Pro Se

Vol. 15 Number 4: Fall 2005 Published by Prisoners' Legal Services of New York

Court Finds DOCS' Telephone Rates May Be Unconstitutional

DOCS' practice of collecting a large commission on all phone calls made by prison inmates--and passing the costs on to their families--may be unconstitutional, held a New York federal judge recently. The decision is a victory for inmates and their family members who have long criticized the exorbitant costs of inmate telephone calls.

The controversy stems from DOCS' telephone contract with MCI, the telephone company. Under the contract, DOCS requires MCI to pay it a 60% commission, over and above the regular costs of a telephone call, for all calls placed by inmates. In return, MCI receives the right to be the exclusive provider of telephone service within DOCS' facilities. Since all inmate calls are collect, the extra costs required by the contract are passed on to the calls' recipients, typically inmates' families. This results in telephone bills to family members far in excess of what would ordinarily be charged for similar calls from non-inmates.

DOCS argues that the 60% commission, which critics call a kickback, is necessary to finance the security costs associated with a prison telephone system, including such things as the ability to monitor calls and to trace the identity of the inmate placing the call. It also argues that the extra revenues finance a variety of other programs which might not otherwise be financed by the State Legislature, including bus services for visitors and some aspects of medical care.

Inmates and their families counter that the commission amounts to a regressive tax on some of the poorer segments of society, that is, inmates'

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Also Inside...

This project is supported in part by grants from the New York State Division of Criminal Justice Services, the New York State Bar Foundation, and the Tompkins County Bar Association. Points of view in this document are those of the author and do not represent the official position or policies of the grantors.

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families, and often forces the families to choose between staying in touch with their incarcerated loved ones or providing for basic necessities.

The decision came in the case of Byrd v. Goord, 2005 WL2086321 (S.D.N.Y.) (Aug. 29, 2005), a class action brought by family members of inmates and other recipients of inmate telephone calls in the Southern District of New York. In it, the Court held that the high rates may violate the First Amendment rights of inmates' family members by preventing them from communicating with their incarcerated loved ones. It may also violate their right to equal protection of the law by treating inmates' family members differently from members of the general public, without a rational basis for doing so.

The principal plaintiff in the case was Mary Byrd, a seventy-nine-year-old woman who suffers from severe chronic lung disease and is therefore unable to visit her two sons, who have been in prison since 1983. The only way she can speak with them is by accepting their collect calls. Because of the high cost of these calls, however, Ms. Byrd has at times been unable to pay her telephone bills when they became due. When the telephone company received one payment late, it cut off her long-distance service. Ms. Byrd now receives calls from her sons through her sister's account and makes installment payments on her past bills. She struggles to pay the $150 per month that she is currently billed. As a result, Ms. Byrd and her sons have not been able to keep in close contact.

In the lawsuit, Ms. Byrd and the other plaintiffs alleged that the DOCS-MCI contract violated her First and Fourteenth Amendment rights by "unlawfully burden[ing] their right to familial association by impeding communication with their spouses, children and relatives who are DOCS inmates concerning matters of health care, marriage, procreation, pregnancy, parenting and other critical family issues." They also alleged that the commissions DOCS receives, which they call "kickbacks," violate their right to equal protection of the law because there is no rational basis for the state to distinguish between them as consumers of telephone services and other consumers who do not receive inmate telephone calls.

The Court held that "if Plaintiffs could show that the costs are so exorbitant that they are unable to communicate...then relief could be warranted." The Court noted that several of the cases cited by the plaintiffs might meet that test. For example, the Court cited the case of Cora W., who is homebound due to severe arthritis and the chronic effects of a brain aneurysm and unable to travel to visit her son in prison. In addition, "[she] often cannot grip a pen to write to her son." She is only able to communicate with him by accepting his collect calls. Her sole source of income is the $563 per month she receives from Social Security and Disability. Ms. W. is able to keep her phone bills down to $70 to $80 per month, but only by strictly limiting the duration of her calls from her son.

The Court also cited the case of Ms. Mary M.. Ms. M, like Ms. W., is disabled and subsists on "a limited disability income through the Social Security system" of $535. She has two sons who are incarcerated. Her health problems prevent her from visiting her sons and, therefore, she too can only speak to them by accepting their collect calls. These average $200 to $250 per month. In 1996, her grandson, for whom she was caring, fell out of a window. "He was hospitalized for a long time, battling for his life. During this crisis, [the boy's incarcerated father] called home frequently. Because Ms. W. could not pay the additional expense of these calls, her telephone service was terminated approximately six times."

With respect to the plaintiffs' equal protection

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PLEASE DEPOSIT ALL YOUR MONEY

The following is an editorial that recently appeared in the New York Times concerning the Byrd lawsuit.

Faced with high prison costs, the states have been desperately seeking ways to make sure that people who are released from prison will forge viable lives outside - and not end up right back behind bars. Part of the solution is to help former inmates find training, jobs and places to live. In this context, the increasingly common practice of jacking up the costs of inmates' telephone calls to bankrupting levels, and then using the profits to pay for some prison activities, is self-defeating and inhumane. It also amounts to a hidden tax on prisoners' families, who tend to be among the poorest in American society.

A vast majority of the state prison systems have telephone setups that allow only collect calls. The person who accepts the call pays a premium that is sometimes as much as six times the going rate. Part of the money goes to the state itself in the form of a "commission" or, more simply put, a legal kickback.

While such commissions are common throughout the country, the one in New York is particularly high: the state takes a commission of nearly 60 percent. Faced with telephone bills of $400 or more a month, the inmates' families must often choose between paying phone bills or paying the rent. This billing strategy erodes fragile family ties by discouraging prisoners from keeping in touch with loved ones -especially small children who often have difficulty visiting because they live hundreds of miles away. Inmates who lack family ties are less likely to make a successful transition once released, and more likely to end up back inside.

While most states use collect calls only phone systems for prisons, federal prisons use a less expensive and less onerous debit-calling system. Federal inmates are allowed to use money that is accumulated in computer-controlled accounts to call a limited number of phone numbers. Prison rights groups have long urged the states to adopt the debit-calling system. Lawsuits pending in several states, including in New York, could eventually force prison authorities to abandon their policies of allowing only collect calls. And the New York State Assembly has passed a bill that, if it becomes law, will put an end to this system.

New York state corrections officials argue that the current system is a good thing because the money goes to pay for AIDS treatments, cable television for inmates and other prison programs that benefit the inmates. But the inmates' families already support the prison system through their taxes. Dunning the poor to run the prisons where so many of the poor wind up may have been acceptable in Dickens's time, but no longer.

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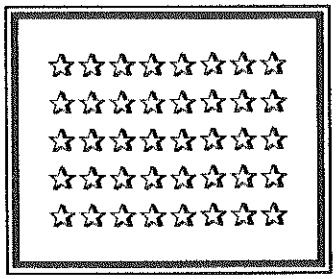
claim, the Court found that DOCS has offered "no rational basis to justify placing the burden of this...commission solely on the friends and families of inmates, and those individuals providing counseling and professional services, thereby charging them more per call than similarly situated collect call recipients." For example, the court cited the case of "Elizabeth F.," the Director and Lead Counsel for the Attica brothers Legal Defense Fund. Ms. F. accepts collect calls from her incarcerated clients in order to effectively communicate with them. As a result, she is forced to pay the high cost of the collect calls from her incarcerated clients so that she can represent them as effectively as she does her non-incarcerated clients.

In view of the evidence, the Court found, it could not say at this stage of the proceedings that there was "no set of facts" that the plaintiffs could prove to support their claims. It consequently denied DOCS' motion for summary judgment. The case will now presumably go to trial.

Barbara Olshansky, the lead counsel for the Center for Constitutional Rights, called the decision "an important victory for inmates' families seeking to maintain ties with their loved ones in prison. It is also a resounding confirmation by the court of the principle that inmates do not lose their constitutional rights when they enter the prison gates, and that no person may be penalized or taxed for seeking to maintain their relationship with a loved one in prison."



