Pro Se

Vol. 16 Number 1: Winter 2006 Published by Prisoners' Legal Services of New York

Governor in All-Out Push for Civil Commitment of Sex Offenders

Governor George Pataki has begun an all-out push to enact legislation to permit the civil commitment of sex offenders after their terms of incarceration have ended. The push consisted of a highly-publicized effort this past Fall to use existing civil commitment laws, which were not designed for sex offenders, to commit sex offenders who were approaching the ends of their terms, while at the same time speaking out loudly against the State Legislature's failure to pass a civil commitment law aimed directly at sex offenders in the past.

As a result of the Governor's efforts, it now appears likely that some form of civil commitment law will pass the State Legislature in the coming year.

"Civil commitment" consists of the involuntary detention of a person in a psychiatric facility for mental health treatment. It has traditionally been used to detain and treat persons who constitute a threat to themselves or to society as a result of a serious mental illness. The length of the commitment may be indefinite: it generally lasts until mental health authorities agree that the detainee is no longer a threat to himself or society.

Throughout the 1990s, civil commitment laws have increasingly been aimed at sex offenders, as both policy makers and some mental health experts have argued that certain sex offenders suffer from a "mental abnormality" which makes it difficult for them to control their behavior and likely that they will re-offend.

The bills currently pending in the State Legislature target as candidates for civil commitment "sexual predators" who suffer from a "mental abnormality" which makes them pre-disposed to re-offend in the future.

article continued on page 2…

Also Inside…

Subscribe to Pro Se! See back page for details

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.

article continued from page 1…

In both current proposals, a "sexual predator" is defined as a person who has been convicted of a crime listed under Penal Law § 130, or another designated violent offense, if the offense was "sexually motivated." *See details, page 4, below.*

According to the New York State Office of Mental Health ("OMH"), the state prison system currently houses about 5,300 inmates who might be exposed to civil commitment proceedings under the proposed legislation.

In 1997, the Supreme Court upheld a Kansas statute which authorized the civil commitment of certain sex offenders after their periods of incarceration had ended. The statute permitted post-incarceration civil commitment if mental health authorities agreed that the inmate was suffering from a "mental abnormality" which made him a "sexual predator" who was a "danger to himself or others." The Court found that this statute violated neither the *double jeopardy* clause nor the *ex post facto* clause of the constitution. It reasoned that the statute was not intended to impose additional punishment on the offender but, instead, merely to provide mental health treatment. The case was Kansas v. Hendricks, 521 U.S. 346 (1997).

Ever since Hendricks was decided, Governor Pataki has proposed similar legislation in New York, but the Legislature had refused to act.

Last September, the Governor instructed the Department of Correctional Services ("DOCS") and the Office of Mental Health ("OMH") to use current civil commitment laws in New York against sex offenders.

New York presently has two laws on the books providing for the civil commitment of the dangerously mentally ill, but neither is specifically aimed at sex offenders.

Following the Governor's order, DOCS and OMH began to evaluate sex offenders who were approaching their release dates for possible civil commitment under current law. According to figures made available by the Governor's office, by late-January 2006, more than 200 inmates convicted of sex offenses had been examined for civil commitment and approximately 41, those who would otherwise have been released, either on their CR date or because their terms had expired, were committed to psychiatric facilities.

In November 2005, the State Supreme Court in New York County issued a decision in a case involving the first twelve civilly-committed offenders. The Court held that the civil commitment proceedings were in violation of current state law, as well as the due process rights of the inmates. The Court ordered the twelve immediately released, but the Governor promptly appealed, obtaining a stay of the Court's order. The case is State ex rel. Harkevy v. Consilvio --- N.Y.S.2d ---, 2005 WL 3134237 (Sup. Ct., N.Y. Co., Nov 15, 2005). The Governor's appeal was argued in mid-January 2006. *See more on the Harkevy case below, page 3.*

In January, the Governor proposed spending $130 million to construct a secure 500-bed facility for the civil commitment of sex offenders after their release from prison. In a press release, he stated: "Today, there are 5,000 sexual predators awaiting release from New York's prisons. We must do everything in our power to keep those who still represent a danger off our streets, out of our neighborhoods, and away from our children--and that's why my Executive Budget will include funding to support a new secure facility and treatment programs directed at sexual predators." Under his proposal, the new facility would be built on the site of present-day Camp Pharsalia. It would be under the direction of OMH, not DOCS.

The Governor's moves received wide press coverage. That translated into pressure on the Legislature to pass a civil commitment law aimed specifically at sex offenders. By early January, both houses of the Legislature had announced plans for civil commitment legislation based on the Kansas model.

This issue of ***Pro Se*** takes a closer look at these developments.

Currently In New York: Two Civil Commitment Laws

New York State law currently provides two mechanisms for civil commitment. Neither was written specifically for sex offenders, but both provide general authorization for the civil commitment of persons who are suffering from a mental illness and who present a danger either to themselves or to society.

Article 9 of the Mental Hygiene Law is the State's general civil commitment statute. It applies to all free persons in New York State. Pursuant to § 9.27, certain designated applicants may seek the involuntary hospitalization of an individual alleged to be mentally ill upon the certification of two examining physicians attesting to the need for psychiatric care and treatment. Thereafter, a member of the psychiatric staff of the hospital is required to examine the patient and determine whether he or she is in need of hospitalization. If so, the patient is committed for an initial period of sixty days. Involuntarily hospitalized patients then have the right to a post-commitment hearing on the question of the need for involuntary care.

Correction Law § 402 provides for the commitment of mentally ill inmates who cannot safely be treated in a prison setting. That section sets forth a detailed procedure whereby the superintendent of a correctional facility may apply to the court for an order committing an inmate to a hospital for the mentally ill, upon notice to the inmate, his family (or friend if no family member can be located), and the Mental Hygiene Legal Service. Thereafter, the inmate is advised of his right to a pre-commitment hearing at which he is entitled to representation by counsel and to seek an independent medical opinion on the need for hospitalization.

