Pro Se

Vol. 15 Number 1: Winter 2005 Published by Prisoners' Legal Services of New York

Second Circuit Holds Appointment of Counsel Sufficient to Satisfy Constitutional Requirement of Access to Court for Inmates

The United States Court of Appeals for the Second Circuit recently held that the appointment of counsel fully satisfies the constitutional guarantee of access to courts for both prisoners and pretrial detainees. In Bourdon v. Loughren, 386 F. 3d 88 (2d Cir. 2004), Judge Cabranes, writing for the majority, ruled against a prisoner who claimed he was effectively denied access to the courts because he was denied adequate materials by the prison law library. The court made it clear, however, that its ruling was limited to those situations where the prisoner/pretrial detainee was being represented by counsel. The court noted, "[i]n the present case, Bourdon did not seek to represent himself, as he would have had the right to do...We express no view as to whether the appointment of counsel could adequately protect the right of access to the court of a defendant who has exercised his Sixth Amendment right to waive counsel and conduct his own defense."

Background

In 1996, Ronald Bourdon was arrested on various charges and held in the Chenango County jail. While in the jail, Mr. Bourdon, who was represented but dissatisfied with his court-appointed counsel, attempted to prepare *pro se* motions regarding his indictment. However, when he requested reference materials from the jail's law library, the defendants denied his

article continued on page 2...

Also Inside...

Subscribe to Pro Se! See back page for details

This project is supported by a grant administered by the New York State Division of Criminal Justice Services. Points of view in this document are those of the author and do not necessarily represent the official position or policies of the Division of Criminal Justice Services.

... *article continued from page 1*

request, since he was "represented at the time by a court-appointed counsel." The defendants advised Mr. Bourdon that if he wanted these materials, he could request them from his counsel. Mr. Bourdon replied that he had not heard from his counsel and that he was "disappointed with the attorney's services," but the defendants still denied his request.

Nevertheless, even without the materials, Mr. Bourdon filed his *pro se* motions, one for new counsel and one to dismiss the indictment. The trial court denied his motion to dismiss the indictment, finding that the motion was "untimely and that Mr. Bourdon, rather than defendants, was responsible for the late filing." The court, however, granted his motion for new counsel.

In 1997, Mr. Bourdon filed a law suit in the Northern District of New York, claiming that the defendants' refusal of his request for reference materials and their delay in providing him with the services of a notary public hindered his ability to prepare his legal papers. Both parties moved for summary judgment, but Mr. Bourdon failed to file any response to the defendants' motion. Northern District Chief Judge Scullin granted the defendants' motion for summary judgment and Mr. Bourdon appealed.

On the first appeal, the Second Circuit found that the District Court had erred in granting summary judgment to the defendants before advising Mr. Bourdon, "a pro se litigant, of the consequences of failing to file a response to defendants' summary judgment motion." Because of this error, the Second Circuit vacated the order of the District Court and remanded the case.

On remand, the parties once again filed cross-motions for summary judgment. Then-magistrate Sharpe recommended finding in favor of the defendants, holding that "Bourdon's right of access to the court had not been denied, ... that Bourdon could have asked for an extension of time to move to dismiss the indictment and that the denial of Bourdon's motion to dismiss resulted from Bourdon's inaction, not because Bourdon was delayed access to notary services." Magistrate Sharpe went on to hold that, during the entire time Mr. Bourdon claimed he was denied access to the courts, he was represented by counsel. The District Court judge adopted Magistrate Sharpe's report and recommendation, and granted summary judgment to the defendants.

In his second appeal to the Second Circuit, Bourdon argued that the District Court was wrong to grant summary judgment to the defendants. Mr. Bourdon asserted that it did not matter that he was represented by an attorney at the time he was trying to file his papers because his "appointed counsel was ineffective," and therefore, the defendants, in failing to provide him with an adequate law library, hindered his ability to access the state trial court.

Right of Access to the Courts

The well-established "right of access to the courts applies beyond criminal litigation to ensure that all citizens have '[t]he right to sue and defend in the courts.'" Bourdon citing Chambers v. Baltimore & Ohio RR. Co., 207 U.S. 142 (1907) Access to court has particular application to prisoners. It assures that those who are in custody "have the tools they need in order to defend against criminal charges, attack their convictions and sentences...and bring civil rights claims challenging the conditions of their confinement." Lewis v. Casey, 518 U.S. 343, 350-55 (1996) The right is grounded in the Due Process Clause of the Fifth and Fourteenth Amendments and the Equal Protection Clause of the Fourteenth Amendment.

The practical application of this right with respect to prisoners was originally set forth in the case of Bounds v. Smith, 430 U.S. 817, 828 (1977), where the Supreme Court held that the right of access to courts "requires prison

authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law."

In Bounds, the issue was whether the district court had erred when it approved a library plan for the prisoners of the State of North Carolina. The State had argued that it should not be forced to implement and pay for a statewide library plan for prisoners as long as its prisoners were allowed to communicate with "jailhouse lawyers." The Supreme Court rejected the State's position and upheld the library plan, but also acknowledged that, "while library service is one valid means of assuring access to the courts, constitutionally acceptable access can be provided alternatively by 'adequate assistance from persons trained in the law.'" Bourdon citing Bounds, 430 at 829. The Supreme Court expounded on this by setting forth a number of alternatives a State might consider to fulfill the access-to-court mandate. Judge Cabranes noted that the Bounds Court found that "[a]mong the alternatives are the training of inmates as paralegal assistants to work under lawyers' supervision, the use of paraprofessionals and law students, either as volunteers or in formal clinical programs, the organization of volunteer attorneys through bar associations or other groups, the hiring of lawyers on a part-time consultant basis, and the use of full-time staff attorneys, working either in new prison legal assistance organizations or as part of public defender or legal services offices."

The Issues in Bourdon

The Bourdon case raised three questions: "(1) whether the appointment of counsel is a valid means of satisfying fully a state's constitutional obligation to provide prisoners with meaningful access to the courts, (2) if so whether the provision of counsel to satisfy a prisoner's right of access to the courts should be measured in terms of whether that counsel was 'effective' under the Sixth Amendment's guarantee of the assistance of counsel, and (3) whether, in the circumstances of this case, the fact of Bourdon's appointed counsel established constitutionally acceptable access to the courts."

Is Appointment of Counsel Sufficient to Satisfy "Meaningful Access to the Courts?"

In answering this question, the Second Circuit first noted that, although it had indicated "in dicta" that appointment of counsel could be a valid means of satisfying a prisoner's right of access to the court, it had, admittedly, never directly addressed this question. The court then looked to the Supreme Court's decision in Bounds and decisions of other circuits on this issue. As stated above, Bounds held that a state could satisfy a prisoner's right of access to the courts by providing a prisoner with "adequate assistance by persons trained in the law." Since Bounds, several circuit courts have also held that appointment of counsel is a valid means of providing access to court to pretrial detainees and other prisoners. Based on these decisions, **Judge Cabranes concluded: "Accordingly, today we explicitly hold that the appointment of counsel is a valid means of fully satisfying a state's constitutional obligation to provide prisoners, including pretrial detainees, with access to the courts. . . ."**

What is Meant by "Adequate Assistance from Persons Trained in the Law?"

Mr. Bourdon did not raise an "effective assistance of counsel" claim under the Sixth Amendment, but did strenuously argue that his attorney was so ineffective that the mere appointment of the attorney to represent him could not possibly satisfy the state's duty to provide him with "meaningful access to the courts." The court found this claim required the court to determine "whether any claim of

constitutionally-acceptable access to the courts through appointed counsel should be measured by reference to the constitutional standard of effective assistance of counsel." In other words, the court decided that it had to determine what is meant by the phrase "adequate assistance from persons trained in the law" in order to determine whether such a phrase rises to level of what is required by the Sixth Amendment in terms of "effective assistance of counsel."

Comparing the two rights, assistance of counsel and access to courts, the court found that they originated from different sources: assistance of counsel being set forth in the Sixth Amendment, the right of access to courts finding its roots in, among other things, the Due Process Clause of the Fifth and Fourteenth Amendments and the Equal Protection Clause of the Fourteenth Amendment. The Court then examined the judicial history of these two rights. Although both rights are generally concerned "with assuring that criminal defendants receive a fair trial," they protect this fundamental right in "different ways and they apply to different categories of persons."