NEWS AND BRIEFS

Rockefeller Drug Reform Update: New Law Permits Re-Sentencing of A-II Offenders; Dispute re Eligibility Requirements

New York's notorious Rockefeller-era drug laws imposed the stiffest punishments in the nation on drug offenders, including maximum terms of life for both A-I and A-II drug offenders. Last year's "Drug Law Reform Act" (the "DLRA") mitigated the harshest aspects of those sentences. It replaced the indeterminate sentences with determinate sentences, reduced the quantity of drugs needed to qualify for some of the harshest offenses, and reduced the overall length of the sentences. Under the old law, for instance, a class A-1 drug felony was punishable by an indeterminate term of between 15 to 25 years to life. Under the DLRA, a class A-1 drug felony is punishable by a determinate sentence of not more than 20 years and as little as eight years. (***Pro Se*** published a full chart of the new DLRA sentences, along with an article detailing the other reforms contained in the DLRA, in our Spring, 2005, issue.)

The sentence reform was cold comfort, however, to the majority of inmates already serving sentences for drug offenses. That is because the new sentences were not made *retroactive*. That is, they were not applied to the estimated 15,000 drug offenders already sentenced under the old laws. On the contrary, the DLRA applied the new sentences only to crimes committed on or after January 13, 2005. It provided only one exception to that rule: it permitted persons serving a sentence for a class *A-I* drug felony to apply to their sentencing courts to have their sentences reduced to the new levels.

Since then, advocates for further drug law reform have been arguing that the new sentences should apply retroactively to other classes of drug

offenses, in addition to A-1 offenses. They have recently scored a modest success.

On August 31, 2005, Governor Pataki signed into law a bill which will allow some *A-II* felony drug offenders to apply to have their sentences reduced to the levels established by the DLRA. Unfortunately, the new law does not make *all* A-II drug offenders eligible for re-sentencing. Instead, it establishes four eligibility requirements. The first two are straightforward. You must be: 1) convicted of a class A-II drug felony; and 2) sentenced to an indeterminate sentence with a minimum term of at least three years.

The third requirement is that you be *eligible* to earn merit time. You need not actually have *earned* any merit time, but you must be *eligible* to earn it. The criteria for earning merit time are set out in Correction Law § 803(1)(d). They are also set out in Title 7 N.Y.C.R.R. § 280.2 and DOCS Directive # 4790. Among other criteria, you cannot be convicted of certain crimes, including most violent offenses, homicide offenses, and sex offenses. So, for example, if you are serving a sentence for an A-II drug offense and also a sentence for Robbery in the Second Degree (a violent offense), you would not be eligible for re-sentencing under the new law, because persons convicted of violent offenses are not eligible to earn merit time. Nor can you have been convicted of a "serious" disciplinary infraction since being incarcerated. Directive # 4790 contains a full list of the crimes and disciplinary infractions that would make you ineligible to earn merit time.

The last requirement to be eligible for re-sentencing is that you be "*more than twelve months*" from being eligible for temporary release.

This requirement has caused some confusion.

Eligibility for temporary release is defined in Correction Law § 851(2). That law states that an inmate becomes eligible for temporary release when he or she is "eligible for release on parole" *or* "will become eligible for release on parole or conditional release within two years."

So, an inmate should be eligible for re-sentencing when he or she is "more than twelve months" from being either "eligible for release on parole" *or* "becom[ing] eligible for release on parole or conditional release within two years."

The editors of ***Pro Se*** interpret the language to mean that you are eligible for re-sentencing if you are more than twelve months from your PE ("Parole Eligibility") date (*i.e.*, "more than twelve months" from being "eligible for release on parole"). To put it another way, you would *not* be eligible for re-sentencing if you are within one year of your PE date.)

DOCS, however, has interpreted the language to mean that you must be more than *three years* from your Parole Eligibility date to be eligible (*i.e.*, "more than twelve months" of being "within two years" of Parole Eligibility). Under DOCS' interpretation, you would not be eligible for re-sentencing if you were within *three* years of your parole eligibility date. DOCS has circulated some information to inmates about the new law which incorporates its interpretation.

The editors of ***Pro Se*** believe that DOCS' interpretation of the law is wrong. We believe that any A-II drug offender who meets the other eligibility requirements listed above, and who is more than *one* year away from their parole eligibility date, should be eligible to petition for re-sentencing.

This is a significant dispute. Under DOCS' interpretation of the law, only some 500 A-II offenders will be eligible for re-sentencing. Under the interpretation of the law supported by ***Pro Se***, more that 1000 A-II offenders are likely to be eligible for re-sentencing.

Ultimately, this question, as with any question regarding statutory interpretation, will have to be resolved by the courts.

For those who *are* eligible, the benefits of re-sentencing could be substantial. Under the

Rockefeller drug laws, a person convicted of an A-II drug felony with no aggravating circumstances could receive an indeterminate sentence with a maximum term of life imprisonment. Under the DLRA, the *maximum* sentence that may be imposed for an A-II drug felony with no aggravating circumstances is a determinate term of 10 years, and it may be as little as three years.

Inmates have a right to assigned counsel to help them prepare an application for re-sentencing. If you are an A-II felony drug offender, and think you may be eligible for re-sentencing under the extension of the DLRA, as described above, you should contact the Chief Defender's office, Public Defender's office, or Legal Aid office in the county in which you were convicted. (A full list of the defenders and legal aid offices, with addresses, is available by writing to Central Intake, Prisoners' Legal Services, 114 Prospect St., Ithaca, NY 14850.)

Efforts to Extend Retroactivity to Other Classes of Drug Offenders Falter

While the extension of DLRA re-sentencing to some A-II offenders is a welcome step forward in the ongoing effort to reform the Rockefeller drug laws, efforts in the courts to extend re-sentencing to other categories of drug offenders have faltered.

In People v. Pauly, 799 N.Y.S.2d 841 (3d Dep't 2005), for example, the Court rejected the argument of a class-B drug offender that he should be allowed to apply for re-sentencing under the DLRA, just as are A-I and (now) some A-II offenders.

Defendant Pauly was serving an indeterminate sentence of 5 to 15 years as a class B drug offender at the time the DLRA was passed. He argued that the failure of the DLRA to allow class B drug offenders to apply for re-sentencing violated his rights under the equal protection clause of the Fourteenth Amendment to the Constitution.

The equal protection clause states that no state shall deny to any person the "equal protection" of the law. It is generally interpreted to prohibit laws that distinguish between similarly situated classes of people without at least a rational basis for doing so. Pauly argued that the Legislature had no rational basis for allowing A-I drug felony offenders to apply for re-sentencing while not providing the same opportunity to class B drug felony offenders. Basically, his argument was that if the Legislature felt that all of the old sentences for drug offenders were unjust and should be reduced, there was no rational reason that they should allow only some classes of offenders convicted under the old laws to apply for re-sentencing and not others.

The Court disagreed. It held: "[T]here is a rational basis for distinguishing between class A-I and class B felony drug offenders for retroactivity purposes." It noted that the DLRA did provide some immediate benefits to other categories of drug offenders sentenced under the old laws. For instance, it increased the merit time available to them and gave them the opportunity to obtain an early termination of parole. It concluded: "It would be rational for the Legislature to allow retroactivity [for A-I offenders] and extend the greatest relief to those facing the most stringent sentences, while at the same time providing different retroactive relief to class B felony drug offenders by, among other things, granting eligibility to earn additional merit time reductions. Given the existence of these and other factors demonstrating a rational basis for the disparity in treatment with respect to re-sentencing, we find [Pauly's] constitutional arguments unpersuasive."

Not All Eligible Offenders Granted New Sentences

Moreover, just because an inmate is eligible to *apply* for re-sentencing under the DLRA does not mean the courts will grant the application. This was

made clear recently in the case of People v. Lafontaine, 799 N.Y.S.2d 841 (3d Dept. 2005).