For more details on these two statutes, *See box pp. 22-23,* **Know Your Rights: A Guide to Civil Commitment Laws In New York**.

The *Harkevy* Decision: Civil Commitments of Inmates Must Proceed Under Correction Law Procedures, Not Mental Hygiene Law Procedures

The Pataki Administration's efforts to commit sex offenders have relied on the Mental Hygiene Law's commitment procedures, rather than the Correction Law's. This is presumably because the Mental Hygiene Law procedures are less stringent than the Correction Law procedures: They do not require the pre-commitment intervention of a judge, nor allow the allegedly mentally ill person to contest his or her commitment in court.

In State ex rel. Harkevy v. Consilvio --- N.Y.S.2d ---, 2005 WL 3134237 (Sup. Ct., N.Y. Co., Nov 15, 2005), the Court held that, when proceeding against inmates, the State must use the Correction Law procedures, not the Mental Hygiene Law procedures. "The plain truth of the matter," the Court wrote, "is that each of the [twelve inmates civilly committed by Pataki] were…imprisoned at the time of their commitment. Thus, state officials were bound by the procedures mandated in the Correction Law."

The Court also suggested the Administration's use of the Mental Hygiene Law procedures probably also violated the inmates' due process rights. In Vitek v. Jones, 445 U.S. 480 (1980), the United States Supreme Court had held that a criminal conviction did not authorize the State to subject an inmate to involuntary psychiatric treatment without first affording him notice and the opportunity for a hearing before an independent decision-maker. In Harkevy, the Court pointed out that the Mental Hygiene Law procedures do not provide the protections required by Vitek.

Even if the Administration were authorized to use the Mental Hygiene Law procedures, however, the Court found that it had violated them in the twelve cases it examined.

For example, the Court wrote, the Mental Hygiene Law requires that a person who applies for the civil commitment of another person must provide a statement of the facts giving rise to the application. In several of the commitment

applications submitted by DOCS, however, the prison superintendent had not provided the facts regarding the inmates' underlying mental condition or behavior, but had merely stated: "Mental Health has determined that this individual requires further evaluation and risk assessment at Manhattan Psychiatric Center."

In another example, the Court found that a number of the inmates who had been subject to civil commitment had received no psychiatric care while incarcerated. This brought into question the OMH physicians' conclusions that they suffered from a mental illness so serious that it met the statutory definition: One that "so impairs [their] judgment that [they are] unable to understand the need" for mental health care. The Court noted that what the Administration was characterizing as the inmates' "essential" need for mental health care had arisen only as their release dates drew near, and the Administration decided to "push the envelope" of what was permissible under current civil commitment laws. In other cases, the Court found, the only mental health diagnosis of the transferred inmate was "Antisocial Personality Disorder ("APD")," which, the Court observed, is a diagnosis applicable to some 75% of the prison population.

In yet another example, the Court noted, one of the twelve inmates alleged that his psychiatric evaluation consisted of a mere 15-minute interview conducted by teleconference, and that one of the examining physicians subsequently admitted that she did not want to send him to a psychiatric hospital, but that a directive had "come down from Albany."

The Court concluded that all of these facts taken together suggested that the Administration's commitment decisions were not made in accordance with the Mental Hygiene Law, but were instead made "by executive fiat."

The Court ordered the twelve inmates released pending a review of their cases by physicians appointed by the Court itself, pursuant to the Correction Law procedures. The Pataki administration immediately appealed the lower court's ruling, resulting in a stay of the release order.

The administration's appeal was being argued as this issue of ***Pro Se*** went to press.

The Pending Legislation

There are currently competing bills pending in the Legislature providing for the civil commitment of sex offenders, one in the State Assembly, the other in the State Senate. There are significant constitutional and other objections to both bills and it is unclear what form a final law might take. At present, the Assembly bill contains more procedural protections for inmates than the State Senate bill**.** What follows is a summary of that bill. *Remember: This bill is not yet law; we summarize it here only as an example of the kind of law the Legislature is considering. If any civil commitment bill does become law,* ***Pro Se*** *will report it.*

The Assembly bill would authorize the lifetime civil commitment of "sexual predators" who had completed their prison sentences. It would be structured as follows:

Eligibility: An adult offender would be eligible for civil commitment if he been convicted of a sexual offense felony under Penal Law § 130, or had been convicted of a murder, manslaughter or kidnaping which was sexually motivated and was considered a "sexual predator." A "sexual predator" would be defined as a person convicted of one of the designated offenses who also suffers from a "mental abnormality" which makes the person "likely" to re-offend.

Mandatory Sex Offender Treatment: Upon being sentenced to their initial prison term, all sex offenders would be subject to a mandatory sex offender treatment program in prison of at least two years duration. The program would be operated by the State Office of Mental Health and would have to meet detailed statutory standards to ensure effectiveness and be designed to reduce the risk of re-offending.

Screening: Eligible offenders who were nearing the completion of their sentences would be screened

for possible civil commitment by the State Office of Mental Health (OMH). Nine months prior to the completion of a sentence, OMH would provide civil commitment recommendations to the State Attorney General. At the same time, the agency would notify the inmate, the crime victim, the initial prosecutor's office, and other appropriate agencies of its recommendation.

Initial Commitment Petition: The State Attorney General would be authorized to file a petition for the civil commitment of the offender. The petition would be filed with the court that originally sentenced the offender. Prior to bringing the petition, the Attorney General would be required to consult with the original prosecutor in the case and a three-person advisory panel of sex offender management and treatment experts.

