits. Yet another consequence of either a prisoner's refusal to

enroll in SOCP, or of enrolling but refusing to discuss his past conduct, is the denial of certain privileges, such as participation in the family reunion program.

In Aquilera v. Conway, the plaintiff alleged that prison officials had violated his Fifth Amendment rights when they denied his application for a family reunion visit because of his refusal to discuss his crime of conviction in SOCP. Aquilera's appeal of the conviction was still pending, and he was concerned that statements he made in the program might jeopardize the appeal. The Court dismissed this action, ruling that plaintiff Aquilera was not compelled to incriminate himself. Rather, the Court stated, the plaintiff could voluntarily choose to participate and abide by the requirements or he could avoid the requirement simply by not enrolling. The fact that participation in the SCOP program might be a condition for other prison privileges, such as family reunion visits, did not bolster the plaintiff's claim that the requirement violated his Fifth Amendment rights because the plaintiff has no constitutional right to have a trailer visit, and DOCS therefore could exercise discretion in deciding who is eligible for a trailer visit.

The court also concluded that DOCS' decision that plaintiff Aquilera be denied a family reunion visit did not violate either Aquilera's fundament right to marry or his Eighth Amendment right to be free from cruel and unusual punishment. Unlike the plaintiff in the Donhauser case below, plaintiff Aquilera did not claim that the program's requirements violated his Fifth Amendment right not to incriminate himself because the refusal to abide by SOCP's rules or to enroll in the program would result in a loss of good time credits.

The Court in Donhauser v. Goord faced a similar set of facts to those considered by the Court in Aquilera, with one very important exception. In Donhauser, the plaintiff alleged that, because DOCS would deprive an inmate who refused to abide by the SCOP's full disclosure requirement of all his good time credit, the requirement violated his Fifth Amendment right not to incriminate himself. Donhauser's focus on the consequence of refusing to disclose all prior sexual misconduct, that is, the loss of good time, led the Court to a different result.

The Donhauser Court ruled that, because the price of exercising his right not to incriminate himself was an extension of his term of incarceration, the plaintiff had stated a cause of action for a Fifth Amendment violation. In reaching this result, the Court distinguished the facts before it from those of McCune v. Lile, 536 U.S. 70 (1973). In McCune, the United States Supreme Court ruled that where a prisoner's refusal to participate in a sex offender treatment program resulted only in a transfer to a higher security prison and a loss of privileges, the Fifth Amendment was not violated. (This is the same reasoning used by the Court in Aquilera). Here, the Donhauser Court reasoned, the fact that the plaintiff's refusal to incriminate himself affected the term of his imprisonment distinguished it from McCune and an earlier decision, Johnson v. Baker, 108 F.3d 10 (2d Cir. 1997).

The Court commented that DOCS could remedy the Fifth Amendment problem by offering program participants "use immunity." That means that any statements made by prisoners participating in SOCP could not be used against them in criminal prosecutions.

The Donhauser Court allowed the plaintiff to proceed with his Fifth Amendment claim for declaratory and injunctive relief. It ruled, however, that Donhauser's claim for money damages could not proceed because the defendants were entitled to qualified immunity. With respect to qualified immunity, the Court ruled that even though a prisoner's right to be free from compelled self-incrimination has been long established, courts had not reached a consensus on the proper legal parameters of such a right; the individual defendants

therefore should not have been expected to solve the riddle either. Like the Aquilera court, the Donhauser court ruled that neither the plaintiff's right to privacy, due process, nor equal protection were violated by DOCS' full disclosure of all prior acts of sexual misconduct.

In the wake of the Donhauser decision, Commissioner Goord announced that he was suspending the SOCP, saying that the order "effectively guts the program" and essentially gives sex offenders inappropriate veto power over their rehabilitative treatment. He rejected the Court's suggestion that participants in SOCP be given use immunity, claiming that "immunity places an intolerable burden" on prosecutors. "I will not grant inmates 'use immunity' that is tantamount to a 'stay out of jail card,' complicating attempts to convict them of other crimes," Mr. Goord said. An alternative program will be offered in place of SCOP.

Subsequently, DOCS filed a notice of appeal and moved for a stay of the court order. The stay was granted, which means that the lower court's decision is held in abeyance until the Second Circuit reviews the case. Because of this, the SOCP program is continuing unchanged.

Hepatitis C: District Court Grants DOCS Summary Judgment

Johnson v. Wright, 2004 WL 938299 (S.D.N.Y.) (May 3, 2004)

Plaintiff Johnson, who suffers from Hepatitis C, sued employees of DOCS, including Dr. Lester Wright, DOCS' Medical Director, claiming deliberate indifference to his medical needs, based on their refusal to provide him with combination therapy of Ribavirin and Interferon, commonly referred to as "Rebetron therapy." Plaintiff Johnson had been treated with Interferon, but in June 1999, when his liver enzyme counts increased, his treating physician recommended that he be placed on Rebetron therapy. His request was sent through the DOCS' chain of command to defendant Wright, who denied the request to add Ribavirin to the treatment "due to drug use within the past year."

A year later, in June 2000, Johnson filed a grievance and sent a letter to Dr. Wright requesting that he be placed on Rebetron therapy. Dr. Wright granted his request and by August, Johnson was receiving Rebetron therapy.