Defendant Lafontaine was convicted in 1989 of two A-I drug felonies, as well as various additional drug felonies. He was sentenced to two indeterminate terms of 25 years to life. After passage of the DLRA, he applied to have his sentence reduced to a determinate term of 12 years, the lowest sentence available under the DLRA. He had several prior drug felony convictions, however, and a police investigation of his activities in the '80s showed him to be a large-scale dealer with employees who assisted him "in regularly distributing kilograms of heroin and cocaine into the streets of New York City." He argued, nevertheless, that his seventeen years in prison, his health (a heart bypass surgery in 1998), his age (70 years), his favorable institutional record (a few insignificant infractions), as well as his having a daughter and son-in-law in Florida willing to give him a residence if released, all justified the Court's re-sentencing him as requested.

The Court disagreed, writing:

> For decades, politicians, the public, and the press, have denounced the mandatory sentences required under the so-called Rockefeller drug laws as harsh and Draconian. Periodically, the news media would draw public attention to a tragic story of someone jailed for up to twenty-five years to life for participating in a single drug sale for fiscal or addiction considerations. The legislators who supported the new statute identified those deserving of more lenient treatment as low-level, non-violent drug offenders, first-time offenders who were misguided in their youth, mules, addicts driven to possession or selling drugs because of a drug habit or others duped or coerced into a drug transaction by a supposed friend or a domineering spouse. As the Senate Majority Leader said when speaking in support of the new sentencing scheme, the new statute serves to 'help [the offenders] get out of trouble, straighten out their lives, be productive and constructive citizens.'

The Court continued, however:

> [T]he harsh reality is that many defendants convicted of A-I level drug offenses bear no resemblance to those depicted as victims of the Rockefeller drug laws. These defendant were not addicts, and they did not enter the drug trade to support a drug habit. They are not first-time offenders or low-level offenders who made a mistake or were misguided in their youth. Nor did they participate in a drug sale for one easy payday. For these defendants, peddling and pushing drugs was their business, their soberly chosen profession. In making that choice, they forever forsook the opportunity to be a productive member of society. Substantial justice dictates denying the re-sentence applications of these defendants.

The defendant in this case, the Court concluded, fell into this latter category of offender. Although the DLRA creates a presumption in favor of re-sentencing, the Court may deny an application for re-sentencing if it is convinced that it is not in the interest of "substantial justice." Under the circumstances of this case, the Court held, "[s]ubstantial justice dictates that defendant not benefit from the new statute and that his re-sentence application be denied."

Update: *According to an Article in the Buffalo News, of the approximately 450 believed to be eligible for re-sentencing under the Rockefeller drug Law Reform Act, 88 A-1 drug offenders had*

been released from prison as of September 1, 2005. (See: Buffalo News - September 1, 2005)

PLS Urges Legislature to Return College Programs to Prison: Says Education Crucial Part of Reintegration

PLS recently testified before the State Legislature on behalf of two bills sponsored by State Senator Velmante Montgomery: one to establish the "New York State Justice Reinvestment Fund" funding for transitional services for ex-offenders and their families, and the other to require the State Board of Parole to notify released felons of their right to vote. Our testimony focused on the transitional programs that should be offered within the prison walls. A significant part of our testimony centered on the need for bringing college educational programs back into the prison.

In 1995, the Legislature, responding to "get-tough-on-crime" rhetoric, voted to prohibit prisoners from receiving New York State Tuition Assistance Program (TAP) grants. At the same time, the federal government prohibited prisoners from receiving Federal Pell Grants. The combined result of these cuts effectively terminated all college programs within the Department of Correctional Services. PLS has long viewed this as a great disservice to the prison community, as well as misguided public policy. Studies have shown that, in New York, only 26.4% of the inmates who earned a college degree in prison returned to prison, compared to 44.6% of those who did not. David D. Clark, *"Analysis of Return Rates of Inmate College Program Participants," NYS Department of Correctional Services, August, 1991.* Additional studies conducted by states across the U.S. have shown similar results: the recidivism rate of prisoners is almost inversely proportional to the educational opportunities afforded them. For example, one study of female offenders showed that women who participated in college while in prison had a 7.7% recidivism rate, compared to a 29.9% recidivism rate for female offenders as a whole. *Fine, M., Torre, M.E., Boudin, K., Bowen, I., Clark, J., Hylton, D., Martinez, M., Missy, Roberts, R.A., Smart, P., & Upegui, D. "Changing Minds: The Impact of College in a Maximum-Security Prison," September, 2001. New York: The Graduate School and University Center, City University of New York.*

Funding for transitional services is plainly necessary as part of an overall effort to reintegrate prisoners into society. Legislators should not overlook the re-institution of educational programs, specifically college-based programs, as an important part of the re-integration equation. These programs have been shown time and again to be an inmate's best tool for successful re-integration and society's best defense against recidivism.

Federal Cases

Second Circuit: Prison Discipline Following Criminal Conviction Is Not Double Jeopardy

Porter v. Coughlin, 421 F.2d 141 (2d Cir. 2005)

In 1991, Andre Porter was found guilty of one count of "promoting prison contraband" as a result of his participation in a riot at Southport Correctional Facility. He was sentenced to a term of three to six years, consecutive to the term he had been serving at the time of the incident. Subsequently, DOCS charged him in a misbehavior report with having violated inmate disciplinary rule 1.00 (Penal Law offenses)--for the same conduct which had already resulted in his criminal sentence. He was found guilty in a Tier III hearing and sentenced to three years SHU confinement.

The question in Porter v. Coughlin was whether

a prison disciplinary sentence, for the same conduct which has already resulted in a criminal conviction, violates the "double jeopardy" clause.

The Second Circuit found that it did not.

The double jeopardy clause of the Fifth Amendment to the Constitution states: "[N]o person shall be subject for the same offense to be twice put in jeopardy of life of limb." Case law has interpreted this to mean that one cannot be punished multiple times for the same offense. In 1997, however, the Supreme Court limited the meaning of the clause. It held that it "protects only against the imposition of multiple *criminal* punishments for the same offense," meaning, for example, that a criminal conviction, followed by a civil fine for the same conduct, would not constitute double jeopardy.

Consequently, the question before the Porter Court was whether a prison disciplinary punishment was primarily "civil" or "criminal" in nature. If the former, Porter's disciplinary sentence would not violate the double jeopardy clause; if the latter, it would.

The Second Circuit addressed the question by asking, first, "whether the legislature, in establishing the [prison disciplinary system], indicated... a preference for one label or the other." It had little trouble finding that it that did. DOCS' disciplinary regulations were intended by the legislature to be civil, not criminal. Their purpose is a "civil remedial purpose," the Court explained, and it noted that the New York State Court of Appeals has specifically interpreted disciplinary rules as being civil in nature.

The second question the Court asked, however, "whether [the disciplinary rules] are so punitive in either purpose or effect as to transform what was clearly intended as a civil remedy into a criminal penalty," was more difficult.

The Court found that a number of factors supported Porter's argument that a disciplinary proceeding was more criminal than civil in nature. Among them: a SHU placement, like a prison sentence, constitutes a physical restraint of a person; the dispositions received at disciplinary proceedings (loss of good time, packages, commissary and phone privileges, together with SHU confinement) are commonly viewed as "punishment" by inmates and staff alike; the principal purpose of imposing disciplinary sanctions, *i.e.*, to "deter inmates from repeating their criminal conduct," "promotes the traditional aims of punishment"; and finally, the disciplinary charge in this case was for a Penal Law offense, meaning that the underlying behavior was already classified as a crime.

Nevertheless, the Court found several factors that weighed against labeling a disciplinary punishment as criminal. First, the Court found, there was an "alternative, non-punitive purpose" to disciplinary sanctions: prison officials have to be given the authority to impose disciplinary sanctions in order to maintain order within the prison walls. Second, the Court found, the sanction Porter received, three years in solitary confinement, was "not at all excessive in light of the events that prompted it."