Provision of Counsel: Indigent offenders subject to a civil commitment petition would be provided with counsel through not-for-profit legal service providers like the Legal Aid Society or Mental Hygiene Legal Services.

Probable Cause Hearing: After the petition was brought, the court would conduct a hearing, without a jury, to determine whether there was probable cause to hold the offender for trial.

Psychiatric Examination: The Court would appoint two independent psychiatrists to evaluate the offender and provide evidence in the civil commitment proceeding.

Trial: An offender would be subject to civil commitment only if found unanimously by a jury beyond a reasonable doubt to fit the definition of a "sexual predator."

Placement: Offenders would be confined in facilities operated by the State Office of Mental Health, State Office of Mental Retardation and Developmental Disabilities, or State Department of Correctional Services.

Court Review: Confined offenders could seek to have their status reviewed by courts each year. In the event the court found that an offender no longer warranted confinement, he or she would be subject to supervised release.

Lifetime Supervision: Offenders who did not become subject to civil confinement could be subject to intensive supervision for life. Offenders who violated their supervision terms could then be subject to civil confinement.

News and Briefs

Governor Also Moves Ahead on DNA Testing

While pressing hard for civil commitment of sex offenders, the Governor has, at the same time, moved forcibly on another front that may affect even more inmates: DNA testing.

Under current law, only certain "designated offenders" are required to provide a blood sample to be stored in New York's DNA databank. These are, for the most part, persons convicted of violent offenses and sex offenses. *See, generally,* Executive Law § 995-c. *(See, also,* the Fall 2003 issue of ***Pro Se***, which contained a complete description of the DNA databank law and a list of the offenses covered by the law.) Governor Pataki has long wanted to extend this law to all persons convicted of a felony.

On November 28, 2005, the Second Circuit Court of Appeals upheld the constitutionality of the current DNA databank law. The Court held that the statute does not violate the Fourth Amendment's prohibition against "unreasonable" searches and seizures. The case was Nicholas v. Goord, 430 F.3d 652 (2d Cir., 2005).

Exactly one month later, on December 28, 2005, Governor Pataki issued an executive order requiring the submission of a DNA sample from all inmates as a condition of participation in DOCS' Temporary Release program, Shock Incarceration program, and CASAT. He also ordered that it be made a condition of parole or conditional release. Pursuant to the Governor's order, the condition will apply regardless of whether the inmate involved is a "designated offender" under the DNA databank law.

By January 3, 2006, both DOCS and the Division of Parole had issued regulations implementing the Governor's order. As a consequence, many inmates who are not subject to the DNA databank law will be required to submit a blood sample for testing as a requirement of either parole or temporary release.

Is the Governor's order legal? No case has yet been brought challenging the Governor's authority to issue his DNA order. Court decisions in the past concerning Temporary Release programs, however, have emphasized that those programs are a privilege, not a right, and that DOCS has broad discretion in determining the eligibility criteria for admission to them. Courts have also repeatedly held that the Division of Parole may impose various "special conditions" on parole and conditional release, above and beyond the statutory conditions of parole. The Governor can be expected to argue that imposing a DNA requirement on DOCS and DOP programs is well within his authority under those prior court decisions. As noted, the Second Circuit Court of Appeals has only recently upheld the constitutionality of DNA testing of convicted felons. Given this history, the editors of ***Pro Se*** view a successful legal challenge to the Governor's order as an uphill fight.

Some Very Bad Advice From the Jailhouse Lawyer's Manual: Post-Release Supervision Cannot Be Avoided By Maxing Out

The Jailhouse Lawyer's Manual, published by the Columbia Human Rights Law Review, has a long history, dating back to 1978, of providing inmates with useful and generally reliable legal information.

The current edition, however, contains an egregious error which has caused much confusion among New York inmates.

Under the section titled "Jenna's Law and Conditional Release Agreements from a Determinate Sentence" (Jailhouse Lawyer's Manual, 6th Edition, Vol. 1, p. 634), the authors suggest that if you have a determinate sentence, you can avoid post-release supervision by serving out the maximum term, rather than agreeing to conditional release. They advise:

> If you have a relatively short amount of time remaining on your sentence at the time of conditional release, you may find it worthwhile to finish out your sentence in prison rather than to submit to three to five years of [post-release] supervision.

Prisoners' Legal Services has received a number of letters from inmates asking if this advice is correct. We have also heard of inmates refusing conditional release by relying on this advice. In at least one case, it appears that an inmate refused conditional release and then refused to sign his post-release supervision agreement when his maximum expiration date arrived, arguing that he was not subject to post-release supervision. The inmate was release from prison, but transported immediately to a local jail under the custody of the Division of Parole, where a parole revocation proceeding was commenced against him.

Inmates should be aware that the advice in this section of the Jailhouse Lawyers Manual is **wrong**. A period of post-release supervision is a mandatory element of all determinate sentences. It will be imposed whether you CR or "max out." See Penal Law 70.45. It cannot be avoided by maxing out.

The editors of the Jailhouse Lawyer's Manual have acknowledged their error. They have sent a "glue-in" correction page and notice to all prison law libraries.

N.Y. Provides Inmates little Opportunity For College-Level Education, Despite Research Indicating Effectiveness in Reducing Recidivism

In the last issue of ***Pro Se*** (Fall 2005), we reported that PLS provided testimony at a State Legislative Hearing on transitional services. PLS attorneys argued that although funding for transitional service is necessary, the Legislature should not overlook the pressing need to reinstate

education programs in the prisons. A recent report from the Institute for Higher Education Policy emphasizes that point.

According to the report, fewer than 5 percent of prisoners nationwide are currently enrolled in college classes, despite a vast body of evidence that correctional education, particularly at the college level, is a cost-effective approach to reducing recidivism. In New York, the figures are far worse: In 1999, only 344 inmates--of a total population of 71,000--had completed a college-level course; and only 70 inmates--less than 0.1% of the population--completed a college degree.