Plaintiff Johnson sued in March 2001, claiming deliberate indifference to his medical needs. After various motions and some discovery, the defendants moved for summary judgment claiming, among other things, that:

1) Johnson had failed to assert that the alleged delay in treatment with Rebetron had caused him any injury;
2) their initial refusal to treat Johnson with Rebetron therapy was justified by medical reasons; and
3) they were entitled to qualified immunity.

Initially, both sides agreed that, even though all of Johnson's doctors recommended Rebetron therapy, that "does not mean that the Constitution required that he receive it." The court held that Johnson's positive drug test result, which occurred in May 1998, was "'evidence of active substance abuse' within the meaning of the DOCS' practice," but that alone did not end the court's inquiry. The court held that "if Johnson had evidence from which a reasonable jury could conclude that the defendants subjectively knew of an excessive risk to his health or safety in their following the Guideline, such evidence would presumably constitute proof of the 'subjective' prong of the deliberative indifference standard."

The court examined the medical evidence submitted by both sides, not to determine which medical view was correct but to determine "whether there [was] any disputed issue of fact as to whether the defendants reasonably could have harbored the

belief that the view embodied in the Guideline was correct. This is because if they held such a belief, it would be impossible for a jury to conclude that they had the subjective intent necessary to show deliberate indifference to Johnson's medical needs." The court explained that the issue was not "the arguments that may now be made regarding the wisdom of the Guideline but rather what apparent basis it had at the time." The court then concluded that the defendants submitted sufficient evidence that they had valid medical reasons justifying the denial of the therapy to Johnson, and that Johnson had failed to rebut the defendants' evidence that their "treatment of Johnson was consistent with the DOCS' Practice Guideline and that the Guideline was based on medical evidence that was apparently reliable at the time."

Finally, Johnson argued that the defendants were deliberately indifferent to his medical needs by not providing him with the recommended treatment because drug use under the DOCS' Practice Guideline was not a per se bar to treatment, but rather was merely a factor to be considered. The court found that the issue was "whether the defendant prison officials knew that their use of the factor as a complete bar to Rebetron therapy presented an excessive risk to Johnson's health or safety," and held that there was no evidence to support such a finding.

First Amendment - Freedom of Religion - Update Court Accepts DOCS' New Guidelines on "Five Percenter" Literature and Practices

Marria v. Broaddus, 2004 WL 1724984 (S.D.N.Y.) (July 30, 2004)

In an article that was published in 2003 - Volume 13 - Fall Issue of *Pro Se*, we reported on the case of Marria v. Broaddus, 2003 WL 21782633 (S.D.N.Y. July 31, 2003), a Section 1983 action, in which the district court reversed DOCS' long-standing ban on Five Percenter literature and practices, finding that the ban violated the inmates right to freedom of religion. In his original case, plaintiff Marria had alleged that the defendants violated the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) by refusing to accommodate his religious beliefs as a member of the Nation of Gods and Earths (Nation). The court issued an opinion holding that the Nation was a religion whose sincere adherents were entitled to accommodations under RLUIPA, granting the plaintiff some of the accommodations he sought, and remanding the rest of his claims to DOCS to reevaluate their policies in light of the court's holding.

DOCS then crafted new policies to accommodate Five Percenters and returned to court to request that the court allow DOCS to adopt these new policies as protocol for accommodating members of the Nation. After reviewing the proposed protocols, the court granted DOCS' application for an order adopting a set of proposed protocols. The court found that evidence submitted by DOCS supported its position that the law does not require it to allow members of the Nation to congregate. Therefore, although the protocols do provide for one-on-one meetings with outside volunteers, they do not allow members to congregate.

As part of the resolution of the case, DOCS agreed that each facility will post and maintain a copy of the protocols in the law library and general library.

For a copy of the approved protocols, please write to Central Intake, Prisoners' Legal Services, 114 Prospect Street, Ithaca, New York 14850

State Cases

Court of Appeals

New York's Death Penalty "Deadlock Provision" Found Unconstitutional

People v. Lavalle, 2004 WL 1402516, (Ct. of App. June 24, 2004)

In a hotly contested 4-3 decision, the Court of Appeals effectively ruled that New York's death penalty statute is unconstitutional. The statute contains what is referred to as a "deadlock provision," which requires that jurors responsible for sentencing at the penalty phase must be told that, if they cannot make a decision between punishing with death or life-without-parole, the defendant will some day be eligible for parole. The Court held that such a deadlock provision violates the New York State constitution, stating that "a vote for life imprisonment or death, driven by the fear that a defendant might be parole-eligible if jurors fail to reach unanimity, does not satisfy the heightened standard of reliability required by our State Constitution."

When the statute was originally drafted, there was a great deal of debate concerning the deadlock provision. Proponents argued that it was necessary for a hung jury to know what would happen if they could not reach a verdict. Critics expressed concern that the deadlock provision could have a coercive effect on a juror, in that a juror leaning toward voting for life-without-parole might be inclined to vote for the the death penalty simply out of fear that any other vote would result in the accused being released out onto the street someday. Regardless of the merits of both arguments, the Court held that the provision, as it is written, creates a defect in the existing statute which "can only be cured by a new deadlock instruction from the Legislature."