"Punitive interests and remedial interests," the Court wrote, "are nowhere so tightly intertwined as in the prison setting, where the government's remedial interest is to maintain order and to prevent violent altercations among a population of criminals...Thus the fact that remedial concerns require 'punishing' individuals for violent or other disruptive conduct does not mean that the sanctions imposed constitute "punishment" for double jeopardy purposes." Consequently: "Rule 1.00 authorizing prison disciplinary sanctions for the commission of Penal Law offense is not 'so punitive in either purpose or effect as to transform what was clearly intended as a civil remedy into a criminal penalty.'" Since Porter's disciplinary sanction "was clearly related to a non-punitive interest, and not

excessive in relation to it," the disciplinary hearing in this case should be considered civil in nature. It therefore did not violate the Double Jeopardy clause.

State Cases

New York's High Court Holds Sentencing Courts Are Required to Inform Defendants When Post-Release Supervision Will Be Consequence of Plea

People v. Catu, 4 N.Y.3d 242 (2005)

The Court of Appeals, New York's highest court, recently affirmed what a number of lower courts had already held: that sentencing courts must inform defendants when a period of post-release supervision will be one of the consequences of a guilty plea. Failure to do so will result in the reversal of the conviction.

Post-release supervision came into being in 1998 when the Legislature eliminated indeterminate sentences for violent felonies and replaced them with determinate (or "flat") sentences. The Legislature required that all such sentences be followed by a period of post-release supervision.

At issue in Catu was what should happen if the sentencing court neglects to inform a defendant who is pleading guilty in exchange for a determinate sentence that the sentence will include a period of post-release supervision.

In general, a sentencing court has no obligation to explain to defendants who plead guilty all of the possible "collateral" consequences of their plea. The "collateral consequences" of a plea are those "that are peculiar to the individual and generally result from actions taken by agencies the court does not control." Courts have held, for example, that the immigration consequences of a criminal conviction are a "collateral" consequence of the conviction and that sentencing courts are therefore not required to inform defendants that their plea may result in their deportation.

On the other hand, courts are required to inform defendants of the "direct" consequences of their pleas, *i.e.*, those that have a "definite, immediate and largely automatic effect on [the] defendant's punishment."

Post-release supervision, the Court held, is a direct consequence of a plea, not a collateral consequence. The Court noted that the obligations of post-release supervision are significant:

> Upon release from the underlying term of imprisonment, a defendant must be furnished with a written statement setting forth the conditions of post-release supervision in sufficient detail to provide for the defendant's conduct and supervision. In addition to supervision by and reporting to a parole officer, post-release supervision may require compliance with any conditions to which a parolee may be subject, including, for example, a curfew, restrictions on travel, and substance abuse testing and treatment. Moreover, post-release supervision may require up to six months of participation in a residential treatment facility immediately following release from the underlying term of imprisonment. A violation of a condition of post-release supervision can result in reincarceration for at least six months and up to the balance of the remaining supervision period, not to exceed five years.

Consequently, "a defendant pleading guilty to a determinate sentence must be aware of the post-release supervision component [of the sentence] in order to knowing, voluntarily and intelligently choose between alternative courses of action." If

such information has not been provided, the plea must be vacated.

Disciplinary Cases

What follows is a review of this quarter's disciplinary cases:

Witnesses: Court (Reluctantly) Reverses Hearing Where Petitioner was Improperly Denied Witnesses

Matter of Reyes v. Goord, 798 N.Y.S.2d 795 (3d Dep't 2005)

The petitioner in this case was charged with having used a forged call-out slip and found guilty in Tier II hearing. During his hearing, he asked to have the inmate who distributed the call-out slips testify. The Hearing Officer denied the request on the grounds that the inmate's testimony was irrelevant. In making the ruling, the Hearing Officer relied on testimony and other evidence establishing that, on the date in question, the petitioner's name was not on the master call out sheet or on the call out sheet for the religious program he claimed to be attending.

The Court reversed. It held that the inmate's testimony was relevant because it was the only credible evidence that the petitioner could have presented to refute the inference that he forged the call out slip. Because his defense was prejudiced by the absence of the other inmate's testimony, the court was "constrained to conclude that the determination must be annulled."

Timeliness: Hearing was Timely Commenced

Matter of Barnes v. Goord, 797 N.Y.S.2d 324 (3d Dep't 2005)

The petitioner challenged a determination finding him guilty of fighting, violent conduct, and creating a disturbance on the grounds that the hearing was not timely commenced. The court found this claim "unpersuasive," as the petitioner "erroneously counted the day on which the misbehavior report was written as one of the seven days within which the hearing was required to be held." Moreover, held the court, "the record reveals that a one-day extension of time was validly authorized to allow petitioner's assistant more time and petitioner did not establish any prejudice as a result of the delay."

***Practice Pointer**: The "Seven Day Rule" stems from 7 N.Y.C.R.R. § 251-5.1, which concerns the time within which a disciplinary hearing must be started and finished. Sub-section (a) provides, "Where an inmate is confined pending a disciplinary hearing or superintendent's hearing, the hearing must be commenced as soon as is reasonably practicable following the inmate's initial confinement pending said disciplinary hearing or superintendent's hearing, but, in no event may it be commenced beyond seven days of said confinement without authorization of the commissioner or his designee."*

The courts usually interpret the rule as excluding the first day of confinement. This interpretation is based on General Construction Law § 20, which states, "A number of days specified as a period from a certain day within which...an act is authorized or required to be done means such number of calendar days exclusive of the calendar day from which the reckoning is made." See, e.g, Matter of Trang v. Goord, 283 A.D.2d 816 (3d Dep't 2001).

Sub-section (b) of 7 N.Y.C.R.R. § 251-5.1 states that, "The disciplinary hearing or superintendent's hearing must be completed within 14 days following the writing of the misbehavior report unless otherwise authorized by the commissioner or his designee."

The court's decision in this case apparently

confused subsections (a) and (b) of the regulation. It held that the petitioner "erroneously counted the day on which the misbehavior report was written as one of the seven days within which the hearing was required to be held." This would be erroneous as applied to a counting of the fourteen days within which to complete a disciplinary hearing under subsection (b), but it is irrelevant to the counting of the seven days within which to commence a hearing under subsection (a). The relevant consideration under subsection (a) is the date the pre-hearing confinement commenced, not the date the misbehavior report was written.

Waiver: Guilty Plea Results in Waiver

Matter of Calhoun v. Goord, 798 N.Y.S.2d 212 (3d Dep't 2005)

A corrections officer responded to a dormitory after hearing a loud thud and observed the petitioner in this case standing with a clenched fist over an unconscious inmate. He charged the petitioner with assault, engaging in violent conduct, and fighting. At a Tier III disciplinary hearing, the inmate pleaded not guilty to the first two charges, but guilty to the last. He was found guilty of all charges and the determination of guilt was affirmed on administrative appeal, but the penalty was subsequently modified. He then commenced this CPLR Article 78 proceeding challenging the determination.

The court held that petitioner had waived his right to challenge the evidentiary basis for the charge of fighting by pleading guilty to the charge. With respect to the remaining charges, the court found that they were supported by the misbehavior report, the testimony of several correction officers who investigated the incident, confidential testimony, and the petitioner's own admission that he struck the inmate.

Practice pointer: *You should carefully consider a decision to plead guilty in a prison disciplinary hearing. Doing so will generally result in a waiver of your ability to challenge the hearing result in court at a later date and /or a finding that even if the hearing was affected by procedural errors, the errors were "harmless" and should not result in a reversal of the hearing.*

Waiver: Failure to Object to Conduct of Hearing Officer Leads to Waiver

Matter of Mahon v. Goord, 798 N.Y.S.2d 799 (3d Dep't 2005)

The inmate in this case was charged with assaulting staff and various other disciplinary violations when, during a frisk, a corrections officer discovered a packet of paper in the inmate's pocket. When the corrections officer set it aside, the inmate lunged for it, knocking the officer to the ground and causing a struggle.