The Institute's report revealed a number of barriers to greater enrollment of those eligible for post-secondary correctional education, including limited funding, restrictive eligibility criteria, conflicting administrative priorities, poor academic preparation, and logistical problems such as security concerns and frequent reassignments that interrupt course work. Lack of support from policymakers and the public magnifies these barriers and makes providing consistent programming more challenging, the study found.

"Prisoners are serving longer sentences than in the past but are frequently released without the education or skills necessary to find productive employment," said Jamie Merisotis, president of the Institute. The study found that recidivism, *i.e.*, the re-arrest, re-conviction, or return to prison of former prisoners, has contributed to the rapidly-growing prison population, and that greater access to post-secondary education had been shown in the past to reduce recidivism.

According to the Federal Bureau of Prisons, there is an inverse relationship between recidivism rates and education. This translates to the proposition that education is synonymous with crime prevention. Knowing this, more than forty years ago, in 1965, Congress passed Title IV of the Higher Education Act. This Act permitted inmates to apply for financial aid through Pell Grants. In the 1970s, studies were conducted to determine the success rate of the higher education programs that were available to inmates. Success was measured by the re-arrest rate and the ex-offenders' ability to obtain and maintain employment. It was found that inmates with at least two years of college education had a 10% re-arrest rate, compared to the national re-arrest rate of approximately 60%. In 1993, the Texas Department of Criminal Justice undertook a study of recidivism rates, noting that the general recidivism rate was 60%. It found that an inmate with an associate degree had a recidivism rate of 13.7%, those inmates with a bachelor's degree had a recidivism rate of 5.6%, and those with a master's degree had a recidivism rate of *zero*.

In New York, the last study of the effectiveness of post-secondary education, conducted for the Department of Correctional Services in 1991, found that the completion of a college degree by an inmate greatly reduced the likelihood that the inmate would commit a further crime. The study showed that only 26.4% of inmates who had been awarded a college degree were returned to the Department's custody, whereas 44.6% of those who withdrew from the program or were administratively removed had been returned to prison after release, contrasting with the general return rate for the same time period of 47.4% for inmates who had not participated in the program.

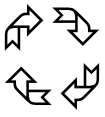
And yet, in 1994, the U.S. Congress included a provision in the Violent Crime Control and Law Enforcement Act of 1994 which denied all prisoners access to Federal Pell Grants. The bill was adopted in response to public outcry that prisons had become places of leisure, and that inmates were being given education at the expense of law-abiding taxpayers. Nothing could be further from the truth. Under the Pell Grant system, the grants were noncompetitive, need-based federal funds available to any and all qualifying low-income individuals

who wished to attend college. The pool of money available for Pell Grants was unlimited and only dictated by the number of individuals applying and qualifying for the Grants. In fact, the total percentage of the Pell Grants' annual budget that was spent on inmate higher education was one tenth of one percent (.1%).

The Institute of Higher Education study found that the greatest barriers to higher education for inmates identified in the study were the laws passed in the mid-90s making inmates ineligible for Federal Pell grants and the State Tuition Assistance Program. Previously, when funding through Pell Grants and the TAP program was available to eligible prisoners, a much higher percentage of inmates had the opportunity for post-secondary study. In 1991, for example, 1078 college degrees were earned by New York State inmates, as compared to the 70 earned in 1999.

College enrollment is currently available at only five correctional facilities in DOCS: Attica, Bedford Hills, Collins, Wyoming, and Sing Sing, where the New York Theological Seminary offers a program leading to a master's degree. Funding for these programs is provided by the colleges and the inmates themselves.

The report calls for a national effort to build public support for college-level correctional education as an important means to reducing recidivism, and includes a series of recommendations, including: reinstating Pell Grant eligibility for prisoners; allocating more state funds to the public colleges and universities that provide instruction in correctional education programs; and allowing prisoners to receive state grants for low-income students.



PLS Welcomes New Executive Director

Prisoners' Legal Services is pleased to announce that Alba Susan Johnson was hired this past November, 2005, as our new Executive Director. Ms. Johnson comes to PLS with almost twenty years of experience in legal services. Prior to joining PLS, she worked for the Office of the Public Defender in West Palm Beach, Florida, the HIV Law Project in New York City, and Bronx Legal Services, Bronx, New York. Since 1995, she has been employed at the Capital Defender Office, where she first served as Deputy Capital Defender and then, in 2000, became Assistant Director of Mitigation and Special Counsel. Ms. Johnson received her J.D. degree from the University of Florida, College of Law, in 1988, and is trilingual with two degrees in French and Spanish studies.

She brings enthusiasm, dedication, and passion to her new job. She has dedicated her life to representing the under-privileged, the oppressed, and the forgotten. As Executive Director, Ms. Johnson will be responsible for insuring that we at PLS fulfill our mission to provide meaningful legal representation to indigent inmates. Not an easy task in a time of shrinking budgets and a growing inmate population, but one at which, if experience is a guide, she will excel.

Federal Cases

Paralyzed Inmate's Suit Barred For Failure to Exhaust Administrative Remedies

Williams v. Comstock, 425 F.3d 175 (2nd Cir., 2005)

In 2001, Leroy Williams suffered a stroke while in DOCS' custody that left him paralyzed on the left side of his body. Nearly two years later, he filed a grievance alleging that a DOCS' nurse had failed to provide him with adequate medical care at the time

of his stroke. The Inmate Grievance Program Supervisor rejected the grievance on the grounds that it was not filed within 14 days of the incident, and therefore was untimely. Williams then brought suit in federal court under 42 U.S.C. § 1983, alleging that DOCS had failed to provide him with adequate medical care. The district court dismissed his claim on the grounds that he had failed to exhaust his administrative remedies. Williams appealed. In his appeal, he argued that his institutional grievance had exhausted his administrative remedies, even though it was rejected as untimely. The Court of Appeals disagreed.