The Sixth Amendment right of effective assistance of counsel exists to prevent a person from being hauled into court and being denied a fair trial simply because he cannot afford to hire a lawyer. The right of effective assistance is rooted in the constitutional right to be heard on the criminal charges against you. This right would be meaningless if it did not include "the right to be heard by counsel." The right to effective assistance of counsel applies only to a defendant's criminal trial and his/her first appeal as of right. It does not apply to collateral attacks, discretionary appeals, or challenges regarding conditions of confinement.

The right of access to the courts, although it also concerns the issue of being provided a fair trial, achieves that end differently, and applies to different types of proceedings and a different category of people. The right of access to the courts applies to all prisoners, not just those who are facing a criminal trial or engaging in their first appeal of that trial. This right encompasses aspects of litigation that are not at issue for a criminal defendant. For instance, in addition to the need of a prisoner to have adequate assistance from persons trained in the law, the right of access to the courts also allows indigent prisoners to "'file appeals and habeas corpus petitions without payment of docket fees.'"

One way to distinguish between the two rights is to view the Sixth Amendment right as a means of protecting individuals from unjust or unfair prosecution, whereas the access to court right is meant to open the courthouse doors to those who might otherwise be unable to enter.

There is no question that "both rights impose a certain minimum standard of 'assistance.'" However, the Sixth Amendment right speaks in terms of "effective assistance," whereas the access to courts right speaks in terms of "adequate assistance." The court noted, "effective assistance of counsel" means, "quite plainly, that the defendant is entitled to assistance by a competent attorney who, through his or her representation of the defendant, 'plays the role necessary to ensure that the trial is fair.'" By contrast, the phrase, "adequate assistance from persons trained in the law," is somewhat more amorphous and does not guarantee any specific type of assistance, but rather, it confers on the benefitted person the capability of bringing a challenge to his sentence or conditions of confinement.

In light of all of these factors, the court determined that **"the term 'adequate' modifying 'assistance from persons trained in the law' does not incorporate the effectiveness inquiry" of the Sixth Amendment but rather refers to the "capability of qualified and trained persons" to bring a prisoner's legal claim before the courts.** Thus, the court held, in quoting a 1995 Eighth Circuit case, 'adequate assistance', "refers not to the effectiveness of the representation, but to the adequacy of the

prisoner's access to his or her court-approved counsel...."

Appointment of Counsel Established Constitutionally Acceptable Access to Courts

Mr. Bourdon claimed that his counsel was so ineffective as to not be able to provide him with meaningful access to the courts. However, the court held that, **"[b]ecause attorneys, by definition, are trained and qualified in legal matters, when a prisoner with appointed counsel claims that he was hindered by prison officials in his efforts to defend himself or pursue other relevant legal claims, he must show that, on the facts of his case the provision of counsel did not furnish him with the capability of bringing his challenges before the courts, not that he was denied effective representation in the court."**

Since Mr. Bourdon was, at the time he requested the reference materials, represented by an attorney, since he failed to present any evidence that the defendants restricted his access to his attorney, since he did not request the reference materials from his attorney, and since he did not allege that his attorney was incapable of pursuing his claims, the court found that "the denial of Bourdon's request for reference material did not 'hinder [] his efforts to pursue a claim' and thus did not violate Bourdon's right of access to the courts."

The Concurrence

Senior Circuit Judge Oakes, although he concurred with the decision to affirm the grant of summary judgment, did so only because he believed that Bourdon failed to prove that he was injured or prejudiced by the alleged denial of access and thus failed to state a claim on which relief could be granted. (Lewis, 518 U.S. at 350) In his concurring opinion, Judge Oakes voiced his disagreement with what he referred to as "the breadth of the rule announced," stating that, although it is true that there are times when the appointment of counsel may be sufficient, such action does not necessarily always fully satisfy "a state's constitutional obligation to provide prisoners, including pretrial detainees with access to the courts." Judge Oakes noted, "[t]here may be other aspects of the right of access that a state may not constitutionally obstruct despite the provision of counsel." For instance, a state could not obstruct a prisoner's ability to visit with his counsel and then argue that, simply because it had appointed counsel, it had provided access to the courts.

Judge Oakes also disagreed with the majority's holding that the right to effective assistance of counsel does not play a role in analyzing whether the state has fulfilled its obligation to provide access to the courts. Judge Oakes noted: "A defendant whose counsel fails to meet the minimum constitutional standards of effectiveness is not represented at all, and to deny that defendant all other means of communicating with the court most certainly is a deprivation of constitutional proportions...."

A Message from Tom Terrizzi, Executive Director of PLS

The Importance of Being an Educated Consumer

The looming crisis regarding the treatment of those who are afflicted with Hepatitis C is sobering. Throughout the United States, it is estimated that, in some state prisons systems, up to 25% of those incarcerated are HCV positive. In New York, knowledgeable sources estimate that 10,000 or more of the state prison population is HCV positive.

Just getting the tests to discover your HCV status can be daunting. Even with a diagnosis, it is difficult, if sometimes impossible, to get appropriate treatment while incarcerated. The story told in the recent Second Circuit case of McKenna v. Wright, reported in this issue, is

troubling to anyone seeking to overcome the barriers to treatment. Even if you are persistent, like Mr. McKenna, you still might have to take the matter to court for relief.

One thing is clear, however, if you aren't persistent: you often will not get the care you need. Being persistent, while respecting the medical care provider, is crucial. Even outside of prison, access to medical care is getting increasingly difficult, with many bureaucratic rules to comply with, and that is only if you are lucky enough to have health insurance. If you don't have coverage, the task is even harder. It is necessary to be an educated consumer of health care to insure that you are getting the best care possible.

One way to insure you are following through on efforts to get needed treatment is to keep a log of your efforts. Every time you go to sick call for a particular problem, prepare by noting in your log what it is you will be asking the medical staff to do for you. During your visit, or as soon as possible afterwards, you should write a note in your log about what your appointment covered and the name of the nurse, physician assistant, or doctor you saw. You should also write down what information was given to you and what you need to do to follow up.

This may seem obvious, but in order to keep track of what happened, especially if your condition is a serious one which will require multiple appointments, you should have a log regarding your treatment. You can't always rely on the medical records to accurately reflect what you discussed with the medical staff. Your independent log of information will help you remember what was said and what you have to do next.

Keeping a written log will help you be better informed when you go to see a medical provider, especially if you have been transferred and have to start over with a new doctor. A log will also help you in preparing a grievance or other appeal, if that route is necessary to get needed assistance. In the last issue of ***Pro Se***, we reported on Abney v. McGinnis, in which Mr. Abney repeatedly filed grievances to secure needed medical care. The Second Circuit found that his efforts were sufficient to exhaust his administrative remedies before going to court seeking an order for relief.

Persistence and accurate records will help you get the care you need in a timely manner.

News and Briefs

Supreme Court Denies Petition For Review on Case Involving Voting Rights of Felons

Locke v. Farrakhan, 2004 WL 2058775 (U.S. Nov. 8, 2004)

In a decision which sends mixed messages to states with respect to the issue of voting rights for convicted felons, the Supreme Court declined to review a Ninth Circuit Court of Appeals case which allowed felons to challenge a Washington state felon disenfranchisement statute as a violation of the Voting Rights Act. However, the Court also let stand a decision by the Second Circuit Court of Appeals which held that the Voting Rights Act did not apply to New York's disenfranchisement law. In our last issue of ***Pro Se***, we reported on the Second Circuit case of Muntaqim v. Coombe, 366 F.3d 102 (2d Cir. 2004), where the Second Circuit held that the Voting Rights Act, 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. Apparently all States, save Maine and Vermont, deny felons the right to vote, although some allow felons to regain the right to vote under certain circumstances. "When you have that many people who don't get to choose their government, that is a serious problem for democracy," said Jessie Allen, of the Brennan

Center for Justice at New York University School of Law. Mr. Allen is representing a class of 600,000 Florida ex-felons before the Eleventh Circuit on a challenge to a disenfranchisement statute.

The decision in Locke, however, is not the end. The Locke case will now proceed to trial and various appeals are possible. In Muntaqim, a majority of Second Circuit judges voted on their own motion to rehear the case if the high court denied review, so that case is back before the Second Circuit. Finally, the Florida case could be before the Supreme Court by next year.

Federal Cases

Qualified Immunity: Can Be Raised in Motion to Dismiss

McKenna v. Wright, 386 F. 3d 432 (2d Cir. 2004)

Qualified immunity is an affirmative defense which means that when sued, a defendant can raise the defense of qualified immunity to shield himself from liability. Qualified immunity finds its basis in the common law and was instituted in an attempt to protect civil servants from the fear of being sued in performing lawful discretionary functions. When a public official raises the defense of qualified immunity, he will be protected from liability unless the plaintiff can prove that he has violated a "clearly established" law, of which a reasonable official in his position would have known.