The court upheld the finding of guilt. The misbehavior report, together with the testimony of two of the officers involved in the incident, provided substantial evidence. The inmate's claim that the officers were retaliating against him presented a question of credibility for the Hearing Officer. His claims of impropriety concerning the Hearing Officer "were not raised at the hearing and [were] not preserved for review." (The court did not specify the nature of his claims of impropriety concerning the Hearing Officer.)

Waiver: Inmate who Failed to Object at Hearing Waives Claims

Matter of Christian v. Goord, 798 N.Y.S.2d 807 (3d Dep't 2005)

The petitioner in this case was found guilty of smuggling after an officer in a watch tower observed

an object, later identified as a finger from a latex glove, being thrown from his cell window. Later drug testing of the contents of the glove found it to be marijuana.

On appeal, the inmate claimed that he had been denied effective employee assistance and denied a witness because his assistant denied his request to reveal the name of the inmate housed directly above his cell, whose cell was allegedly searched on the same day of the incident. The record showed, however, that the petitioner accepted the Hearing Officer's determination that he was not entitled to the name of the other inmate, thereby waiving his claim. He likewise waived his claim that he did not receive the requisite drug testing forms by failing to raise it at the hearing; in any event, the hearing record sheet indicated that he received the test results.

After dismissing the petitioner's legal claims, the court went on to find that the misbehavior report, the test results confirming the substance as marijuana, and the corroborating testimony of the corrections officers provided substantial evidence to support the determination.

Practice pointer: *Failure to object to a procedural ruling with which you disagree may result in a court finding that you have waived the claim. Generally, however, you need only object once to each adverse ruling. While you should make your objection firmly, you should also do so calmly. (PLS has seen cases in which Hearing Officers have ejected inmates from their hearings in response to overly-zealous objections.) You should also be aware that, even if you fail to object at the hearing, raising it on administrative appeal is generally sufficient to preserve the claim. See, e.g.,* Matter of Crowley v. O'Keefe, *148 A.D.2d 816 (3d Dep't 1989). Finally, if the claim is of a constitutional magnitude--that is, if it pertains to a right that derives from the constitution, such as the right to call witnesses, or to receive adequate notice of the charges--rather than merely from DOCS' regulations (such as the right at issue in this case, to have the drug testing forms made part of the hearing record, a right that derives from 7 N.Y.C.R.R. section 1010.5) the burden will be on DOCS to show not only that you failed to object but that you "knowingly and intelligently" waived the right. That means that the record must show that you understood that you had a right and that you understood that you were waiving it. See, e.g.,* Matter of Williams v. Coughlin, *145 A.D.2d 771 (3d Dep't 1988).*

Contraband: Inmate's Possession of Blank Letterhead of County Court Judge and District Court Clerk Held Rule Violation

The broad wording of Disciplinary Rule 113.23, which defines "contraband" as "any article that is not authorized by the superintendent or designee," gives DOCS great leeway in determining what does and does not constitute contraband within a correctional facility. Despite its breadth, the constitutionality of the rule has been consistently upheld by the courts. *See, e.g.,* Matter of Hughes v. Goord, 300 A.D.2d 789 (3d Dep't 2003) (holding that the rule was "sufficient to have placed petitioner on notice that he would be in violation by retaining personal information regarding correction officers at least two years after he could have held any reasonable belief that he was authorized to possess it").

In this case, various items, including blank letterhead from the chambers of a county judge and a District Court clerk, as well as blank Notice of Time and Place of Hearing papers which order that an inmate shall appear in court, were confiscated from the petitioner's cell during a search. The petitioner was charged with violating the prison disciplinary rules against possessing unauthorized identification papers, conspiracy to impersonate, and possession of contraband. On administrative appeal,

however, the determination was modified by dismissing all charges except for the possession of contraband.

The Court affirmed the hearing result. Unless listed in Rules 113.10 through 113.22 of the Standards for Inmate Behavior, all items are contraband unless the inmate is authorized by the superintendent to possess them. The petitioner was not so authorized, so the items seized constituted contraband, in accordance with Rule 113.23.

Notice: Incorrect Date on Misbehavior Report Did Not Prejudice Inmate's Ability to Defend Himself

Matter of Werner v. Phillips, 798 N.Y.S.2d 241 (3d Dep't 2005)

The petitioner in this case was charged with using another inmate's personal identification number to make a telephone call. After being found guilty at a disciplinary hearing, he appealed, arguing that the incorrect date on the misbehavior report requires annulment of the determination. The court disagreed. It noted that, during the course of the hearing, the correction officer who wrote the report testified that he inadvertently indicated on the misbehavior report that the incident date was July 20, 2003, when, in fact, the telephone log established that the call in question was made on July 16, 2003. The Hearing Officer offered the petitioner a two-day adjournment in order to prepare his defense based upon the corrected date; however, the petitioner declined the opportunity. Under these circumstances, the court found, the petitioner had failed to show how he was prejudiced by the error in the misbehavior report and precluded from preparing an appropriate defense.

Urinalysis Testing: Few Defenses Prevail

Matter of Cooper v. Selsky, 798 N.Y.S.2d 797 (3d Dep't 2005)
Matter of Infante v. Selsky, 799 N.Y.S.2d 331 (3d Dep't 2005)
Matter of Paige v. Goord, 797 N.Y.S. 2d 180 (3d Dep't 2005)
Matter of Mohammad v. Goord, 799 N.Y.S.2d 154 (3d Dep't 2005)

An inmate confronted with a positive urinalysis test must overcome a heavy presumption of guilt to avoid disciplinary sanctions. The Court of Appeals held almost two decades ago that a positive urinalysis test, substantiated by a second urinalysis test, is sufficiently probative to constitute "substantial evidence" in a prison disciplinary case if the record shows that proper testing procedures have been followed. *See*, Matter of Lahey v. Kelly, 71 N.Y.2d 135 (1987) (citing studies showing that "EMIT" tests have a greater than 98% reliability rate). Courts are, perhaps consequently, skeptical of most defenses. These cases, all from the past quarter, are typical.

In Cooper, the petitioner argued that the chain of custody of his urine sample was not sufficiently established because the correction officer who administered the second test did not make the appropriate notation on the Request for Urinalysis Test form. The corrections officer testified, however, that he never physically handled the sample. It was placed in the testing machine by the correction officer who administered the first test. He merely programmed the machine and then read the test results. Insofar as the regulations governing testing procedures only require the person *actually handling* the sample to make a notation under the chain of custody (*See* 7 N.Y.C.R.R. 1020.4[e][1][i]), the Court concluded that the chain of custody was sufficiently established.

In Paige, the petitioner argued that the test results could not be admitted because the specimen bottle was not properly labeled. The regulations state that "security or medical staff" shall provide the inmate with a specimen bottle with his name, DIN number and the date written on it (*See* 7 N.Y.C.R.R. 1040.4[d][2]). The testing officer in this case testified that the procedure in his facility was to have *the inmates* write their name and DIN number on the bottle. The Court concluded that that showed "reasonable compliance" with the regulation. Moreover, the Court concluded, the inmate had not shown that he had been prejudiced by the different procedure.

The petitioner also argued that he was taking medication which caused a false positive. That assertion was contradicted by the testimony of a technician for the manufacturer of the testing equipment and, hence, merely presented a credibility issue for the Hearing Officer to resolve.

In Mohammed, the inmate's assertion that the positive test result was caused by medications he was taking was similarly refuted by the testimony of the technical assistant employed by the manufacturer of the testing equipment. Furthermore, although the lieutenant who authorized the test failed to sign the Request for Urinalysis Form as required (*See* 7 N.Y.C.R.R. 1020.4 [b]), he testified at the hearing that this was an oversight. He remembered authorizing the test and he signed the form at the hearing. He thus, according to the Court, "cur[ed] any defect." In any event, the Court noted, "the petitioner failed to demonstrate that he was prejudiced" by the error.