The Prison Litigation Reform Act of 1995 requires that inmates exhaust available administrative remedies before bringing a lawsuit in federal court 42 U.S.C. § 1997e(a). In 2004, the Second Circuit Court of Appeals held that "prisoners may not circumvent the exhaustion requirement simply by waiting to bring a § 1983 action until their administrative complaints are time-barred [under DOCS regulations]." Giano v. Goord, 380 F.3d 670, 677 (2d Cir., 2004). In other words, an inmate must exhaust the grievance process before bringing a federal lawsuit, even if he knows the grievance will be considered untimely.

The Court recognized some exceptions to this rule but, it held, the exceptions are limited to circumstances in which an "uncounselled prisoner" might understandably "fail to grieve in the normally required way." In Giano, for example, the inmate was complaining that he had received a misbehavior report in retaliation for his exercising his First Amendment rights. He understood DOCS regulations to state that complaints about disciplinary hearings could not be raised in the grievance process. Consequently, although he appealed his disciplinary hearing, he never filed a grievance. The Court held the inmate's interpretation of DOCS' regulations was a reasonable justification for failing to exhaust the administrative grievance process.

In Williams's case, however, the inmate did not claim that he misread DOCS' policy. He claimed, instead, that it had simply been "physically and mentally impossible" to file an institutional grievance within the fourteen days permitted by DOCS' regulations "after suffering from the onset of a stroke which left him partially debilitated, *i.e.*, paralyzed on his left side." The Court did not find this explanation sufficient. It wrote: "While it might be true that Williams was incapable of filing his grievance within two weeks of his stroke, [he] does not explain why he waited nearly two years to file the grievance. We therefore do not find Williams's justification persuasive. Accordingly, the failure to timely file the grievance in accordance with IGP rules amounted to a failure to exhaust administrative remedies in this case."

Practice pointer: *The statute of limitations within which to bring a 1983 action in federal court is three years from the date of the incident complained of. DOCS' grievance regulations require that an inmate file a grievance within fourteen days of the incident complained of. Since the PLRA requires exhaustion of administrative remedies before bringing an action in federal court, does Williams effectively mean that no prisoner's action may be brought in federal court if the inmate has not filed an administrative grievance within fourteen days of the incident? Probably not. Williams seems to stand for the more limited principle that if you have failed to file a timely grievance, you should, at the very least, have a good explanation, and also be able to show that you filed a late grievance and that DOCS refused to consider it despite your good explanation.*

Note: *When an IGP Supervisor rejects a grievance as untimely, the grievance is not given a grievance number or filed in the grievance office.*

Technically, therefore, the inmate has nothing to appeal. This presents a problem: How can an inmate "exhaust" the IGP Supervisor's decision not to accept his grievance? In litigation, DOCS has taken the position that the inmate must file a separate grievance complaining about the IGP Supervisor's decision in his first grievance. If that grievance is also rejected, he may appeal that decision to the Central Office Review Committee ("CORC") in Albany. Question: If an inmate does this, and CORC still rejects the grievance, has the inmate "exhausted" his administrative remedies regarding the underlying complaint such that he may now file in federal court? Could Mr. Williams have exhausted his administrative remedies in this way? This question has not yet been addressed by the courts.

PLRA Ban on Damages for Emotional Distress Held Not to Apply to Ex-Inmates

Kelsey and Wright v. County of Schoharie, 04-CV-299

The various restrictions on prisoner litigation enacted in 1995, known collectively as the Prison Litigation Reform Act ("PLRA"), apply to all inmates who bring a lawsuit about conditions or incidents in a prison or local jail in federal court. But does it also apply to suits by *ex*-inmates concerning things that happened to them before they were released? As it happens, that question has received different answers depending upon which provision of the PLRA is at issue.

In Greig v. Goord, 169 F.3d 165 (1999), for instance, the Second Circuit held that prisoners who are released do not have to satisfy the *exhaustion requirements* of the PLRA.

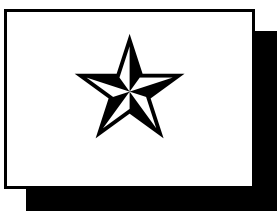
In Cox v. Malone, 56 Fed. Appx. 43 (2003), however, the Court accepted a lower court's conclusion that the PLRA's "*physical injury*" provisions, *i.e.*, provisions which prohibit inmates from bringing a suit for emotional distress unless they can also show some physical injury, applied both to current inmates and ex-inmates. The Cox decision was unpublished, however, which means that lower courts are free to ignore it, if they so choose.

In Kelsey and Wright v. County of Schoharie, the U.S. District Court for the Northern District of New York did just that, holding that the physical injury limitation of the PLRA only applies to individuals who are incarcerated at the time their action commences.

The case involved plaintiffs who had been incarcerated in the Albany County Jail on misdemeanor charges. They alleged that their Fourth Amendment rights were violated when they were allegedly subjected to strip searches following arrests for misdemeanor offenses.

Albany County argued that the PLRA's "*physical injury*" requirement barred their suit, since they could not prove a physical injury.

The Court disagreed. It wrote: "If a litigant is no longer incarcerated at the time the action is brought, they do not fall within the category of litigant with which Congress was concerned--incarcerated plaintiffs who bring civil lawsuits for recreation." "If the Cox decision were the rule," said one of the attorneys representing the Albany County plaintiffs, "it would mean you could not get emotional distress damages for any prison activity that doesn't result in a physical injury. For instance, you could have a horrific sexual assault that did not result in physical injury, and you'd have no claim for damages. I think [the Northern District] decision shows that Cox was an anomaly."