The Case

In the early morning of May 1997, Cynthia Quinn, a Long Island teacher and track coach, was raped and murdered while out for her daily 6:00 a.m. run. A subsequent investigation resulted in the arrest of Lavalle, who ultimately confessed to the murder. The trial began in June 1999 and lasted 17 days. The prosecution presented 41 witnesses and 180 exhibits. The defense did not present any witnesses. Lavalle was found guilty and on August 6, 1999, after the penalty phase of the trial was completed, he was sentenced to death.

The Appeal

On appeal, Lavalle's defense counsel raised a number of issues. By the time the case reached the Court of Appeals, the deadlock provision issue was before the court, together with issues concerning: jury selection; self-representation; the existence of Brady material; inflammatory testimony; and an improper summation by the prosecutor. The Court of Appeals found for the prosecution on all of the issues except for the deadlock provision.

The Decision

In comparing New York's deadlock provision to those in other states, the Court found that New York's CPL §400.27(10) "is unique in that the sentence required after a deadlock is less severe than the sentences the jury is allowed to consider. No other death penalty scheme in the country requires judges to instruct jurors that, if they cannot unanimously agree between two choices, the judge will sentence [the] defendant to a third, more lenient,

choice." The Court then noted that "[s]tudies have found that jurors tend to 'grossly underestimate how long capital murderers not sentenced to death usually stay in prison.'" Because of this, when faced with the choice provided for in the deadlock provision, "jurors might impose the death penalty on a defendant whom they believed did not deserve it simply because they fear that the defendant would not serve a life sentence."

The Court commented that the New York State Legislature had made it clear that it believes that a person convicted of a capital murder should have only two options, death or life-without-parole. And yet, the Legislature passed a statute that tells a jury that although it may not impose a sentence of life **with** parole, if it cannot agree on death or life-without-parole, then the sentencing court will impose a sentence of life **with** parole. Such a "deadlock instruction interjects the fear that, if jurors do not reach unanimity, the defendant may be paroled in 20 years and pose a threat to society in the future. Yet, in New York, a defendant's future dangerousness is not a statutory aggravator the jury may consider." Thus, held the court, "[b]y interjecting future dangerousness, the deadlock instruction gives rise to an unconstitutionally palpable risk that one or more jurors who cannot bear the thought that a defendant may walk the street again after serving 20 to 25 years will join jurors favoring death in order to avoid the deadlock sentence."

The Court noted that "[f]or jurors who are inclined toward life without parole, the choice is between death and life with parole, a Hobson's choice in light of the jurors' likely concerns over defendant's future dangerousness. The choice of death results not through 'a comparison of views, and arguments among the jurors themselves,' but through fear and coercion." The Court admitted that there may be instances where a juror who favored death over life without parole would vote for life without parole, rather than allow the defendant to be sentenced to life with parole. "That, however, does not cure the coercive effect of the deadlock instruction before us," said the Court. "The coercive effect is not relieved by recognizing that some jurors may be coerced in the opposite direction."

The Court made reference to various commentators who have been critical of New York's death penalty statute, quoting one commentator as saying: "The only possible reason for having this cockeyed sentencing scheme – and for insisting that capital jurors be informed of it - is to put pressure on jurors in the minority holding out for life to switch to death so that the defendant is not made eligible for parole as a result of a non-unanimous verdict."

The importance of this decision cannot be overstated. The existence of the death penalty in New York has been and will continue to be a hotly contested issue. The New York Court of Appeals has consistently approached this issue with great caution, realizing the vast implications of upholding a death sentence. "Because death is qualitatively different, there is a 'corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case. Whether a juror chooses death or life without the possibility of parole, the choice is driven by the fear that a deadlock may result in the eventual release of the defendant. Under New York's deadlock instruction the choice is not, as it should be, the result of a reasoned understanding that it was the appropriate one.'"

FOIL Decision

New York Civil Liberties Union v. City of Schenectady, 2 N.Y.3d 657 (2004)

At first, the question before the Court of Appeals was whether police officer reports relating to use of force were subject to the Freedom of Information

Law (FOIL), but a rather bizarre turn of procedural events left the Court with little to decide.

In April 2000, the NYCLU made a FOIL request to the City of Schenectady for "[a]ll documents...referencing...[u]se of force by police officers against civilians." When the city objected to the request as being too broad, the NYCLU amended its request, asking for "[i]ncidents prepared by police officers pertaining to use of force." After a year passed without any response from the city, the NYCLU filed suit. The city responded by claiming that the records being requested were the same as those requested in Matter of Gannet, Co., v. James, 86 A.D.2d 744 (4th Dep't 1982), lv denied 56 N.Y.2d 502 (1982), where the court held that the Rochester Police Department 'use of force' form was exempt from disclosure under FOIL. The lower court agreed. The NYCLU appealed, arguing, among other things, that the Court of Appeals decision in Matter of Gould v. New York City Police Dep't., 89 N.Y.2d 267 (1996), effectively overruled the Gannet case. (Gould involved a situation where a FOIL request was made to a New York City Police Department seeking complaint follow-up reports. The Court of Appeals found that such reports were not exempt from disclosure under FOIL, regardless of the fact that they might be classified as intra-agency material, since such reports included factual data.) The Appellate Division, Third Department, however, disagreed and affirmed the finding of the lower court, holding that the Court of Appeals' decision in Gould did not affect the Fourth Department's holding in Gannet.