In Infante, the petitioner argued that he had been unable to provide a urine sample because of a prior groin injury, compounded by "shy bladder syndrome." His examining physician, however, testified that the petitioner's condition would not have prevented his compliance within the allotted three-hour time period. His alleged inability to produce the urine sample raised a credibility issue for the Hearing Officer to resolve.

Program Participation

Cases Grant DOCS Broad Discretion in Determining Eligibility For Program Participation

Discretionary decisions by DOCS officials--that is, decisions which the law leaves mostly to their judgment--are reviewed by the courts under a "rational basis" standard. The question that will be asked by the court is not whether the decision was right or wrong, or good or bad. The only question the court will address is whether there was some "rational basis" for the decision. In some circumstances, where the discretion granted by law to the decision maker is broad, it is not even sufficient to show that the decision was "irrational." The person complaining about the decision must show that the decision was *so* irrational as to "border on impropriety." Under either standard, the bar for inmates challenging such decisions is high. One area in which the courts grant DOCS this kind of broad discretion is in deciding who is and is not eligible to participate in various programs. The following decisions, all from this quarter are illustrative.

Eligibility for Time Allowance: Court Finds Rational Basis for Withholding All of Inmate's Good Time

Matter of Benjamin v. New York State Department of Correctional Services, 796 N.Y.S.2d 747 (3d Dep't 2005)

The petitioner in this case was sentenced as a second felony offender to six to 12 years in prison. After a hearing, the Time Allowance Committee decided to withhold all of his good time based upon

his failure to participate in recommended substance abuse and aggression management programs. The Court affirmed the decision. "Good behavior allowances are a privilege and no inmate has the right to demand or to require that any good behavior allowance be granted. Whether to grant or deny a good time allowance is discretionary and is not subject to judicial review so long as it is made in accordance with law." This Court noted that it has held in past cases that an inmate's failure to participate in recommended programs provides a rational basis for withholding a good time allowance. "Inasmuch as that was the reason for withholding petitioner's good time allowance in the case at bar, and his failure to participate is substantiated by signed inmate review sheets and other evidence in the record, there is no basis to disturb the determination at issue."

Temporary Release: Decisions to Deny Inmates Temporary Release Found to Have Rational Basis

Matter of Abascal v. Maczek, 796 N.Y.S.2d 757 (3d Dep't 2005)

The petitioner in this case was an inmate serving a sentence of six years to life. He challenged DOCS' decision to deny him temporary release. The Court, noting that participation in a temporary release program is a "privilege, not a right," found that its review was limited to "consideration of whether the determination violated any positive statutory requirement or denied a constitutional right of the inmate [or] whether [it] is affected by irrationality bordering on impropriety." The record showed that the petitioner's temporary release application was denied due, in part, to his overall poor disciplinary record, his recidivist criminal history, his prior parole revocation, and the nature of his instant offense. Inasmuch as those were appropriate factors to consider, the Court concluded, "it cannot be said that the determination was irrational or violated petitioner's statutory or constitutional rights and, therefore, it will not be disturbed."

Matter of Greig v. Joy, 799 N.Y.S.2d 343 (3d Dep't 2005)

The petitioner in this case also challenged the denial of his temporary release application. The grounds for the denial were his "extensive and at times violent criminal history." Applying the rational basis test, the Court held, "we cannot say that [DOCS'] decision to deny temporary release on this ground was irrational."

The petitioner also challenged DOCS' refusal to allow him to enter a drug-treatment program. In order to be eligible for the program in question, an inmate must have "a documented history of drug and/or alcohol abuse." DOCS concluded that this petitioner had no such history. Again, the Court held, its determination was "not irrational." "While petitioner apparently was under the influence of marijuana at the time of his most recent offense and participated in an alcohol and substance abuse treatment program while incarcerated, such factors, standing alone, do not demonstrate a history of drug and/or alcohol abuse. Indeed, the pre-sentence investigation report reflects that petitioner expressly denied a history of abuse...Under such circumstances [his] application was properly denied."

Family Reunion Program: Sufficient Grounds Found for Refusing to Allow Offender to Participate.

Matter of Correnti v. Baker, 797 N.Y.S.2d 627 (3d Dep't 2005)

The petitioner, a sex offender, was denied permission to participate in the Family Reunion

program on the grounds that his status "created security concerns." A lower court reversed the decision and required DOCS to "more adequately set forth the reasons for such security concerns as it related to the petitioner's underlying crimes." On remittal, DOCS explained that "the presence of children and the potential for violence by other inmates and family members created a serious threat to petitioner's safety and the safety of the FRP site."

The Court found this to be a rational basis for the decision. "We are satisfied that the FRP in this case is implemented in a reasonable manner, consistent with the inmate's status as a prisoner and the legitimate operation considerations of the institution."

Family Law

Incarcerated Father Loses Parental Rights

In re Shawn O, 797 N.Y.S.2d 72 (1st Dep't 2005)

Inmates who fail to make affirmative efforts to maintain a relationship with their children or are uncooperative with the agencies charged with supervising their children may be at risk of having their parental rights terminated, as happened in this case.

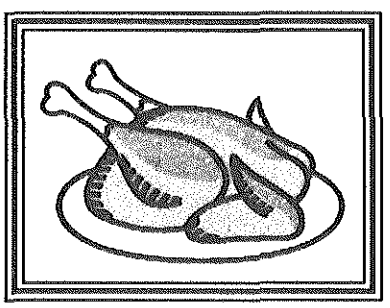
The respondent, an inmate, was appealing from the decision of the Family Court, Bronx County, to terminate his parental rights and commit his child's custody to Children's Services. The Court, however, upheld the lower court. "Clear and convincing evidence showed that respondent...delayed establishing paternity despite numerous requests by the agency over a three-year period, refused to appear [in] placement hearings that would have facilitated direct contact with the agency and planning for the child's future, and otherwise failed to cooperate with the agency...Clear and convincing evidence also shows that [he] failed to contact the child, and that his only plan for the child's future was inappropriate long-term foster care until his release from prison." Under the circumstances, the Court finds, termination of the father's parental rights and commitment to Children's Services will be "in the child's best interests."

Court Reverses Order Suspending Visitation

Matter of Crowell v. Livziey, 798 N.Y.S.2d 279 (4th Dep't 2005)

Inmates who seek to maintain contact with their minor children while incarcerated retain a right to visitation, even in circumstances of conflict with the other parent, as shown in this case.

Here, the petitioner was the mother of a minor child and the respondent was the child's incarcerated father. She sought to terminate the child's visits with her father. The lower court granted her request, but the Appellate Division reversed. "It is generally presumed to be in a child's best interests to have visitation with his or her non-custodial parent," wrote the Court, "and the fact that a parent is incarcerated will not, by itself, tender visitation inappropriate." In this case, the Court held that the lower court had not taken enough testimony to establish, as the child's mother alleged, that the child's visits with her father in prison were detrimental to her psychological health. It therefore reversed the decision and returned it to the lower court for further hearings.



Court of Claims

Court of Claims Curtails Expansion of State Liability For Inmate Assaults

Sanchez v. State of New York, 8 Misc. 3d 1019(A)(Ct. of Cl., June 28, 2005) (Lebous, J)

In 2002, New York State's highest court, the Court of Appeals, appeared to expand the circumstances under which the State may be held liable for failing to protect an inmate from an assault by another inmate. The case involved an inmate named Sanchez who, while working as a teacher in the facility program building, was assaulted by an unidentified inmate. At the time of the assault, there was only one officer stationed on the floor to supervise approximately 100 inmates--and he was occupied at the time of the assault and unable to see the area where the assault occurred. Sanchez received over 40 stitches to his head and face, causing permanent and visible scarring. He sued the State, asserting that DOCS' supervision of the inmates had been negligent, and that but for the negligence, the assault would not have occurred.