Normally, since it is an affirmative defense, qualified immunity is asserted as a defense in answer to a complaint. However, there have been at least two cases in the Second Circuit where the defendants have not answered, but rather, have made a motion to dismiss the complaint pursuant to FRCP 12 (b)(6), and in their motion to dismiss, raised the defense of qualified immunity. In Green v. Maraio, 722 F.2d 1013 (2d Cir. 1983), the court permitted the defendant, a court reporter who was alleged to have altered a transcript of a criminal trial, to raise the defense of qualified immunity in a motion to dismiss because "the complaint itself establishe[d] the circumstances required as a predicate to a finding of qualified immunity. Green, 722 at 1019. The court in Green held that "dismissal pursuant to [Rule] 12(b)(6) was proper . . . '[s]ince judges are immune from suit for their decisions [and therefore] it would be manifestly unfair to hold liable the ministerial officers who carry out the judicial will."

In the second case, Pani v. Empire Blue Cross Blue Shield, 152 F.3d 67 (2d Cir. 1998), a "fiscal intermediary" was accused of making a false statement regarding a claim for Medicare reimbursement. The Second Circuit upheld the defendant's qualified immunity defense which was raised in a motion to dismiss, reasoning that "fiscal intermediaries...are acting as adjuncts to the government and are carrying out a traditional government function." In both of these cases, the court noted that it was allowing the qualified immunity defense to be asserted in 12(b)(6) motion to dismiss because it had determined that "the facts supporting the defense appeared on the face of the complaint." Pani, 152 F. 3d at 74-75. See also: Green 722 at 1019.

In the recent case of McKenna v. Wright, the U.S. Court of Appeals for the Second Circuit extended the trend to allow exceptions to the general rule that affirmative defenses must be presented in an answer to the complaint and not in a motion to dismiss. Although the court ultimately rejected the defendants' defense of qualified immunity, the court held that "even a traditional qualified immunity defense" may be asserted on a Rule 12(b)(6) motion, "as long as the defense is based on facts appearing on the face of the complaint."

Background

Edward McKenna, a prisoner who was incarcerated at Woodbourne C.F., sued the defendants within DOCS, claiming that they were deliberately indifferent to his medical needs when they failed to diagnose and treat him for the Hepatitis C Virus (HCV), "a treatable virus that affects the functioning of the liver."

The facts of deliberate indifference, as alleged by Mr. McKenna, are quite disturbing. Mr. McKenna has been in DOCS custody since 1990. Prior to his incarceration, he served in Vietnam. He admitted to prison authorities that he had used drugs intravenously, had been diagnosed with a sexually-transmitted disease, and had previously been incarcerated. All of these factors indicate the potential for being infected with HCV. In 1994, certain tests performed on Mr. McKenna indicated some symptoms of HCV.

However, in 1998, when Mr. McKenna was transferred to Woodbourne, he was not tested for HCV despite DOCS' policy to test all inmates entering a new facility. In 1999, Mr. McKenna was tested and was told by one of the defendants that he was positive for HCV. He requested but was denied medication. DOCS' guidelines require that in order to receive treatment, an inmate must remain incarcerated for at least twelve months. Since Mr. McKenna was eligible for parole in less than a year, he was denied treatment.

Mr. McKenna was ultimately denied parole so he requested treatment again, but was denied due to the fact that he was not enrolled in an Alcohol and Substance Abuse Treatment (ASAT) program. Ironically, Mr. McKenna had previously been deemed ineligible for ASAT because of his medical condition.

By 2001, Mr. McKenna's HCV had progressed to cirrhosis of the liver but he was once again denied treatment, being told that "his cirrhosis was decompensated, *i.e.*, accompanied by various complications...." However, when he later requested a liver transplant, he was denied that also, being told that his request was denied "because the cirrhosis was probably compensated."

Again in 2002, Mr. McKenna requested treatment, but was again denied because he was not in ASAT. Finally, in January 2003, he was approved for treatment; however, "because of the delay in receiving treatment, his disease was so advanced that the side effects rendered him too weak to continue treatment." Mr. McKenna sued.

Availability of Qualified Immunity Defense on a Rule 12(b)(6) Motion

Instead of answering, the defendants filed a motion to dismiss and raised the defense of qualified immunity. When their motion was denied, they appealed to the Second Circuit. The Second Circuit first examined its holdings in Green and Pani. The court determined that although this case was somewhat different, in that "the qualified immunity defense being asserted is the traditional one asserted by executive branch personnel making discretionary decisions,...rather than the specialized defense of a court reporter...or that of a fiscal intermediary..." the analysis should be the same. "[A]s long as the defense is based on facts appearing on the face of the complaint," the defendants should be permitted to raise even a traditional qualified immunity defense.

The court cautioned, however, that the burden on defendants is much greater in terms of proving their defense if it raised in a motion to dismiss. "Not only must the facts supporting the defense appear on the face of the complaint...but, as with all Rule 12(b)(6) motions, the motion may be granted only where 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief,'" held the court.

The Merits of the Defendants' Qualified Immunity Defense

The claim in this case was one of deliberate indifference to serious medical needs. In light of this, the court pointed out that, "[t]o establish their qualified immunity defense, the defendants must show that it was 'objectively reasonable' for them to believe that they had not acted with the requisite deliberate indifference." Although it is quite possible that, at the summary judgment stage, the defendants may be able to produce sufficient evidence through affidavits or otherwise, that their actions in denying Mr. McKenna treatment were "objectively reasonable," the court found that they could not have the case dismissed at this stage of litigation based upon their bare assertion of qualified immunity. The defendants attempted to argue that their twelve-month incarceration rule, regarding eligibility for treatment, was rationale but the court stated: "Whether or not that [twelve month incarceration] theory can be supported on summary judgment by affidavits of sufficient plausibility to demonstrate the defendants' objectively reasonable reliance on the policy, McKenna's allegation that he was denied urgently needed treatment for a serious disease because he might be released within twelve months of starting the treatment sufficiently alleges deliberate indifference to withstand a Rule 12(b)(6) motion.

Post Release Supervision: No Real Remedy for Prisoner When State Fails to Advise of Mandatory Post-Release Supervision Period

Eiland v. Conway, 2004 WL 1961564 (S.D.N.Y., Sept. 2, 2004)

In February 1999, Ellis Eiland pled guilty to attempted burglary in the second degree, a crime which he allegedly committed on November 7, 1998. Mr. Eiland entered his plea of guilty based upon his understanding that he would receive a three-year determinate sentence. However, unbeknownst to Mr. Eiland, New York law mandates that, for crimes committed after September 1, 1998, any determinate sentence of this kind must also carry a five-year term of post-release supervision. After Mr. Eiland served his three-year term, he was released on parole but was subsequently violated.

Violation of the terms of parole when there is a post release supervision period at issue requires the violator to be returned to prison. After Mr. Eiland had been returned to prison several times and held pursuant to his post-release supervision status, he filed a writ of habeas corpus challenging his retention in State prison. Mr. Eiland argued that, since he was never told about the post-release supervision period, the State had no legal authority to hold him after the expiration of the three-year determinate sentence.

The State did not dispute that Mr. Eiland was never informed of the post-release supervision period. Instead, the State first argued that the Eiland Habeas petition was untimely. The court engaged in an exhaustive analysis to determine whether Mr. Eiland's petition was indeed, untimely. "[A] federal habeas petition is time-barred unless it is brought within one year of (so far as is relevant here) either 'the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review,' or 'the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence,'" the court said. Since there was no dispute that Mr. Eiland was not aware of the post-release supervision period until he was violated by parole and returned to DOCS custody, the court decided that Mr. Eiland could "not possibly have discovered the 'factual predicate' of [his] claim until at least March 31, 2001." Thus, the court found that the time in which Mr. Eiland had to file his habeas action began to run on March 31, 2001.

Without any interruptions then, Mr. Eiland would have had to file his Habeas Corpus action on or before March 31, 2002. He actually filed his petition more than nine months later: on January 10, 2003. This would, at first blush, appear to be blatantly untimely. However, the statute of limitations can be tolled (the time stops running) pending certain actions, such as post-conviction or other collateral review challenges. Thus, the court had to determine how much time Mr. Eiland should be credited with for tolling purposes. After examining the facts surrounding Mr. Eiland's argument that he attempted to file various challenges to his conviction, the court concluded that, even applying tolling provisions, Mr. Eiland's Habeas Corpus petition was untimely.