STATE CASES

DISCIPLINE

Documents: Third Department Holds Failure to Provide Inmate With Unusual Incident Report Is Harmless Error, Where Report Does Not Exonerate Inmate, Nor Was Relied Upon By Hearing Officer

Matter of Seymour v. Goord, 804 N.Y.S.2d 498 (3rd Dep't 2005)

Petitioner Seymour was charged with stabbing another inmate. At his disciplinary hearing, he testified that he had seen a fight in the yard between the man who was stabbed and another inmate but had not participated in it. He told the Hearing Officer that the man who was stabbed had hit his assailant on the left eye, causing a cut below the eye.

At his hearing, he requested copies of all the memos and reports relating to the incident. For unknown reasons, both the employee assistant and the Hearing Officer withheld five and one-half pages of the six-page unusual incident report, as well as an interdepartmental memorandum. The withheld documents stated that a second inmate was also assaulted and named a number of potential witnesses, including the alleged second victim. They also stated that the second victim was found in his cell with a cut beneath his eye. When questioned, the documents stated, he said he was attacked in the yard along with the man who was stabbed.

After being found guilty, the Petitioner filed an Article 78 proceeding, alleging that he was improperly denied relevant documentary evidence which he could have used in his defense.

The Appellate Division disagreed: It held that the unusual incident report was properly denied because it did not contain any information exonerating the Petitioner. It also stated that since the Hearing Officer did not rely on the unusual incident report, any error in denying it was harmless.

Practice pointer: *This is a troubling decision. The Petitioner thought the Hearing Officer should have relied on the withheld document because, in his view, it corroborated his alibi testimony that the man with the black eye was probably the assailant. More importantly, the holding in this case appears to add a new requirement to the relevance of documents. It suggests that an otherwise relevant document need not be given to an accused inmate unless it contains exonerating evidence. It also suggests that failure to disclose a relevant document to the inmate is a harmless error if the Hearing Officer doesn't list it in his "Statement of Evidence Relied Upon" in the hearing disposition.*

Misbehavior Report: Charges Were Duplicative

Matter of Thomas v. Selsky, 804 N.Y.S.2d 148 (3rd Dep't 2005)

The Petitioner was charged with possessing an authorized item in an unauthorized area after a search of his cell revealed a computer disk. Upon examining the disk, and finding that it contained personal information concerning the creation of a corporation, the Petitioner was charged in a separate report with smuggling and misuse of state property. After being found guilty, he challenged his hearing in an Article 78 proceeding. In response, DOCS conceded that the smuggling charge was duplicative of the unauthorized item charge and agreed to expunge it. The court found that the remainder of the charges were supported by substantial evidence: the Petitioner admitted that he had used the disk for

an unauthorized purpose. The Court also rejected Petitioner's argument that the charges should be reversed because he was not allowed to be present during his cell search. The need for his presence, the Court held, was not required because he was in the yard at the time.

Practice pointer: *DOCS Directive # 4910, § V(C)(1), states: "The search of a general confinement housing unit may be conducted with or without the inmate being present. If the inmate is removed from quarters prior to the search, he or she shall be placed outside the immediate area to be searched and be allowed to observe the search. However, if, in the opinion of a supervisory security staff member, the inmate presents a danger to the safety and security of the facility, the inmate shall be removed from the area and not allowed to observe the search."*

Witnesses: Inmate's Wife Prevented From Testifying

Riley v. Goord, 802 N.Y.S.2d 524 (3rd Dep't 2005)

The Petitioner's wife, while on a visit, was found to be in possession of a heroin-filled condom hidden in her underwear. The Petitioner was charged with conspiring with her to smuggle the heroin into the facility. At a subsequent Tier III hearing, the Petitioner sought to call his wife as a witness. The Hearing Officer refused, on the grounds that she was incarcerated in a local jail on charges related to the incident and was "the subject of an ongoing investigation." After being found guilty at the Tier hearing, the Petitioner filed an Article 78 proceeding, claiming that the Hearing Officer had denied him his right to call witnesses.

The Court found no error. It held: "Under the circumstances presented, [allowing the wife to testify] would jeopardize correctional goals."

Practice Pointer: *This is questionable result. Inmates have a constitutional right to call relevant witnesses at a disciplinary hearing in which good time is at stake, unless doing so would be "unduly hazardous to institutional safety or correctional goals." Wolff v. McDonnell, 418 U.S. 539 (1974). Here, the wife was presumably a key witness: it was she with whom the Petitioner was charged with conspiring to smuggle the heroin. The brief opinion of the Court does not explain how allowing her to be called to testify would "jeopardize correctional goals." The Court cites only one case in support of its opinion, Matter of Hill v. Selsky, 795 N.Y.S.2d 794 (3rd Dep't 2005). That case, however, involved a witness who refused to testify. There is no indication in this case that the Hearing Officer asked the Petitioner's wife to testify, much less that she refused.*

Witnesses: DOCS Failed to Adequately Investigate Witness's Refusal To Testify

Crosby v. Selsky, 2005 WL 3434604 (3rd Dep't 2005)

In the Summer 2005 issue of ***Pro Se***, we reported the case of Hill v. Selsky, 795 N.Y.S.2d 794 (3rd Dep't 2005). In that case, the Court outlined the steps DOCS officials must take to try and obtain the testimony of a reluctant witness in a prison disciplinary hearing, or alternatively, verify that the witness's refusal to testify is genuine. Any inmate dealing with a "witness refusal" in a disciplinary case should refer to Hill for guidance. In this case, the Court applied Hill, with results favorable to the inmate.