The Court of Appeals granted the NYCLU's motion for leave to appeal. After the NYCLU filed its brief, the City advised the Court that there had been a misunderstanding and that it did not even have use of force records, as it has "no routine procedure for reporting use of force...." The City indicated that there may be references to use of force in standard incident reports and that such reports would be available to the public under FOIL but that, also, there may be such references in internal affairs investigations, and those documents would be exempt from FOIL. The City also indicated that it would be willing to provide information that could be disclosed to the NYCLU. However, the Police Chief submitted an affidavit stating that it would be too burdensome to search thousands of reports looking for references to use of force.

A very frustrated Court of Appeals initially addressed the fact that, although both parties had briefed the legal issue of whether the Gannet case had any continuing viability after the Gould decision, such an issue had become an "academic one." The Court noted that it does not decide academic issues. Thus, the Court was left with an admission by the City that it did have some reports that would reference use of force incidents and that the City was willing to provide those reports under FOIL, but the City also took the position that searching the thousands of documents involved would be too burdensome. The Court of Appeals determined that, based on the City's admission that documents that should be disclosed under FOIL existed, the Appellate Division's decision finding that the denial of the petitioner's request was "entirely proper" could not stand. The Court admitted that there may now be some lack of clarity as to what documents are subject to disclosure under FOIL, but cautioned the defendants that "[w]hat is clear above all is that the 'runaround' must end." Citing the Gould case, the Court reminded the City that "government records are 'presumptively open,' statutory exemptions are 'narrowly construed,' and the City must articulate a 'particularized and specific' justification for non-disclosure."

Disciplinary

Civil Procedure/Administrative Regulations: Appeal Response Period is Directory

Matter of Goberdhan v. Goord, 776 N.Y.S. 2d 648 (3d Dep't 2004)

Petitioner Goberdhan was charged with various rule violations. After being found guilty, he filed an administrative appeal with DOCS, which was received on September 9, 2002 and ultimately decided on October 29, 2002. The petitioner filed an Article 78 claiming, among other things, that he did not receive a decision on his administrative appeal within the 60-day time period, as is required in the regulations. Title 7 N.Y.C.R.R. §254.8 requires that an administrative appeal be decided within 60 days from the date it is received. The court found that the administrative appeal in this case was decided by the respondent within the 60 days, as required by the regulation, and that there was nothing in the record to support the petitioner's claim that he did not receive the determination within that period. Moreover, the court noted, "[e]ven if he did not, such time period is directory, rather than mandatory, and does not warrant disturbing the determination of guilt absent a showing of substantial prejudice, which had not been made here."

Civil Procedure/Service Requirements: Insufficient Funds No Excuse for Failure to Serve Order to Show Cause

Matter of Adams v. Goord, 778 N.Y.S. 2d 554 (3d Dep't 2004)

Petitioner Adams was found guilty of various prison disciplinary rules and subsequently brought an Article 78 to challenge the disposition. The respondents moved to dismiss the petition based upon lack of personal jurisdiction, claiming that none of the respondents had been served in the manner directed by the Order to Show Cause. Adams admitted to the court, via a letter, that he did not furnish the Order to Show Cause to the respondents, but stated that his failure to do so was due to his lack of funds. The lower court then denied the respondents' motion, ordered the respondents to file an answer, and transferred the proceeding to the Appellate Division.

The Third Department held that, even though the respondents did not appeal the determination of the lower court to deny the respondents' motion to dismiss, it would exercise its power to review the procedural error that had previously been raised by the respondents. The court then granted the respondents' motion to dismiss, holding that "[w]hile an inmate's failure to abide by the service requirements in an order to show cause may be excused upon a showing that [the] prison presented an obstacle beyond the inmate's control, petitioner's assertion of insufficient funds does not constitute such an obstacle."

Contraband: Defense to Drug Charge Results in Contraband Charge

Matter of Gonzalez v. Goord, 779 N.Y.S.2d 602 (3d Dep't. 2004)

Petitioner Gonzalez, an inmate, was charged with drug use. During that hearing, and apparently in an attempt to defend himself against the drug charge, he admitted eating pretzels which contained poppy seeds; he even gave the hearing officer the empty bag of pretzels which contained some loose poppy seeds. As a result, the petitioner was charged with possession of contraband and found guilty, the determination being upheld on appeal.

In his subsequent court challenge, the petitioner asserted that, because the pretzels had come through

the package room lawfully, he should not be charged with possession of contraband. The court disagreed. The court relied on the language of the rule violation regarding contraband, which states that "[i]nmates shall not be in possession of any contraband items" and that "[c]ontraband is any article that is not authorized by the superintendent or designee." The court noted that the superintendent had previously sent out a memo to the inmate population, which advised that "'poppy seeds' and 'poppy seed products' are not allowed into this facility as it is considered contraband." Based upon the petitioner's admission that he possessed a bag containing poppy seeds, the court found that the charge was supported by substantial evidence.