Moreover, the court determined, that even if Mr. Eiland's petition had survived the timeliness provision, the technical obstacle of exhaustion still prevented him from obtaining Habeas Corpus relief. "A federal court may not grant habeas unless 'the applicant has exhausted the remedies available in the courts of the State.'" 28 U.S.C. §2254(b)(1)(A). This means that Mr. Eiland had to demonstrate that he had brought his case before the highest state court authorized to make a decision in his case. In Mr. Eiland's case, he was unable to demonstrate this. Although Mr. Eiland apparently attempted to challenge his confinement due to his post-release violations by filing various writ petitions in state court, he never appealed the denial of those petitions.

The court then addressed the merits of Mr. Eiland's claim: that he completed his lawful sentence of imprisonment and was entitled to immediate release from custody. Mr. Eiland argued that the only available state remedy which would be a §440.10 motion was unacceptable because it would only result in allowing him to withdraw his plea and face a trial on the charges or to renegotiate his plea. Both options were "unattractive to Eiland" because he had no desire to go to trial on the original charges and could not get a plea more favorable than the one for which he had originally bargained, since state law mandates the post-release supervision time.

Mr. Eiland argued that he was being held by the state without any legal authority. However, the court rejected this argument. "Since the sentence of post-release supervision was mandatory under state law, the fact that the judgment of conviction failed to include an explicit reference to it does not render Eiland subject to punishment without lawful authority," the court held. "The term of supervised release is, by legislative command, a part of the judgment of conviction. Eiland's problem is not that supervised release was not part of his sentence, it is that he was never properly advised that it would be."

Mr. Eiland also argued that, "to the extent he did not receive the sentence he thought he was receiving," he shouldn't be limited to simply being allowed to withdraw his plea but should be entitled to "the benefit of his bargain." The court, relying on the Second Circuit, stated that ordinarily "'the only remedies available for breach of a plea agreement are enforcement of the agreement or affording the defendant an opportunity to withdraw the plea.'" The court then noted that, '[i]n the case of breach of a plea agreement by a state prosecutor, the Supreme Court on direct review has left the choice of remedies to the state courts...and the federal courts on habeas have done the same."

However, the court noted, in this case, Mr. Eiland claimed that he bargained for a sentence of three years without any post-release supervision, and such a sentence under New York law would have been illegal. In that situation, the court held, "courts have generally, and quite reasonably, held that the only available remedy is rescission of the agreement and withdrawal of the plea." Therefore, even assuming that Mr. Eiland could have overcome the hurdles of the statute of limitations and exhaustion and thus be properly before the

court, and even assuming that his constitutional rights had been violated, he could not have proven that he was entitled to immediate release, the remedy called for in a Habeas Corpus petition.

State Cases

Administrative Segregation

Court Review of Confinement to AD SEG and IPC

Matter of Blake v. Selsky, 781 N.Y.S.2d 802 (3d Dep't 2004)

In 1987, William Blake was convicted of killing one deputy sheriff and of critically wounding another while attempting to escape from police custody. When Mr. Blake was turned over to DOCS's custody, prison staff found that he was a violent escape risk and, for the next seventeen years, housed Mr. Blake in administrative segregation or involuntary protective custody.

In June 2002, a hearing officer recommended that Mr. Blake's administrative segregation placement continue. After this recommendation was affirmed by the Commissioner, Mr. Blake filed an Article 78, arguing that the hearing officer had violated his rights to due process of law and that the decision was not supported by substantial evidence. The Appellate Division rejected both arguments.

An inmate's placement in administrative segregation is valid when his/her presence in the general population threatens the safety and security of the prison where she or he is placed. To decide whether being in general population is a threat to safety and security, prison officials can look at the inmate's history of escape attempts, as well as "evidence 'gleaned from the commissioner's unique expertise in predicting inmates' future behavior,' that additional attempts are likely." Id.

In this case, the court found that the violent and heinous nature of Mr. Blake's 1987 escape attempt, his subsequent threats to escape and kill those involved in his prosecution, and the confidential testimony of prison officials that Mr. Blake had recently engaged in conduct showing he wanted to escape, were substantial evidence that placing Mr. Blake in the general population would be a threat to prison safety and security.

The court further found that the hearing officer had not violated Mr. Blake's rights to due process of law. The hearing officer had properly denied Mr. Blake's request to call witnesses and to produce documents that pertained to prior administrative segregation hearings because they were irrelevant to the present proceeding, and the hearing officer properly rejected Mr. Blake's claim that the hearing was not completed in a timely manner.

Criminal Law

Is New York's Discretionary Persistent Felony Offender Law Unconstitutional?

People v. West, 783 N.Y.S.2d 473 (1st Dep't 2004)

In 1984, Oliver West was convicted of a felony for the third time. The sentencing court found Mr. West to be a persistent felony offender, as defined by Penal Law § 70.08, and imposed the mandatory maximum sentence of life imprisonment, with a minimum of 15 years. Mr. West recently filed a motion under Criminal Procedure Law § 440.20, arguing that under Apprendi v. New Jersey, 530 U.S. 466 (2000), and Ring v. Arizona, 536 U.S. 584 (2002), the New York procedure for finding a defendant to be eligible for sentencing as a persistent felony offender was unconstitutional. The trial court accepted Mr. West's argument and ordered that his sentence be vacated. People v. West, 768

N.Y.S.2d 802 (Sup. Ct., N.Y. Co., 2003). On appeal, the Appellate Division, First Department, reversed the lower court decision and reinstated the sentence.

In Apprendi, the Supreme Court looked at a state statute requiring a judge to impose a longer sentence if the judge found, by a preponderance of the evidence, that the crime was in the nature of a bias crime. The Court held that the statute violated the defendant's due process rights, holding that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to the jury and judged against the reasonable doubt standard." Apprendi, 530 at 469.

In the first Apprendi challenge to New York's sentencing laws to reach the Court of Appeals, the Court held that the discretionary persistent felony offender provisions were constitutional. People v. Rosen, 96 N.Y.2d 329 (2001). The Court based its decision on its finding that the only fact that a judge had to find to sentence a criminal defendant as a persistent felony offender was whether he had prior felony convictions. Two federal habeas decisions since the Rosen decision, Brown v. Greiner, 258 F.Supp2d 68 (E.D.N.Y. 2003) and Rosen v. Walsh, 02 Civ. 7782 (7/17/03 Hearing Tr.) (S.D.N.Y.) (Hellerstein, J.) (although no written opinion was issued, Judge Hellerstein explained his judgment at a hearing held July 17, 2003), have found the reasoning in Rosen to be flawed and have declared discretionary persistent felony offender sentencing statutes to be unconstitutional under Apprendi.

A year after Rosen was decided, the U.S. Supreme Court made its position clear: juries, not judges, must find the facts that permit a court to impose enhanced sentences, and such facts must be found beyond a reasonable doubt. Ring v. Arizona, 536 U.S. 584 (2002). In Ring, the Court struck down a death penalty statute that allowed the sentencing judge to decide whether certain facts had been proven. The Supreme Court held that, if an increase in a defendant's punishment depends on a finding of fact, that fact must be found by a jury beyond a reasonable doubt. Ring, 536 U.S. at 586.

Earlier this year, the New York Court of Appeals granted leave applications in several cases challenging the constitutionality of the state's discretionary persistent sentencing laws. By the next issue of ***Pro Se***, we should be able to report whether the Court's decision to grant leave was in order to reconsider its ruling in Rosen or to affirm its prior ruling.

Court of Claims

Expert Testimony Crucial in Delay of Treatment Cases

Dickerson v. State of New York, Claim No. 100200 (Oct. 31, 2003) (Mignano, J.)

Cases alleging medical malpractice typically include failure to diagnose and treat claims and/or delay in treatment claims. Such cases are a common occurrence in the Court of Claims. Often inmates have difficulty proving their claims because they either do not have facts that demonstrate liability or because, in litigating *pro se*, they do not have access to an expert who can support their claim of medical malpractice. However, when the facts are good and an expert is retained, an inmate can be successful. In our 2004 Winter Issue of ***Pro Se***, we reported on the case of Zacchi v. State of New York, N.Y. Ct. Cl.(Claim No. 102854), where the inmate was awarded $800,000.00 because the State failed to diagnose and treat his throat cancer. In the Dickerson case, the inmate, represented by attorney William Rold, presented convincing evidence that the delay in diagnosing and treating his sudden hearing loss resulted in permanent hearing loss, which could have been averted.