Traditionally, a party can be held liable for negligence in an accident if the accident was "foreseeable," that is, if the party knew or should have known that circumstances under his control created an unreasonable risk that the accident would occur. Applying that principle to prisons, New York State courts had held that an inmate could obtain damages for an assault by another inmate only if he or she could show: (1) the inmate was known to be at risk and the State nonetheless failed to take reasonable steps to protect him or her; (2) the assailant was known to be dangerous but the State failed to protect other inmates from him or her; or (3) the State had both notice and the opportunity to intervene for the purpose of protecting the inmate victim, but failed to do so.

In this case, Sanchez testified that he was completely surprised by the attack: he knew of no enemies at Elmira and had no reason to believe he was going to be attacked. The lower courts held that since the evidence did not show that the State had any reason to know that either the assault was likely to occur, that Sanchez was at a heightened risk of attack, or that Sanchez's assailants were particularly dangerous, there was no basis for holding the State liable for failing to take additional measures to prevent the assault.

The Court of Appeals reversed. It held that the lower court's focus on what the State *actually knew* was too narrow. Such a holding prevented full consideration of another factor traditionally relevant to the question of foreseeability, that is, what the State *should have known*, based on its expertise and prior experience in running prisons, as well as its own policies and practices designed to address the risks of inmate assaults. For example, should the State have known, based on its experience running prisons, that assigning one guard to supervise one hundred inmates made an assault by an inmate more likely? The Court of Appeals sent the case back to the Court of Claims for a trial to address these questions. At the time, the Court of Appeals' decision was seen as potentially broadening the scope of situations in which the State could be held liable in such cases to include those in which a shortage of supervision was a significant contributing factor, even when the State had no specific knowledge that an attack was likely (*Pro Se* reported the Court of Appeals' decision [which is reported at 99 N.Y.2d. 247] on the front page of our March, 2003 edition.).

Regrettably, after the trial ordered by the Court of Appeals, Court of Claims Judge Ferris D. Lebous dismissed Sanchez's case. The Court found that he had failed to prove by a preponderance of the evidence that the State could have reasonably foreseen the attack, even under the broader standard

articulated by the Court of Appeals.

In analyzing whether the State should be found liable in this case, the court asked two questions: 1) Did the State know, or should it have known, that Sanchez was at risk of being assaulted and nevertheless fail to provide reasonable protection? 2) Did the State know, or have reason to know, that Sancehz's attacker(s) were prone to engaging in an assault yet failed to take preventative measures?

Did the State Have Reason to Know Sanchez Was at Risk?

At the trial, an expert in prison management testified that the State had *constructive* notice of the risk of harm to him. The expert testified that the corrections officer on duty on the evening of the assault engaged in actions which were inconsistent with the State's duty to protect inmates. The expert also testified that the "physical layout of the classroom corridor [where Sanchez was assaulted] provided the unidentified attacker(s) an opportunity to assault claimant" in an area which could not be seen by the correction officer on duty. The expert stated that "go-back," when the assault occurred, "is precisely the time when the correction officer should have been positioned so he could see both avenues of the corridor." The expert also criticized the officer on duty for focusing on returning items to the storage area, "rather than observing inmate movement at such a crucial time." Sanchez argued that, under the analysis set forth by the Court of Appeals, this lax supervision created a heightened risk that he would be assaulted and was sufficient to establish liability.

The Court, however, focused on the following testimony: that Sanchez had been attending classes in the area where the assault occurred for over two years without incident; that there hadn't been *any* assaults in this area for at least five years; that participants in the programs were honor inmates with good disciplinary records; and that there were three other civilian workers present in the classroom at the time of the assault. The Court also noted Sanchez's testimony in which he admitted that he had no known enemies, did not know his attacker(s), and had no reason to believe that he would be assaulted.

On cross examination, Sanchez's expert admitted that there is no standard which requires *constant* supervision of inmates in correctional facilities and that, often, inmates move about correctional facilities unescorted. It would not be *per se*, "inappropriate or negligent," for an officer to become distracted or even leave his post to use the restroom, he testified, and he conceded that increasing staffing or improving the physical layout would not necessarily prevent all assaults. "When pressed on cross-examination," the Court noted, "[the expert] had difficulty explaining how this particular assault was foreseeable." The Court concluded that "although [Sanchez] may have established that there was a *general* risk present to all inmates due to the inmate movement and the physical layout of the corridor...under these circumstances the State did not know or have reason to know of a heightened risk of assault to *this* victim."

Did the State Know or Have Reason to Know That the Attackers Were Prone to Engage In an Assault?

Sanchez's theory was that his assailants planned the attack knowing that the officer on duty was far down the corridor and distracted. According to the Court, however, the testimony revealed that Sanchez had no known enemies and the attacker(s) were unidentified, so there was no way to determine whether the attack was planned based on the attacker(s) knowledge of the officer's usual routine. Additionally, because those attending the classes

were honor inmates, it was "reasonable to assume that this group of inmates was less likely to perpetrate such violent acts." Therefore, the Court concluded, there was no evidence that the State knew or had reason to know "that the unidentified assailants were prone to perpetrating such an assault."

Did the State Fail to Timely Intervene to Protect Claimant?

The Court also asked whether the State failed to intervene in the assault in a timely fashion. Since the attack lasted only about 20 seconds and the officer on duty responded to the incident in less than a minute, however, the Court found that there was no negligence on the part of the State in failing to intervene.

Should the State Have Provided Additional Supervision?

Finally, the Court addressed the question of whether additional supervision should have been provided. Here, the Court focused on the fact that the physical layout of the prison wing in question would have required the presence of numerous guards to be able to view all the areas where an assault might possibly occur. The Court concluded: "To require the State to provide such additional manpower and supervision in this location in light of the lack of any prior assaults in this area and given the relatively discipline-free records of the inmates attending these programs would improperly render the State an insurer of inmate safety and require unremitting supervision of inmates at all times."

Does the decision by the trial judge represent a retreat from the Court of Appeals decision? It is probably too early to tell. It still seems clear that the Court of Appeals' decision in Sanchez opened up the possibility that, in some circumstances, the failure to provide adequate supervision in an area where an assault occurs may be grounds for liability--a possibility that had been all but foreclosed by previous cases. It also seems clear, however, that those circumstances will be limited to those in which it can be shown that the State *should have known*, based on its experience and expertise managing prisons, that additional supervision in the area in question was needed, and that the failure to provide it significantly raised the likelihood of an assault.

Inmate Awarded Damages for Unauthorized Disclosure of Medical Condition, but None for Emotional Distress

Tatta v. State, 799 N.Y.S.2d 610 (3d Dep't 2005)

Claimant Tatta, an inmate, sued the State for unauthorized and negligent disclosure of his confidential medical diagnosis after officials at Eastern Correctional Facility disclosed his medical diagnosis to his children without his permission. The Court, after a hearing, found that the corrections officials' disclosure had, in fact, violated Public Health Law § 2782. Public Health Law § 2782 limits the persons to whom certain kinds of medical information may be disclosed and calls for a penalty of "up to" $5,000.00 for any violation of its provisions. Here, the Court decided on a penalty of only $2,500.00. It also refused the claimant's request to award additional damages for emotional distress. The claimant appealed, calling the award "grossly inadequate."

The Appellate Division affirmed the Court of Claims. "A court has broad discretion in choosing the amount of...a penalty [under section 2783]," wrote the Court, "so long as the court explains its choice and [the penalty] is not disproportionate to the offense." Here, the Court of Claims credited the testimony of the officer responsible for the disclosure, which supported the Court's finding that

the disclosure had been inadvertent. The Court cited this lack of intent as the basis for awarding less than the maximum statutory penalty, and the Appellate Division found no abuse of its discretion in doing so.