Contraband/Drugs: Inference of Possession

Matter of Torres v. Selsky, 777 N.Y.S.2d 815 (3d Dep't 2004)

Petitioner Torres was charged with unauthorized possession of a controlled substance after marijuana in a toilet paper roll was discovered in his cell. Torres filed an Article 78 to challenge the finding of guilt at his disciplinary hearing. He claimed, among other things, that the misbehavior report was defective because it failed to specify the role he played in possessing the contraband which was found in a common area of a cell he shared with another inmate.

The court initially rejected all of his arguments, since he failed to raise them at his underlying hearing. However, the court went on to hold that, even if it were to address his claim of a defective misbehavior report, it would find it to be without merit. "[T]he fact that the cigarette was found in an area within the petitioner's control, notwithstanding that his cellmate also had access to the area, leads to an inference of possession by petitioner," the court held.

In Absentia Hearing: Inmate's Conduct Warranted Exclusion From Hearing

Matter of Alexander v. Ricks, 779 N.Y.S.2d 606 (3d Dep't 2004)

It is well-established that prisoners have both a federal constitutional due process right and a state right under DOCS' regulations to attend a prison disciplinary hearing. Wolff v. McDonnell, 418 U.S. 539 (1974); Title 7 NYCRR §§ 254.4-254.6. However, it is equally clear that the right to be present is not an absolute one. Violent, unruly, or disruptive conduct can justify the exclusion or removal of an inmate from a hearing, but there must be evidence of such conduct on the record to support such an exclusion or removal. See Matter of Berrian v. Selsky, 306 A.D.2d 771, 772 (3rd Dep't 2003); Matter of Johnson v. Goord, 297 A.D.2d 881 (3rd Dep't 2002); and Matter of Beckles v. Selsky, 273 A.D.2d 584 (3rd Dep't 2000).

In March 2001, Alexander received six different misbehavior reports, resulting in five different Tier hearings. All five hearings were conducted by the same hearing officer. To minimize confusion, the five hearings are referred to as the Hebert, Cook, Baker, Herrick, and Premo/Winters hearings, named after the officers who wrote the various misbehavior reports.

All the hearings commenced on March 23, 2001. On that day, Alexander was removed from the Hebert hearing, following a warning by the hearing officer that he would be removed if he continued to act in an "insolent" and disruptive manner, and after the hearing officer found that he had continued to behave in such a manner despite his warnings. Alexander did not challenge his removal from that hearing. After his removal from the Hebert hearing, the other hearings were reconvened later that day and again on

March 26. Upon reconvening those hearings, no mention or reference to the removal from the Hebert hearing was made.

On the morning of March 26, during the reconvened Cook hearing, the hearing officer removed Alexander from the hearing for alleged disruptive behavior, refusal to obey directions, and for swearing and threatening conduct. Alexander maintained that he was simply, but forcefully, objecting to violations of his due process rights. After his ordered removal from the hearing, Alexander became very upset and physical force was used to remove him from the hearing room. Thereafter, the hearing officer reconvened the remaining Herrick, Baker, and Premo/Winters hearings in Alexander's absence, finding that Alexander had forfeited his right to attend the remainder of those hearings, both as a result of his conduct in connection with the Cook hearing and his behavior that had led to his earlier removal from the Hebert hearing.

Following unsuccessful administrative appeals, Alexander filed an Article 78. In March 2003, the Supreme Court, Franklin County, held that Alexander's removal from the Cook hearing was not justified, finding insufficient support in the hearing record that Alexander's removal was necessitated by reasons of institutional safety and correctional goals. Namely, there was no evidence that Alexander swore or was in any way threatening prior to his exclusion from the Cook hearing. As well, the Supreme Court held that the hearing officer "failed to articulate any clear warning to Alexander that he would be excluded from the hearing if he continued to ignore the hearing officer's admonishments to be quiet."

However, the Supreme Court did uphold the hearing officer's decisions to exclude Alexander from the remaining Baker, Herrick and Premo/Winters hearings. The Court found support for the exclusion from those remaining three hearings based upon Alexander's earlier disruptive conduct at the Hebert hearing, and his disruptive "physically out-of-control conduct" following his ordered exclusion from the Cook hearing.

The petitioner appealed the decision upholding his exclusion from the Baker, Herrick and Premo/Winters hearings. The petitioner argued that the hearing officer's removal of him from the earlier Hebert hearing could not be relied upon to support his subsequent removal from the three remaining hearings because he had been allowed to attend those hearings after his removal from the Hebert hearing, with no mention made of his behavior at, and removal from, the Hebert hearing. The petitioner also argued that, since the Supreme Court found that the removal from the Cook hearing was improper and unsupported by the record, it was inappropriate and unreasonable for the hearing officer to immediately reconvene the remaining three hearings without giving the petitioner a chance to attend those hearings. There was no need, petitioner asserted, for the hearing officer to quickly reconvene those hearings; rather, he should have provided a cooling-off period and then warned the petitioner that any further outbursts or unruly behavior would result in his exclusion from the remaining hearings.