The sad facts of the case are as follows: On August 22, 1997, Claimant Dickerson was

exercising in the Fishkill C.F. yard when he heard a popping sound in his left ear and then lost his hearing in that ear. Even though he complained to a correction officer, he was simply told to go to his cell and rest. The next morning, he was seen by a nurse due to his complaints of dizziness, nausea and loss of hearing in his left ear, but was not provided with any treatment nor was any medication given. He finally saw a doctor on August 25, 1997, who diagnosed "sensory hearing loss," prescribed some medication, and ordered an ear, nose and throat (ENT) consult. Mr. Dickerson was not seen by the ENT specialist until 26 days later. The ENT ordered an audiogram, an MRI, and a follow-up visit, but the facility physician, Dr. Francis, did not request the MRI and audiogram until November 12, 1997. Although Dr. Francis did refer Mr. Dickerson back to the specialist on November 21, 1997, for some reason, he was not seen by the specialist until January 9, 1998, over 4½ months after the initial hearing loss.

Experts called by Mr. Dickerson during his trial in the Court of Claims testified that "the body does not regenerate cells of this type and if treatment is delayed, the damage to hearing and balance is irreversible." One expert opined that the delay in treating Mr. Dickerson's symptoms created a "medical certainty that the patient will not recover," and that the failure of Dr. Francis to send claimant to an ENT specialist within 72 hours of the sudden hearing loss "was a departure from the accepted standard of medical care."

The law is well settled that "the State is obliged to provide the inmates of its correctional facilities with reasonable and adequate medical treatment." An inmate/patient can sue, alleging simple negligence and need not produce expert testimony if "the alleged negligence can readily be determined by the trier of fact upon common knowledge." However, if the inmate is asserting a claim that the treatment he received was inadequate or deficient, "the case is premised upon medical malpractice and a claimant must establish that the medical professional involved either did not possess or did not use reasonable care or his/her best judgment in applying the knowledge and skill ordinarily possessed by practitioners in the field." Hence the need for expert testimony in medical malpractice cases.

In the Dickerson case, the court found that the uncontroverted expert testimony demonstrated that "Dr. John Francis did not possess or did not use reasonable care or his best judgment in applying his knowledge or skill in his treatment of claimant." Based on this finding, the court awarded Mr. Dickerson $300,000.00: $50,000 for past pain and suffering and $250,000.00 for future damages, including future suffering and impairment of employability.

Wrongful Confinement: No Prejudice Resulted in Misdesignation of Tier II as Tier III

Vasquez v. State, 782 N.Y.S.2d 294 (3d Dep't 2004)

In this case, the claimant was charged with failing to promptly report an injury or illness. Such a charge should have been disposed of at Tier II hearing but was improperly designated for disposition at a Tier III hearing. The claimant was found guilty and given a penalty of 45 days keeplock, with 15 days suspended, 30 days loss of commissary, suspended for 60 days, and 30 days loss of phone privileges. Claimant Vasquez appealed the disposition and it was subsequently reversed. Mr. Vasquez then sued in the Court of Claims, claiming that he was improperly confined because the misbehavior report should have been designated as requiring a Tier II rather than a Tier III hearing. He sought $4,500.00 in damages. The parties cross-moved for summary judgment and the court granted the defendant's motion. The claimant appealed.

The Third Department upheld the decision of the Court of Claims, finding that there was no

prejudice to the claimant in the misdesignation of the charge as warranting a Tier III, as opposed to a Tier II hearing. "Inasmuch as the regulations provide that a misbehavior report charging a violation of the disciplinary rule requiring inmates to promptly report illness or injury may be classified by the review officer as either tier I or tier II disciplinary matter, and the penalty served of 30 days in keeplock was appropriate for a tier II disciplinary disposition, claimant suffered no prejudice as a result of the misdesignation," the court held.

Disciplinary

Administrative Review: Failure of Review Officer to Listen to Tape Does Not Deny Due Process: Failure to Object at Hearing Constitutes Waiver of Right to Call Witnesses

Vigliotti v. Duncan, 781 N.Y.S.2d 800 (3d Dep't 2004)

Petitioner Vigliotti was found guilty after a Tier II disciplinary hearing of refusing a direct order and improper movement. The finding of guilt was upheld on administrative review and Mr. Vigliotti sued. The Supreme Court dismissed his Article 78 proceeding and he appealed.

Petitioner Vigliotti claimed, among other things, that he was denied the right to call witnesses when, after three of his witnesses testified, he indicated to the hearing officer that "other unidentified inmates would be willing to testify if '[there] wasn't enough." The court found that, since the petitioner did not elaborate on this nor did he object when the hearing officer closed the hearing without calling any more witnesses, the petitioner waived any objection he may have had regarding his right to call additional witnesses.

Petitioner Vigliotti also claimed that he was denied due process when the administrative review officer who decided his appeal failed to review the hearing minutes but rather, made his determination to uphold the decision based solely on the misbehavior report, hearing record sheet, and hearing officer disposition. The court was unpersuaded, finding that "neither regulations nor the mandates of due process principles require that an officer conducting an inmate's administrative appeal review the verbatim record of his disciplinary hearing, particularly where, as here, the inmate is afforded judicial review of the Hearing Officer's determination and all the evidence, including the hearing minutes, is considered in support thereof."

Confidential Information: Failure of Hearing Officer to Make Independent Assessment of Reliability of Confidential Informant

Debose v. Selsky, 2004 WL 2697283 (3d Dep't November 24, 2004)

Based upon confidential information, the Petitioner, an inmate, was charged with smuggling items into the prison, possessing and selling alcohol, possessing narcotics, and other charges. The Petitioner was found guilty of all the charges following a disciplinary hearing. He filed an administrative appeal of the disposition, which was affirmed. He then filed an Article 78 alleging that the disposition was not supported by substantial evidence.

Upon performing an *in camera* review of the confidential information, the Third Department found in favor of the Petitioner. The court determined that the hearing officer took testimony from a correction officer who conducted an investigation into the Petitioner's alleged misbehavior. This correction officer apparently relayed "detailed information" to the hearing officer regarding his investigation of the smuggling operation but "the information provided failed to indicate any basis upon which the officer or the unidentified informants were able to connect the Petitioner to the smuggling

operation." The court found that, based upon a review of the confidential information, "it appears that the Hearing Officer relied on the correction officer's assessment of the informants' reliability," rather than independently assessing the credibility and reliability of the confidential informants. The court noted that case law is well settled that a disciplinary disposition based upon hearsay confidential information is permissible; however, that information must be "sufficiently detailed for the Hearing Officer to make an independent assessment of the informant's reliability." Because that was not done in this case, the court annulled the decision and ordered expungement of the charges.

Denial of Witness: Requested Witness's Testimony Irrelevant; Claim of Retaliation Raises Issue of Credibility

Brown v. Goord, 783 N.Y.S.2d 151 (3d Dep't 2004)

Petitioner Brown, an inmate, was charged with assaulting an inmate and possession of a weapon after a correction officer obtained information that an inmate had been cut with a sharp object and a search of the Petitioner's cell, including an x-ray of his mattress, resulted in the discovery of a sharpened piece of metal. Mr. Brown was found guilty and appealed, and the penalty was modified. Mr. Brown sued alleging, among other things, lack of substantial evidence and improper denial of a witness.

The court rejected Mr. Brown's claim of lack of substantial evidence, finding that the misbehavior report, together with the unusual incident report, the testimony of the correction officer who frisked the Petitioner's cell, the search itself, and the testimony of a confidential informant, provided substantial evidence to support the charges. Mr. Brown also claimed that he was improperly denied his right to call witnesses when he requested, but was denied the testimony of a correction sergeant who he claimed knew of threats that had been made against him by the officer who x-rayed Brown's mattress. The court rejected this argument as well, stating: "The correction sergeant had no knowledge of the events underlying the charges contained in the misbehavior report and therefore, was unable to provide relevant testimony." Although Mr. Brown asserted that the testimony of the correction sergeant would have helped to prove retaliation on the part of the officer who searched Brown's cell, the court held that: "Petitioner adequately presented his retaliation defense to the Hearing Officer, who was free to reject it as it presented a question of credibility."

Substantial Evidence: No Evidence of Providing Legal Assistance Without Approval

Hynes v. Girdich, 781 N.Y.S.2d 710 (3d Dep't 2004)

Upon being transferred from one facility to another, Petitioner Hynes' property was searched by a correction officer, who confiscated various documents in Hynes' property and charged him with providing legal assistance without approval and possessing the crime and sentencing information of another inmate. Following a Tier III disciplinary hearing on the charges, Mr. Hynes was found guilty. The determination was upheld on administrative appeal, and Mr. Hynes filed an Article 78 challenging the disposition as not being supported by substantial evidence.