The Appellate Division also rejected the claimant's assertion that the lower court had erred in failing to award additional damages for emotional distress. The Court held that in order to obtain damages for emotional distress, the claimant would have to show that the disclosure "unreasonably endangered his physical safety." Here, although the claimant alleged that the unauthorized disclosure accelerated the progression of his illness and resulted in deterioration of his health, he presented no competent medical evidence to support the claim. Absent medical evidence, his own testimony "was wholly insufficient to support a claim for the negligent infliction of emotional distress."

DOCS Not Liable for Inmate's Basketball Injury; Had No Notice of Defective Conditions

Black v. State, 8 Misc. 3d 1025(A) (Court of Claims, 2005) (Unpublished Decision)

The claimant, an inmate, was playing basketball at the Hudson Correctional Facility when he fell into a depression surrounding the access cover to a water supply valve along the edge of the basketball court and broke his foot. He sued the State, claiming it had been negligent in maintaining the court.

At trial, he testified that while running during an intra-prison game, his foot got caught in a hole approximately three inches wide and two inches deep, causing it to twist. On cross examination, he stated that he had played basketball for approximately 23 years and was aware that playing basketball could result in injury. In fact, he testified, he had previously broken a bone while playing basketball. He also admitted that he had played basketball at Hudson since arriving approximately one year earlier and that he had previously played on this particular basketball court.

The Court held that he had not made out a claim against the State. "It is well settled that landowners owe a duty to exercise reasonable care in maintaining their property in a reasonably safe condition," explained the Court. "To be liable, however, a landowner must have actual or constructive knowledge of the defective condition. To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit a landowner to discover and remedy it."

Here, although the Court credited the claimant's testimony that there was a hole by the access cover on the edge of the basketball court, it found "no evidence that [DOCS] had either actual or constructive notice of this condition."

> Although claimant attempts to establish actual notice by submitting reports of injuries from nine other inmates on the same basketball court, none of the injuries sustained by these inmates were caused by this condition. Further, with respect to constructive notice, there is no evidence that the condition was present for a sufficient time so that it should have been discovered and remedied.

The Court also doubted the claimant's assertion that the hole was the cause of his injury. The "Report of Injury" made at the time of the incident did not support his version of what happened. In the report, the claimant stated that "he was chasing the ball, stopped short and heard a pop in foot area." Thus, said the Court, "when the incident was the freshest in his mind, claimant did not refer to the hole on the basketball court."

Finally, the Court noted, "[a] landowner is relieved from liability for inherent risks of engaging

in a sport...when a consenting participant is aware of the risks; has an appreciation of the nature of the risks; and voluntarily assumes the risks." "[A] person who elects to engage in a sport or recreational activity consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation."

In this case, the claimant was, by his own account, an experienced basketball player. He admitted that he was aware he could be injured while playing the game and, indeed, was previously injured while playing basketball. In the Court's view, a depression around a water valve along the edge of an outdoor basketball court is not the type of defect that is a "dangerous condition over and above the usual dangers inherent in the activity." Consequently, the Court found, the claimant had not established that the State was negligent.

Former Inmate's Claim for Damages for Unjust Conviction Dismissed on Technicality

Long v. State, 797 N.Y.S.2d 124 (2d Dep't 2005)

Court of Claims Act § 8-b allows persons who were wrongly convicted of crimes to bring an action against the State for damages. The conditions for such a suit, however, are strict. In order to state a cause of action, the person must have either: 1) been pardoned on the grounds that he was innocent of the crime for which he was convicted; 2) been found not guilty at a new trial; or 3) had the judgment of conviction "reversed or vacated, and the accusatory instrument...dismissed" for one of the grounds specified in § 440.10 of the Criminal Procedure Law. Criminal Procedure Law § 440.10, in turn, provides several grounds upon which a defendant may move to vacate a judgment. These include, among others, that the judgment was obtained by "duress, misrepresentation or fraud on the part of the court or a prosecutor"; that the "evidence adduced at a trial resulting in the judgment was false"; that there is newly-discovered evidence which creates a probability of a verdict more favorable to the defendant; that evidence adduced at a trial resulting in the judgment was procured in violation of the defendant's rights under the constitution; and that the defendant was incapable of understanding or participating in the proceedings by reason of mental disease or defect. *(See* CPL § 440.10 for the full list of grounds upon which a defendant may move to vacate a judgment.)

In this case, the claimant was convicted in 1995 of rape in the first degree, robbery in the first degree, and two counts of sexual abuse in the first degree, and was sentenced to a term of incarceration. In March of 2000, he moved to vacate the judgment and have the indictment dismissed pursuant to several of the grounds outlined in Criminal Procedure Law § 440.10. On June 23, 2000, the Court granted his motion, stating: "The defendant's motion to set aside the judgment of conviction, pursuant to CPL § 440.10 is granted, and the indictment is dismissed, in the interests of justice *in accordance with CPL § 210.40.*

Almost three years later, in May of 2003, the claimant brought a second motion, again asking the Court to vacate his conviction under CPL § 440. He argued that although the earlier decision of the Court indicated that it vacated the conviction in the interests of justice pursuant to CPL § 210.40, the Court did not decide those parts of the motion raising issues under CPL § 440. The Court granted the motion, writing that it now "reach[es] the issue previously reserved and conclude that defendant's convictions must be vacated pursuant to CPL § 440.10..." It then held, again, that the convictions were vacated pursuant to CPL § 440.10 and the "*indictment is dismissed in the interests of justice pursuant to CPL §210.40.*" The Claimant then brought his action for damages under the Court of

Claims Act in June of 2003.

These facts raised two questions. First: Was the claimant's action commenced in time? The Court of Claims Act provides that an action for unjust conviction must be brought "within two years [of the dismissal]." The claimant argued that his indictment was not dismissed until the May, 2003, decision, because only then did the Court decide the motion to vacate under CPL § 440.10. The Court disagreed. It noted that the lower court had specifically held in 2000 that it was granting the claimant's motion pursuant to CPL § 440.10 even if, in its later decision, it stated that it had reserved that issue. Hence, the Court found, the clock had started to run back in 2000, and the claimant's 2003 action was untimely.

Second, even if that were not the case, the Court noted, in both the 2000 and 2003 decisions, the lower court had specified that the indictment was being dismissed "in the interests of justice." Neither decision indicated that the indictment was being dismissed in accordance with CPL § 440.10. A claim for unjust conviction and imprisonment requires that the "judgment of conviction [be]...vacated, and the accusatory instrument dismissed" upon one of the grounds stated in CPL § 440.10.

"The requirements imposed by Court of Claims Act 8-b are to be strictly construed," wrote the Court, and, since the indictment in this case was only dismissed upon an interests-of-justice basis and not pursuant to CPL § 440.10, the action had to be dismissed.

Are you a woman who has done time in a SHU or "the box" in since 2000? Did you spend more than 60 days in "the box"? Will you be released in 3 months?

A writer based in New York City would be grateful for the chance to talk with you about how you coped with the experience. She is interviewing women for a book that will be used to advocate an end to the practice of extended isolation. The bulk of the book will feature ex-prisoner testimony and the book will be published by a non-profit organization specializing in human rights.

Interested? Please write to Joanne Pawlowski, P.O. Box 30365, New York, NY 10011. Let her know the dates and length of time you spent in SHU and how she could meet you in person.

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EDITORS: JOEL LANDAU, ESQ; KAREN MURTAGH-MONKS, ESQ.
COPY EDITING: ALETA ALBERT; FRANCES GOLDBERG
PRODUCTION: FRANCES GOLDBERG
DISTRIBUTION: MORGAN GARDNER; BETH HARDESTY
EXECUTIVE DIRECTOR: JERRY WEIN

Pro Se is printed and distributed free through grants from the New York State Bar Foundation and the Tompkins County Bar Association.