The Third Department rejected the petitioner's arguments, finding that there was adequate support and justification for his removal from these hearings. The court held that it could not say that the hearing officer abused his discretion in removing the petitioner from the remaining hearings, "given the proximity in time between the violent outburst and the other hearings, the nature of the outburst itself, and petitioner's prior conduct [at the Hebert hearing]." While the court did not address the petitioner's argument that there was no need, and indeed that it was unreasonable and an abuse of discretion for the hearing officer to immediately reconvene those hearings following the petitioner's removal from the Cook hearing room, the Court implicitly rejected that argument.

The petitioner was represented by Prisoners' Legal Services.

Practice Tip: *When facing a Tier hearing, while you have the right to, and indeed should, clearly state on the record any and all objections you may have, there is no need to be impolite, hostile, or angry when doing so. Further, you should take heed of any clear warnings from the hearing officer regarding the type of behavior she or he deems disruptive or unruly and which could result in your removal from the hearing. If you disagree with the hearing officer's characterization of such behavior as unruly, politely state this on the record, and then move on. Finally, if you believe you are improperly treated by the hearing officer, including being improperly excluded or removed from the hearing, the appropriate time, place, and manner to challenge this is by a respectful verbal objection on the record of the hearing and a written objection in your appeal.*

Denial of Right To Witnesses: New Evidence Results in Previously Denied Witness Becoming Relevant

Matter of Escoto v. Goord, 779 N.Y.S.2d 314 (3d Dep't 2004)

As a result of a cell search in which a sharpened can lid was found, petitioner Escoto was charged with violating prison disciplinary rules prohibiting possession of a weapon and altering an item. At his hearing, Escoto, a non-English-speaking inmate who required an interpreter, testified that he had been given the can lid by another inmate for the purpose of cutting vegetables and requested four inmates as witnesses stating that they would corroborate his defense. The hearing officer denied his request, stating that their testimony would be redundant.

However, the hearing officer then heard testimony from a correction officer who stated he had searched the cell of one of the requested witnessed and had found a note, written in English, which apparently gave instructions to the witness as to how to testify to the incident for which the petitioner was charged. The petitioner denied he wrote the note saying, through his interpreter, that he knew nothing about the note and could not write in English. He suggested that perhaps the note was written by his neighbor to inform the inmate as to what he would be expected to testify to if he were called to the hearing. At this point, Escoto reiterated his request to call his witnesses. The hearing officer ignored his request, while at the same time stating, on the record, that "the note was relevant since it evinced an attempt by petitioner to coerce the testimony of others." The hearing officer proceeded to find Escoto guilty on both charges.

The court found that, "[u]nder these circumstances, the hearing officer erred by excluding the testimony of the witness in whose cell the note was found." Although an inmate's right to call witnesses at a disciplinary hearing is somewhat limited, unless the testimony is irrelevant, redundant, or would jeopardize institutional safety or correctional goals, a requested witness should be allowed to testify. The court found that, "[w]hile an initial exclusion of this witness's testimony as redundant was a proper exercise of discretion, the situation changed when the hearing officer took the testimony of the correction officer who had found the note...." This new evidence made the requested witnesses' testimony relevant, especially in light of the fact that the hearing officer determined that the note had been written by the petitioner, and the hearing officer's "previous determination of redundancy was no longer supported by a sufficient basis in the record."

Denial of Right To Witnesses: Court Finds Supervisors' Testimony Regarding Their Understanding of Facility Memo, Irrelevant.

Matter of Koehl v. Senkowski, 779 N.Y.S.2d 851 (3d Dep't 2004)

In an unfortunate decision, the Third Department recently held that testimony from an inmate's supervisors, to the effect that they did not understand a facility-wide memorandum, which apparently prohibited legal papers in the prison's industry, was properly precluded from a Tier III hearing as irrelevant. Inmate Koehl was found guilty of, *inter alia*, possessing property in an unauthorized area. At his hearing, although Koehl admitted that he did possess the legal documents in the unauthorized area, he requested that two of his supervisors be allowed to testify as witnesses, stating that they would declare that they did not understand the memorandum. The hearing officer denied the requested witnesses as irrelevant. Koehl also requested a third witness, a civilian supervisor, whom the petitioner claimed would testify that she gave Koehl permission to bring his legal documents into the industry area to be notarized. The hearing officer also denied that witness.

The court held that the witness denials were appropriate. As to the first two witnesses, the court found that the "supervisors' understanding of the memorandum was irrelevant to the issue of whether petitioner violated the prohibition on possession of legal papers." With respect to the civilian supervisor, the court held that this testimony, too, was irrelevant, since "any testimony that petitioner sought permission to violate the dictates of the memorandum from a civilian employee without the authority to grant such permission would not support a defense to the charges." The court failed to distinguish their decision in Matter of Bole v. Coughlin, 521 N.Y.S.2d 889 (3d Dep't 1987). In Bole, the court annulled the disciplinary hearing at issue, holding that the witness testimony which was requested, testimony very similar to what was requested by Koehl, should have been allowed, as it may have resulted in mitigation of the penalty imposed.

Substantial Evidence: Lack of Involvement of Other Inmates Does Not Negate Charge of Organizing a Demonstration

Matter of Schuler v. McCray, 778 N.Y.S.2d 237 (3d Dep't 2004)

The Superintendent of Gowanda received an anonymous letter in February 2003, setting forth various complaints and threatening a revolt. A subsequent search of petitioner Schuler's cell resulted in the discovery of a typewriter ribbon on which the first six lines of the text of the anonymous letter were imprinted. Schuler was then served with a misbehavior report charging him with making threats, organizing a demonstration, and rioting. He was found guilty of making threats and organizing a demonstration, but not guilty of rioting.