With respect to the charge of providing legal assistance without approval, the Third Department agreed. The only proof in support of that charge "was the misbehavior report and testimony of the law library supervisor, which indicated that petitioner was in possession of legal papers involving other inmates." That, by itself, did not establish that Mr. Hynes actually provided unauthorized legal assistance, held the

court. However, with respect to the charge that he was in possession of crime and sentencing information of another inmate, the court found that the evidence submitted at the hearing did support that charge. The victory for Mr. Hynes, however, was an empty one. In granting relief, the court noted that, "although the determination must be modified, remittal for a redetermination of the penalty is not required inasmuch as there was no recommended loss of good time and petitioner already has served the penalty."

Jail Time

Court Denies Request for Jail Time Credit for Time Spent in Mandated In-patient Rehabilitation

Titmas v. Hogue, 2004 WL 2244129, (Sup. Ct., Sullivan Co.) (LaBuda, J.) (Oct. 7, 2004)

In a disappointing decision from Sullivan County Supreme Court Judge Frank LaBuda, the court held that the petitioner, Eric Titmas, was not entitled to credit toward his sentence for time he spent in a mandated rehabilitation hospital prior to his incarceration in a state facility. The basis of the holding was in Judge LaBuda's interpretation of the phrase "in custody."

The facts of the case are as follows: As a result of an incident which occurred on January 1, 2001, Petitioner Titmas was arrested on various charges and detained by the Respondent in the Sullivan County Jail. In May 2001, Petitioner Titmas pled guilty to one of the charges in return for an agreement that he serve a five (5) year determinant prison sentence. However, prior to sentencing, the Petitioner's defense counsel and the prosecution jointly requested that the court defer sentencing so that Mr. Titmas could receive needed rehabilitation treatment and counseling.

Judge Frank J. LaBuda held a fact-finding hearing to decide the question of deferring the Petitioner's sentence. The hearing established that the Petitioner suffered from severe medical impairments resulting from a motorcycle accident in May 1996. According to medical reports, it was determined that the extent of Petitioner Titmas' impairments would make it extremely difficult for him to adapt to the conditions of the average prison. It was also determined that, if he did not get treatment at that time, he would suffer further and irreversible behavioral debilitation.

The hearing record demonstrates the extent to which Mr. Titmas's impairments would have affected his ability to be housed in a state prison: "[I]t was established and conceded by both parties that the defendant [Mr. Titmas] is a 23 year old man who suffered a severe traumatic brain injury in a motorcycle accident on May 25, 1996. As a result of his injuries, he was unconscious and in a coma for approximately seven weeks. In addition to the head injury, he sustained a permanent injury to the left brachial plexus. His left arm and hand are permanently paralyzed. Approximately in 1998 defendant developed a tremor in his right hand suffering from post traumatic dystonia. The defendant then had surgically implanted in his brain a thalmaic stimulator running through his shoulder up through his neck and into the brain stem. The thalmaic stimulator is on the "cutting edge" of neurological surgery and was implanted to stabilize a serious decline in the defendant's functional capacity. At the present time based upon the reports received from the Director of Head injury Services at the Helen Hayes hospital, the defendant's residual cognitive impairments from his brain injury would make it extremely difficult for him to adapt to the conditions of the average prison ... Although, it is undisputed that the defendant suffers a permanent brain injury affecting attention, impulse control, social awareness, and all higher executive functions including judgment and planning, because of the diffuse axonal injury wherein the frontal lobes were partially

disconnected, it is medically stated the defendant would be a risk to himself and others if he were incarcerated in the average State's prison system at this time."

At the hearing, Judge LaBuda also heard testimony concerning the security of the proposed rehabilitation center (Stone Bridge), in an attempt to determine whether the center was sufficiently secure to protect the community. Based upon testimony from an experienced nurse administrator from Stone Bridge, the Petitioner would be classified as an "at risk patient," meaning he would be housed in a men's ward with limited and controlled access. In addition, the expert noted that the facility had only one exit which was manned 24 hours a day. Because of this, the expert concluded, if the Petitioner did attempt to leave without authorization, the facility would be on notice of such attempt and would, if necessary, restrain him.

At the conclusion of the hearing, after finding that he was satisfied that Stone Bridge provided a secure environment, Judge LaBuda decided to issue an order adjourning sentencing. He noted, however, that the Petitioner's stay at Stone Bridge was not "designed nor intended to reduce or suspend the five-year prison sentence."

As a result of the court's order, in June 2001, Mr. Titmas was transferred to Stone Bridge and detained there for medical treatment for approximately 13 months. He was returned to the Sullivan County Jail sometime in July 2002. Pursuant to his plea agreement, in July 2002, he was sentenced to a determinate term of five (5) years. Also on this date, he was transferred to the custody of the New York Department of Correctional Services (hereinafter "DOCS"). Upon the Petitioner's transfer to DOCS, the Petitioner learned that the Respondent certified to DOCS that the Petitioner had only served 187 days of jail time, which did not include the approximately 13 months that the Petitioner spent in Stone Bridge. Petitioner Titmas, through his attorney, Prisoners' Legal Services of New York, sought credit for this time but was denied. He sued.

The case was once again before Judge LaBuda. The Petitioner argued that the Court of Appeals decision in Matter of Hawkins v. Coughlin, 72 N.Y.2d 158, 531 N.Y.S. 2d 881(1988), controlled. In Hawkins, the Court referred to the legislative history of Penal Law §70.30, which demonstrated that the term "custody" was intended to mean "confinement" or "detention" under guard and not "constructive custody" such as release on parole or bail. The court in Hawkins further pointed out that the former Penal Law §2193 (1) language was revised from "prison or jail" to time spent "in custody," and rather than enumerate the institutions where one could receive jail time credit for time spent, the new provisions made "it clear that jail time includes time spent in 'custody' no matter where the time was spent."

In his decision, Judge LaBuda focused the Court of Appeals language in Hawkins and Penal Law §70.30(3). Penal Law §70.30(3) states, in pertinent part, "...the term of a definite sentence...shall be credited with and diminished by the amount of time the person spent in custody prior to the commencement of such sentence as a result of the charge that culminated in the sentence." The court found that Petitioner Titmas's confinement at Stone Bridge was not actual "custody," as defined in the Penal Law or as interpreted in Hawkins. In reaching this decision, the court noted first that the Petitioner's confinement at Stone Bridge was voluntary. Second, the court found that the Petitioner "was not under guard in the 'custody' sense as there were no handcuffs or confinement of movement save leaving the grounds of Stone Bridge," but rather Petitioner "was only in 'constructive custody' as he was on bail to Stone Bridge at his own request and not as part of the charges that culminated in his sentence." Finally, the court relied heavily on its own statement made during the fact-finding hearing,

that the rehabilitation time was "in no way designed nor intended to reduce or in anyway suspend the five year State's prison sentence."

The Petitioner argued that the entire purpose of the original fact finding hearing by the sentencing court was to determine if Stone Bridge was a secure facility which could adequately confine and detain Mr. Titmas. The court found that it was and that if Mr. Titmas attempted to leave, he would be forcibly restrained. This type of confinement, argued the Petitioner, amounted to 'custody" under the Penal Law definition and the Court of Appeals decision in Hawkins. The Petitioner also argued that, regardless of what the sentencing court might have wanted or might have said at sentencing, it does not have the authority to supercede Penal Law §70.30 and deny the Petitioner jail time credit for the time he was held in 'custody' at Stone Bridge. The Petitioner asserted that such a denial would actually extend the period of time that the Petitioner was sentenced to receive by the sentencing court from five years to six years and one month. The court rejected these arguments and found that Petitioner Titmas was not entitled to sentence credit for the time he spent in the rehabilitation center.

The court also noted that the Petitioner's stay at the rehabilitation center "was not part of the charges which culminated in his sentence," because the court "could have denied his application for rehabilitation and sentenced him to state prison instead." And yet, the court also noted that "it was undisputed that all medical testimony concurred that without extensive rehabilitation prior to sentencing the defendant would be a risk to himself and others in an average prison setting and pose a serious liability to the New York State Department of Corrections." Thus, although the court may have been technically correct that it had the authority to deny Titmas' application for rehabilitation, to do so would have--based upon the courts' own findings--placed Petitioner at risk and posed a serious liability to DOCS. The decision is being appealed.