The Petitioner was charged with "kiting" a letter to his girlfriend via another inmate, in which he requested that she bring "dope" contained in balloons to him on her next visit. (Prison officials opened the letter when it was returned due to lack of postage.) After a Tier III hearing, he was found guilty of violating disciplinary rules prohibiting solicitation, conspiring to bring narcotics into the facility, smuggling, and providing misleading

information. During the hearing, he had attempted to obtain the testimony of the inmate who sent the letter, and whom the Petitioner alleged wrote it. The inmate allegedly refused to testify.

The Court, citing Hill, noted that the failure of a Hearing Officer to make appropriate inquiry into a requested inmate witness's refusal to testify may constitute a deprivation of the conditional right to call witnesses at a disciplinary hearing. Here, the Court found, the efforts made to secure the testimony of the inmate who the Petitioner alleged wrote the letter, or to ascertain his reasons for refusing to testify, were inadequate. The requested inmate witness did not sign the witness refusal form and the employee who attempted to secure his testimony did not testify regarding either the circumstances of his refusal or any inquiry made about the reason for his refusal. Finally, the record did not reflect that the Hearing Officer personally conducted any such inquiry. Under these circumstances, the Court held, Hill dictated that the hearing be reversed.

Substantial Evidence: Confidential Information Did Not Constitute Substantial Evidence

Matter of Colon v. Goord, 804 N.Y.S.2d 451 (3rd Dep't 2005)

The Petitioner was found guilty of being involved in a fight in the prison yard. The findings were based largely on confidential information given to the Hearing Officer by the investigating officer. The Petitioner challenged the hearing in an Article 78 proceeding. The Court reviewed the confidential information ***in camera*** (in secret) and found that it did constitute substantial evidence of guilt.

The Court noted, "[i]t is well settled that hearsay evidence in the form of confidential information relayed to the Hearing Officer may provide substantial evidence to support a determination of guilt where the Hearing Officer makes an independent assessment and determines that the information is reliable and credible." Here, however, the Court found that the information provided by the investigating officer was not sufficiently detailed or specific for the Hearing Officer to make an independent credibility assessment of the informants. "Although there was some information as to how Petitioner was identified, no specific information was relayed about the fight and assault. Furthermore, there was simply a general statement that the information from the confidential informants coincided, without any particulars regarding the specific activity allegedly engaged in by petitioner. In fact, most of the confidential interview involved the Hearing Officer disclosing the particulars of the investigation for the record with the investigating officer simply affirming or denying the facts as stated by the Hearing Officer."

Practice pointer: *Although the use of confidential information in prison disciplinary hearings has been widely upheld by the courts, cases that rely on such information may still be challenged in an Article 78 proceeding. Although the court will not substitute its judgment regarding the reliability or credibility of the confidential information for that of the Hearing Officer, it will review the information* ***in camera*** *(in secret) to determine if there was at least a sufficient evidentiary basis upon which the Hearing Officer could have found it credible and reliable. In doing so, courts look at a number of factors; a personal interview by the Hearing Officer of the confidential informant, for instance, has often been held to provide a sufficient basis for a credibility judgment. Absent a personal interview, courts will examine whether the confidential information was corroborated by other sources of information, or if*

it was sufficiently "detailed and specific" to allow the Hearing Officer to measure its credibility without corroboration. The vast majority of confidential information cases are affirmed by the courts. On rare occasions, however, such as in the present case, a court will find that the confidential information lacked even the bare minimum of corroboration or detail and specificity needed to allow the Hearing Officer to judge its credibility.

Substantial Evidence: Drug Testing: Proper Documentation Required

Matter of Gonzalez v. Selsky, 803 N.Y.S.2d 315 (3rd Dep't 2005)

Seven N.Y.C.R.R. § 1010.5 provides that when the results of a drug identification test are to be used in a disciplinary hearing, the record must contain the following documents, in addition to the misbehavior report: (a) the "request for test of suspected contraband drugs form"; (b) the "contraband test procedure form"; (c) the test report prepared by an outside agency subsequent to testing of the substance, if any; and (d) a statement of the scientific principals and validity of the testing materials and procedures used.

In this case, the Petitioner was found guilty of possessing controlled substances based on tests conducted of substances found in his cell. He argued that the hearing result lacked substantial evidence because the Hearing Officer failed to include all of the forms relating to the drug testing procedure required by 7 NYCRR § 1010.5. The "request for test of suspected contraband drugs form" and the "contraband test procedure form" were included, but the other documents required by 7 NYCRR § 1010.5 concerning the testing procedure and instructions were not. Furthermore, the Hearing Officer obtained no testimony concerning the testing procedure or instructions from the correction officer who conducted the test. Accordingly, the Court held, the test results could not be considered evidence of the Petitioner's guilt.

Punishment: Court Upholds Eight-Year SHU Sentence For Assault-on-Officer

Matter of Ford v. Smith, 803 N.Y.S.2d 821 (3rd Dep't 2005)

A Petitioner was charges with assaulting a correction officer by throwing hot oil in his face and stabbing him several times. The Petitioner was sentenced to eight years in SHU after being found guilty at a Tier III hearing. He challenged the hearing results in an Article 78 on a number of grounds: that he had been denied a witness, that he had been prevented from presenting documentary evidence on his behalf, and that his sentence was excessive, cruel and unusual.

The Court rejected the inmate's arguments. On the witness denial claim, the Court found that the Hearing Officer's failure to locate one unidentified witness was not improper because the Petitioner had been allowed to call twenty other witnesses and the record revealed that, had the missing witness been obtained, his testimony would have been redundant. On the documentary evidence claim, the court found that the Petitioner was not prejudiced by the Hearing Officer's refusal to call the injured correction officer's treating physician or to allow him to see photographs of his injuries, because he had previously been allowed to review the officer's medical records. Finally, on the inmate's claim that his sentence was excessive, the Court held that eight years in SHU, "although lengthy…[is] not so excessive as to shock our sense of fairness given the serious nature of Petitioner's assault on [the] correction officer."