After an unsuccessful administrative challenge, Schuler filed an Article 78 alleging, among other things, that the lack of involvement of other inmates rendered the charge of organizing a demonstration unsupported by substantial evidence. The court rejected the argument, holding that lack of involvement of others did not render the charge unsupported by substantial evidence, since the letter clearly indicated "the author's intent to incite collective action on the part of the prison population if certain issues" were not addressed.

Unauthorized Organizational Material: Does Anyone Have a Widget?

Matter of Lorenzo v. Neuwrith, 778 N.Y.S.2d 236 (3d Dep't 2004)

Petitioner Lorenzo, an inmate, was charged with destruction of state property and displaying unauthorized organizational material when a gang symbol was discovered on the inside door of his medicine cabinet. At his subsequent hearing,petitioner Lorenzo denied that he had placed the symbol on the door, and elicited testimony that the symbol was "worn" and "appeared to have been on the medicine cabinet door for some time." Lorenzo was found guilty of displaying unauthorized organizational material but not guilty of destruction of state property. He filed an Article 78 proceeding, claiming that the finding of guilt on one charge was inconsistent with the finding of not guilty on the other.

The court disagreed. The court found that the determination of not guilty on the destruction of state property was consistent with the testimony at the hearing, which indicated that the symbol was so worn it may have been on the cabinet before Lorenzo occupied the cell. However, with respect to the displaying of unauthorized organizational material, the court held, "petitioner was aware that the display of such material was prohibited, but took no action to remove or report it during the seven months that he occupied the cell."

Other State Cases

Court of Claims

Failure to Provide Requested Documents Results in Negative Inference Being Drawn

Gentle v. State of New York, Claim No. 9692 (Ruderman, J.)

In this case, the claimant was an inmate at Sing Sing in 1996, working in the facility workshop when he "amputated the left upper joint of his left middle finger and severely lacerated the fourth finger of his left hand." He sued in 1997, claiming that the injury was due to an unsafe router that did not have the proper safety guards in place.

After he filed his claim, the claimant requested certain documents through discovery, including an accident investigation report and reports of weekly maintenance inspections, reports mandated to be kept by DOCS' own Directives. After the defendant failed to produce the requested documents, the claimant made a motion to strike the defendant's answer. In response, the defendant submitted an affidavit from the Fire and Safety Officer, who indicated that he did not make a "formal report" but that he had investigated the incident, pursuant to DOCS' Directives. He further stated that he only keeps such records for a period of three years and thus, by the time claimant requested them in 1999, they would have been destroyed.

The court held:"'To impose the drastic remedy of striking a pleading pursuant to CPLR 3126, there must be a clear showing that a party's failure to comply with discovery demands was willful, contumacious, or in bad faith.'" Based upon the evidence presented, the court decided "[w]hether the destruction of the maintenance records was willful, and the circumstances surrounding the absence of a formal report by the Fire and Safety Officer, present credibility issues and genuine issues of fact which cannot be determined at this time and must await resolution at trial." The court then denied the claimant's motion to strike the defendant's answer, finding that it would reconsider the claimant's application to strike the defendant's answer after it had the opportunity to observe the demeanor of the

witnesses at trial. However, the court did find "claimant [made] a sufficient showing to warrant an adverse inference that, had the records sought been produced, they would have been unfavorable to defendant."

Information Set Forth In Notice of Intention Found Adequate to Place State on Notice

Rodriguez v. State of New York, 779 N.Y.S.2d 552 (2d Dep't 2004)

Claimant, Esther Rodriguez, filed a Claim against the State, claiming that the State's negligent medical care had caused the death of an inmate. The State moved to dismiss, claiming that the Notice of Intention and the Amended Notice of Intention to File a Claim were insufficient, in that they failed to provide the defendant with sufficient notice of the alleged negligence that caused the wrongful death. The Court of Claims granted the defendant's motion to dismiss and the claimant appealed.

The Appellate Division, Second Department, held that the Amended Notice of Intention filed by the claimant was sufficient. The whole purpose of a Notice of Intention is to provide "sufficient definiteness to enable the State to be able to investigate the claim promptly and to ascertain its liability under the circumstances."

The Notice must set forth the time and place where the claim arose and the nature of the claim. The court noted, "[i]n describing the general nature of the claim, the notice of intention need not be exact but should provide an indication of the manner in which the claimant was injured and how the State was negligent." In this case, the claimant, in her Amended Notice of Intention, stated, "'the wrongful death of Gregory Darby occurred...as a result of the negligence of the State of New York as follows:...[t]reatment for his condition of congestive heart and the injuries herein sustained took place ... at Downstate Correctional Facility and/or its medical facilities intermittently, upon information and belief from August 1998 through September, 1998.'" Such information, the court held, was sufficient to place the State on notice that the claimant was asserting that the death was caused by the medical negligence of the State. The court found that the information provided in the Notice was sufficient for the State to investigate the claim and assess its liability.