Petitioner Titmas is being represented by Prisoners' Legal Services of New York

Parole

Parole Board Not Required to Give Equal Weight to Each Statutory Factor

Zhang v. Travis, 782 N.Y.S.2d 156 (3d Dep't 2004)

Petitioner Zhang was convicted and sentenced to 7 to 21 years in prison as a result of his involvement in a robbery of a restaurant. He appeared before the parole board twice and was denied parole each time. He reappeared in June 2002, and was again denied, being told that he could reappear before the Board in 24 months. After unsuccessfully appealing the denial, he filed an Article 78 challenging the Board's decision. Judge Sise, Supreme Court, Washington County, found that the Board's determination lacked sufficient detail to "permit intelligent judicial review" and granted the petition. The Board of Parole appealed.

The Third Department reversed. Executive Law §259-(i)(2) sets forth the factors which the Parole Board must consider in making its decision on whether to grant discretionary release on parole. Although there is a list of factors that must be considered, the court noted, "the Board is not required to give equal weight to each statutory factor...nor is it required to specifically articulate every factor considered." The court noted that, although the Board did not specify each factor it considered, a review of the entire record indicated the Board did consider Petitioner Zhang's "disciplinary record and program accomplishments, his potential deportation and postrelease living arrangements, as well as the violent circumstances of crimes of which he was convicted." Thus, the court

reversed the judgment below, holding that the record was "sufficiently detailed to permit intelligent judicial review of the grounds for the Board's denial of parole release."

Pro Se Practice

Inmate Testimony Where Mental Illness is an Issue

Introduction

Under certain conditions, discussed later in this article, an inmate's mental illness or limited intellectual ability may be an issue in a Tier III disciplinary hearing. Where mental illness or limited intellectual ability is considered an issue, it may be useful for the inmate to testify about his or her mental condition. In addition, the inmate should consider calling witnesses who can testify about the inmate's mental condition at or near the time of the incident resulting in the misbehavior report.

Recent regulations, effective May 1, 2004, state the circumstances under which an inmate's mental condition may be an issue that a hearing officer must consider in Tier III disciplinary proceedings. These new regulations, found in Title 7 of the New York Code of Rules and Regulations (NYCRR), resulted from the agreement reached in a class action lawsuit, Anderson v. Goord (87-CV-141, N.D.N.Y.). The inmate plaintiffs in this federal lawsuit were represented by Prisoners' Legal Services of New York and the Prisoners' Rights Project of The Legal Aid Society. An article on the Anderson settlement was published in an earlier issue of *Pro Se* (Vol. 14, Number 1: Winter 2004).

Although the new regulations require hearing officers to consider an inmate's mental condition, these changes do not free inmates from their obligation to obey prison rules. Inmates who violate prison rules still face the prospect of loss of good time and confinement in the Special Housing Unit.

Why is mental condition a circumstance that you may want the hearing officer to consider?

The amended regulations governing Tier III hearings *require* a hearing officer to consider an inmate's mental status under certain specified condition. See, 7 NYCRR 254.6[b]. These rules also *allow* the hearing officer to dismiss the charges if the "penalty would serve no useful purpose" in light of the inmate's mental condition. See, 7 NYCRR 254.6[f].

Because consideration of mental condition may result in no sentence, a suspended sentence, or a reduced sentence, you should consider offering proof about your mental condition if the circumstances permit. These circumstances are explained below.

When is mental condition an issue that the hearing officer must consider?

The NYCRR defines the circumstances under which an inmate's condition is an issue that must be considered by the hearing officer. These criteria are listed in 7 NYCRR 254.6[b]. Note that the criteria for mental illness, what the regulations refer to as "mental state," are listed in [b][1], while the criteria for limited intellectual capacity are presented in [b][2].

Mental Illness

A hearing officer must consider mental illness as an issue in a Tier III disciplinary hearing when:

- ★ the inmate has an Office of Mental Health (OMH) Level 1 classification, 7 NYCRR 254.6[b][1][I]; or
- ★ the inmate is charged with self harm, 7 NYCRR 254.6[b][1][ii]; or

- ★ the incident took place while the inmate was being transported to or from the Central New York Psychiatric Center (CNYPC), 7 NYCRR 254.6[b][1][iii]; or

- ★ the inmate was an inpatient at CNYPC within nine months of the incident resulting in the Tier III hearing; 7 NYCRR 254.6[b][1][iv]; or

- ★ the incident took place while the inmate was assigned to an OMH satellite unit or the intermediate care program, 7 NYCRR 254.6[b][1][v]; or

- ★ the incident took place while the inmate was being escorted to or from an OMH satellite unit or intermediate care program, 7 NYCRR 254.6[b][1][vi]; or

- ★ the hearing was delayed or adjourned because the inmate became an inpatient at CNYPC or was assigned to an OMH satellite unit, 7 NYCRR 254.6[b][1][vii]; or

- ★ it appears to the hearing officer that the inmate was mentally impaired at the time of the incident or at the time of the hearing, 7 NYCRR 254.6[b][1][viii].

This last condition, [b][1][viii], is important because it allows a hearing officer to consider mental illness even if the other criteria are not met. Thus, an inmate may ask the hearing officer to consider mental illness as a factor under [b][1][viii], even though he or she does not fit within the other criteria (for example, a recent CNYPC hospitalization).

In situations where an inmate asks for consideration under [b][1][viii], it would be very helpful for the inmate to present the hearing officer with information about his or her psychiatric history and current symptoms. This kind of testimony is also useful where the inmate's situation fits within the other criteria listed above. A discussion of the inmate's role as a witness is presented later in this article.

Limited Intellectual Capacity

Mental condition may also be an issue that must be considered if the inmate suffers from limited intellectual capacity. The NYCRR offers three criteria to determine whether an inmate's intellectual capacity must be considered as an issue in a Tier III hearing. The issue of intellectual capacity must be considered when:

- ★ the incident took place while the inmate was in the special needs unit at the Wende, Arthurkill, or Sullivan Correctional Facilities; 7 NYCRR 254.6[b][2][I]; or

- ★ the inmate has not scored above 69 on an intelligence test or above a 3.0 grade level in reading in assessments conducted by the Department of Correctional Services, 7 NYCRR 254.6[b][2][ii]; or

- ★ it appears to the hearing officer that the inmate may have been intellectually impaired at the time of the charged misconduct or may be impaired at the time of the hearing, 7 NYCRR 254.6[b][2][iii].

This last condition allows a hearing officer to consider an inmate's intellectual limitations, even where the inmate does not fall within the other two categories (low test scores and placement in the special needs unit). If the inmate suffers from intellectual limitations, he or she should testify about those limitations, even if he or she does not satisfy the criteria pertaining to low test scores and special needs placement.

May an Inmate Present Testimony About Mental Condition?

As a general matter, an inmate has a right to present evidence in a disciplinary proceeding. 7 NYCRR 254.5; Johnson v. Goord, 669 NYS2d 434 (3d Dep't 1998) (reversing the SHU sentence where the inmate's constitutional right to call witnesses was violated by the hearing officer). See, Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963, 2976 (1974) (recognizing limited due process rights in prison disciplinary hearings including the "opportunity to be heard").

Testimony that is not "material" (relevant) or is "redundant" (repetitive) or constitutes a security threat may be excluded by the hearing officer. 7 NYCRR 254.5. A hearing officer, however, does not have an "unlimited right" to exclude inmate testimony, Butler v. Irvin, 661 NYS2d 138 (4th Dep't 1997) (disciplinary action annulled where the hearing officer refused to allow inmate testimony about the alleged forgery of a claim form). See also, Escoto v. Goord, 779 NYS2d 314, 316 (3d Dep't 2004) [discussed in *Pro Se*, Vol. 14, Number 3, October 2004 at 27] (reversing disciplinary action and noting that a hearing officer is obligated to comply with an inmate's "reasonable requests" for testimony).

Testimony about the inmate's mental condition is relevant to a disciplinary hearing when the inmate satisfies at least one of the criteria set forth in 7 NYCRR 254.6[b] (discussed earlier in this article). The materiality or relevance of testimony about mental condition is made clear in the 6[b] rule: "When an inmate's mental state or intellectual capacity is at issue, a hearing officer shall consider evidence regarding the inmate's mental condition or intellectual capacity at the time of the incident and at the time of the hearing...."

In short, testimony about an inmate's mental health is "material" (a requirement of 7 NYCRR 254.5[a]) because a recently added regulation (7 NYCRR 254.6[b]) requires a hearing officer to consider such evidence if certain criteria are satisfied.

What kind of testimony would be useful to you if your mental health or intellectual capacity were at issue?

Keep in mind that the hearing officer must obtain the confidential testimony of an OMH clinician (ordinarily a social worker, nurse, or psychologist) when your mental illness is an issue in the hearing. See, 7 NYCRR 254.6[c][3]. This rule expressly requires that the clinical testimony be given "out of the presence of the inmate and on a confidential tape." If your limited intellectual capacity is an issue, the hearing officer must obtain the testimony of a teacher or counselor, and this testimony (like the testimony of an OMH clinician) cannot be disclosed to you. 7 NYCRR 254.6[c][4].

Even though an OMH clinical witness offers evidence about your mental condition, it may be useful for you to also present testimony about this issue. If you are suffering from mental illness or limited intellectual capacity, you have first-hand knowledge of your problems and the treatment for those problems.

For example, the OMH witness may not know about pre-prison psychiatric treatment. Do not assume that the OMH witness will give testimony about psychiatric treatment provided before you entered the custody of the Department of Correctional Services (DOCS). If there is a history of psychiatric treatment before prison, you should give testimony about the reasons for that treatment. If possible, you should tell the hearing officer about the diagnosis and the medication prescribed. If you do not know the psychiatric term describing the diagnosis, you should testify about the symptoms that were treated. If you do not know the name of the medication, inform the hearing officer about the purpose and effect of the drug that was prescribed. In fact, provide this information even if you are able to provide the name of the medication. These details will enable

the hearing officer to more fully consider your mental condition.

In addition to testifying about any mental health treatment given prior to entering DOCS custody, inform the hearing officer about your mental condition while in prison. Do not assume that the OMH witness will testify about all the facts relevant to your situation. For example, if OMH has stopped a prescription, you should testify about the circumstances that resulted in the doctor's order ending the medication. If side effects led to the discontinuation of a prescription, you should give testimony about those circumstances. If the medication did not work and no substitute was prescribed, that fact should also be presented to the hearing officer. The hearing officer should not be allowed to mistakenly conclude that OMH stopped the medication because you were found to have no mental illness or that you refused to take the medication for no good reason.

In some cases, an inmate's mental condition may present an issue for the hearing officer, even though the inmate is not currently receiving treatment from OMH. For example, a hearing officer must consider the mental condition of an inmate not currently receiving OMH treatment where the inmate had been a patient at CNYPC within nine months of the charged misconduct. See, 7 NYCRR 254.6[b][1][iv].

If you are not receiving OMH treatment at the time of the hearing, the circumstances involving the termination of any prior treatment should be explained to the hearing officer. Those circumstances might include termination of treatment resulting from: 1) a decision by OMH that you no longer have a treatable mental illness; 2) a change of diagnosis by OMH; 3) lack of access to OMH services because of actions taken by the correction staff; 4) trips to court on other charges; 5) medication side effects; or 6) the OMH staff's conclusion that the treatment was not working. In any event, you should explain your mental condition to the hearing officer if this condition is relevant to the charged misconduct, even if you are not currently receiving services from OMH.

In addition to testifying about your mental condition, it may be useful to obtain the testimony of another person familiar with your state of mind at or near the time of the charged misconduct. This person might be another inmate or a civilian or uniformed member of the prison staff.

Ask, on the record, that the hearing officer call such a witness. Explain that this witness has information relevant to your mental condition at or near the time of the charged misconduct. For example, the witness may have observed that you were very upset or imagining things just prior to the incident. In such a situation, it should be explained to the hearing officer that this witness is able to offer observations about your mental condition at the time of the incident.

As discussed earlier in this article, this kind of testimony is "material," see, 7 NYCRR 254.5[a], in a hearing where the inmate's mental condition is an issue. See, 7 NYCRR 254.6[b][1]. Evidence is "material" where it tends to prove or disprove a fact at issue in a legal proceeding.

When making a request for particular testimony, you should always try to explain the materiality of such testimony. In other words, you should inform the hearing officer why the requested evidence is relevant to the determination of an issue that will be decided during the proceedings.

What response is necessary if the hearing officer does not allow you to present testimony about your mental condition?

In some situations, the hearing officer may attempt to limit your testimony about your mental condition. The hearing officer may claim that your testimony about your mental condition is unnecessary in light of the evidence presented by (or expected to be presented by) the OMH witness. When faced with this situation, you

should respectfully point out that because the OMH testimony is confidential, you do not know what points were covered (or will be covered) by the OMH witness and what points were omitted. You should also respectfully object to the hearing officer's ruling and ask for permission to present testimony explaining your symptoms, the treatment given for those symptoms, and how your own mental condition influenced the conduct charged in the misbehavior report.

It is a good idea to come to the hearing with a brief written statement describing your mental condition. That statement should include information about diagnosis and treatment. The statement should also explain how your mental condition influenced your thinking and conduct at the time of the incident for which you received a ticket. Ask the hearing officer to allow you to make your written statement part of the hearing record if he or she prevents you from testifying about your mental condition. You should object to the exclusion of your testimony even if the hearing officer allows the introduction of the written statement.

A hearing officer's mistaken exclusion of evidence requested by an inmate is the kind of error that may result in a court order annulling a disciplinary determination. See, Escoto v. Goord (discussed earlier in this article). In order for a court to consider an inmate's claim about the mistaken exclusion of evidence, the record of the hearing must show that the inmate 1) requested permission to introduce a particular piece of evidence and 2) objected to the ruling denying admission of the requested evidence. Your objection to the hearing officer's ruling should include an explanation of the importance of the evidence you want to introduce. You must "preserve" a claim about a mistaken ruling by informing the hearing officer about his or her error when the ruling is made or soon as possible thereafter.

When courts refer to a failure to "preserve" an issue, what is meant is that there has been a failure to make a timely objection to a ruling that is claimed to be mistaken. See, Towles v. Selsky, 783 NYS2d 431, 433 (3d Dep't 2004) ("[Inmate] [p]etitioner's assertion that he was improperly denied the right to present a character witness has not been preserved for our review inasmuch he failed to raise an objection at the hearing."); Colon v. Goord, 783 NYS2d 158, 159 (3d Dep't 2004) ("Inasmuch as no objection to the lack of any witnesses' testimony or documents was made at the hearing, [inmate] petitioner failed to preserve these issues for our review."); McClean v. LeFevre, 531 NYS2d 411,412 (3d Dep't 1988) (inmate's objection to the exclusion of witnesses was found to be waived where the inmate failed "to insist that the inmate witnesses be produced or to request that inquiry be made as to why they were not willing to testify at a time when the alleged error [by the hearing officer] could have been corrected").

While there are no "magic" words that constitute a sufficient objection, you must phrase your objection so that the hearing officer knows *what* evidence you want presented and *why* that evidence is material to an issue in the proceedings. If the hearing officer denies your objection, you must raise this issue in your administrative appeal to preserve your right to raise it in court. See, Rosario v. Goord,783 NYS2d 726, 727 (3d Dep't 2004) (claims not preserved for review by the appeals court where the inmate failed to raise the issue at the hearing or in the administrative appeal).

CORRECTION

One of our readers has pointed out to us that in our last issue of **Pro Se**, Vol. 14 No. 3, at Page 18, we cited the case of McCune v Lile, 536 U.S.70 (1973). That cite was wrong. The correct cite is McKune v. Lile, 536 U.S. 24 (2002)

We apologize for this error.

Subscribe to *Pro Se!*

Pro Se is now accepting individual subscription requests. With a subscription, a copy of *Pro Se* will be delivered directly to you via the facility correspondence program. To subscribe, send a subscription request with your name, DIN number and facility to Pro Se, 114 Prospect St., Ithaca, NY 14850. Please send only subscription requests to this address. For all other problems, write to Central Intake, Prisoners' Legal Services, 114 Prospect St., Ithaca, NY 14850.

EDITOR: KAREN MURTAGH-MONKS, ESQ.
CONTRIBUTORS: TOM TERRIZZI, ESQ., MICHAEL CASSIDY, ESQ., BETSY HUTCHINGS, ESQ., BRAD RUDIN, ESQ.
COPY EDITOR: FRANCES GOLDBERG **PRODUCTION:** FRANCES GOLDBERG
EDITORIAL BOARD: TOM TERRIZZI, ESQ., BETSY STERLING, ESQ. KAREN MURTAGH-MONKS, ESQ.

Pro Se is printed and distributed free through a generous grant from the New York Bar Association.