Parole

Parole Denial Based on Incorrect Information Reversed, New Hearing Order

Matter of Lewis v. Travis, 780 N.Y.S.2d 243 (3d Dep't 2004)

In 1983, petitioner Lewis was convicted of murder in the second degree and robbery in the first degree and sentenced to prison. In 2002, he made his first parole board appearance at which he was denied parole with the Board, placing particular emphasis on his instant offense. After the parole denial was upheld on administrative appeal, petitioner Lewis filed an Article 78 proceeding.

Lewis challenged the parole board's decision, contending that it improperly focused all of its attention on his instant offense and disregarded his many institutional achievements. The court disagreed, finding that "[i]t is well settled that the Board is not required to enumerate, give equal weight to, or explicitly discuss every factor considered." In reviewing the record, the court found that the Board was well aware of petitioner Lewis' achievement while in prison. The court did, however, find that the Board erred when it incorrectly referred to petitioner Lewis' conviction as "murder in the first degree." Because the Board relied on incorrect information to deny petitioner Lewis parole, the court ordered the decision reversed and granted a new hearing.

Pro Se Practice

Are You Entitled to Prior Sentence Credit Under People v. Richardson?

In October, 2003, the New York State Court of Appeals was faced with the issue of whether a sentencing court could change a defendant's sentences from running concurrently to running consecutively if, in its original sentencing, it had not specified as to how the new sentence should run. People v. Richardson, 100 N.Y.2d 847, 767 N.Y.S.2d 384 (2003) In Richardson, the prisoner was convicted of a new crime while serving parole on a prior A-1 felony conviction. In rendering a sentence, the court was silent on the Sentence and Commitment paper as to whether this new sentence would run consecutively or concurrently to the prior undischarged sentence. Penal Law § 70.25(1)(a) provides that, where the court does not specify how the sentences shall run, they are deemed to run concurrently. Therefore, DOCS, in calculating the sentences, determined that Richardson was entitled to concurrent credit for the prior sentence.

After learning of this calculation, however, the People (i.e. the District Attorney for New York County) moved to reopen the sentencing to allow the court to clarify that it had intended for the sentences to run consecutively. Defendant Richardson opposed the motion. The court granted the People's motion and specified in a new Sentence and Commitment paper that the new sentence was consecutive to the prior undischarged term. The defendant appealed and the Appellate Division affirmed the lower court.

On appeal, the Court of Appeals reversed. The Court held that the trial court did not have the authority to modify a lawful sentence of imprisonment "where the court did not specify whether the sentence was to run concurrently or consecutively to an undischarged term of imprisonment on an unrelated conviction." The Court of Appeals found that the trial court's silence in the original Commitment paper rendered the sentences concurrent. Richardson was therefore entitled to have time he had served on the prior conviction credited against the newly-imposed sentence.

This case has generated much interest among prisoners who believe DOCS has incorrectly calculated their sentence. PLS has received many letters from prisoners seeking to benefit from the Richardson case. Unfortunately, Richardson has seemed to create widespread confusion, and in many instances, Richardson is simply not applicable. The following will help explain whether Richardson and the Penal Law provisions at issue in that case may or may not be applicable to your situation.

The Richardson case may at first appear to support the position that whenever the court is silent in a commitment about how a newly-imposed sentence is to run in relation to any undischarged sentence, the newly-imposed sentence must run concurrently. However, that interpretation is not correct. The Court, in deciding Richardson, did not interpret the Penal Law in any new way.

The ruling turned on several specific exceptions to the "silence equals concurrent" rule. Specifically, §70.25(1) states that "*Except* as provided in subdivisions two, two-a, and five of this section," silence means concurrent. Thus, to determine if you are entitled to concurrent credit because of the court's silence in your commitment paper, you must *first* ensure that none of these subdivisions apply.

The subdivision provision that most often prevents concurrent sentences through silence is §70.25(2-a). This section provides that, where a person is sentenced as a predicate felony offender, meaning a second felony offender under §70.04, a second violent felony offender under §70.06, a persistent felony offender under §70.10, or a persistent violent felony offender under §70.80, such newly-imposed sentence must run consecutively to any undischarged term. That

means the judge does not have discretion to issue a concurrent sentence.

Much of the confusion generated by the Richardson decision seems to be that the Court did not make clear that, although Richardson's prior sentence for murder (an A-1 offense) was an "undischarged term of imprisonment," Richardson was *not* a second felony or second violent felony offender under either §70.04 or §70.06. A-1 offenses are specifically exempted from being considered prior offenses, which would make a person a second felony offender or second violent felony offender. Thus, Richardson did not fall under §70.25(2-a). Because of this, where his Commitment paper was silent as to how his sentence should run, a concurrent sentence on his new conviction was a "lawful" sentence under §70.25(1).

In short, if you were sentenced under any of the predicate felony offender statutes, your sentences must run consecutively, even where the sentencing court was silent about how they would run in the Sentence and Commitment paper. The Penal Law requires that predicate felony offender sentences must run consecutively to prior undischarged terms. Because of this, if your commitment paper is silent as to how your sentences should run, and you were sentenced as a repeat offender pursuant to one of the sections listed in Penal Law §70.25(2-a), DOCS must run your new sentence consecutively to your old sentence, pursuant to the mandates of the Penal Law.

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