Remedies: DOCS Must Expunge References to Reversed Disciplinary Hearing From Inmate's Records

Matter of Proctor v. Goord, 801 N.Y.S.2d 517 (3rd Dep't 2005)

The Petitioner filed an Article 78 proceeding seeking to expunge his institutional records of all references to an incident which occurred in 1995 when, during a search of his cell, a sharpened nail clipper was allegedly found hidden in an electric plate cover. The Petitioner had challenged his subsequent disciplinary hearing in an Article 78 proceeding and won, obtaining an order that all references to the hearing be expunged. In 2003, however, he was placed in administrative segregation. The administrative segregation recommendation was based, in part, on the 1995 incident, the one which had supposedly been expunged from his records.

In response to the Petitioner's Article 78 proceeding, DOCS argued that all references to the 1995 incident had been expunged from the Petitioner's disciplinary history. It argued, however, that an Unusual Incident Report mentioning the incident had been prepared and that, although it understands that it may not keep a record of the misbehavior report, it is necessary to maintain documentation "that the incident did, in fact, occur."

The Court disagreed. In Matter of Davidson v. Coughlin, 546 N.Y.S. 2d 247 (3rd Dep't 1989), it had previously held, "It is beyond argument that allowing references to charges that have been dismissed and other mischievously equivocal information that might be unfairly construed to remain in prisoners' records leaves inmates in jeopardy of having these references unfairly used against them." Here, the Court found that the reference in the Petitioner's records to the sharpened nail-clipper was precisely the kind of "mischievously equivocal information that might be unfairly construed" to which it had referred in Davidson. "While the Court discerns no harm in the use of the unusual incident report in question for other Correctional Department purposes, the Court finds that it was arbitrary and capricious and an abuse of discretion not to expunge the unusual incident report, and all references to the subject incident, from Petitioner's inmate record."

Res Judicata: New Charges Based on Criminal Conviction Upheld Where Earlier Charges Dismissed

Caroselli v. Goord, 803 N.Y.S.2d 288 (3rd Dep't 2005)

The Petitioner was charged in a misbehavior report with violating the prison disciplinary rule that prohibits inmates from committing a Penal Law offense. The charge flowed from the Petitioner's conviction of assault in the second degree by a jury in Cayuga County. The alleged conduct underlying the Criminal conviction involved an attack by the Petitioner on a correction officer. Following a Tier III hearing, the Petitioner was found guilty and sentenced to six years in SHU.

The Petitioner challenged the hearing in an Article 78 proceeding. He argued, among other things, that the hearing violated the principles of res judicata, collateral estoppel, and double jeopardy. *Res judicata*, *collateral estoppel*, and *double jeopardy* are all principles of adjudication which mean, essentially, the same thing: that when an issue has been finally judicially decided in one court, it should not be subject to re-adjudication in another court. The Petitioner's argument in this case was that he had previously been charged and found guilty of violating various disciplinary rules relating to the same incident at Auburn Correctional

Facility. That determination was ultimately reversed in an Article 78 proceeding and a new hearing was ordered, yet DOCS failed to conduct the rehearing. He argued that, under the circumstances, the new Penal Law charge violated the principles of res judicata and/or double jeopardy.

The Court found, however, that DOCS' abandonment of the original disciplinary hearing did not bar it from bringing new charges based on the Petitioner's subsequent criminal conviction. The Penal Law charge was not a second proceeding based on the same facts but, rather, a new proceeding based on the intervening criminal conviction.

***Practice pointer**: The Petitioner might have obtained a different result if the court in his original Article 78 proceeding had ordered the original hearing reversed and expunged, rather than merely remanding it for a rehearing. In Matter of Howard v. Coughlin, 622 N.Y.S.2d 134 (3rd Dept 1995), the Court held that the expungement of the Petitioner's prior hearing prohibited DOCS from charging him with Penal Law violations based on a subsequent criminal conviction arising from the same underlying incident. In this case, however, the Court relied on Matter of Garcia v. Coombe, 649 N.Y.S.2d 724 (2nd Dept 1996). In Garcia, the Court had distinguished Howard on the grounds that, as here, the prior charges had not been ordered expunged but, instead, remanded to DOCS for a new hearing.*

Res Judicata

Matter of Salahuddin v. Goord, 804 N.Y.S.2d 825 (3rd Dep't 2005)

The Petitioner was found guilty in a Tier III hearing of violating various disciplinary rules as a result of his alleged involvement, along with five others, in the assault of another inmate in December, 2000. He commenced an Article 78 proceeding challenging the determination, but it was affirmed by the Third Department in 2002. *See* Matter of Salahuddin v. Selsky, 742 N.Y.S.2d 134. In the meantime, three of the other inmates alleged to have been involved in the assault successfully obtained administrative reversals of their prison disciplinary charges arising from the incident. The Petitioner then commenced this Article 78 proceeding seeking to have his hearing overturned, citing the administrative reversals granted to the three other inmates.

The Court rejected the Petitioner's claim on the grounds of *res judicata*. *Res judicata* bars a cause of action that was raised and adjudicated, or which could have been raised and adjudicated, in a prior action or proceeding. In this case, the Court found, the Petitioner was challenging the sufficiency of the evidence underlying the prison disciplinary determination. However, he had already challenged the evidentiary basis of the determination in his prior proceeding.

Consequently, the Court concluded, he is barred from bringing the new case. "In any event," the Court noted, "the administrative reversals rendered in the three other cases would not mandate reversal of Petitioner's prison disciplinary determination because the circumstances giving rise to reversal in those matters are not present herein."

Right to be Present*: *Hearing Officer Erred In Removing Inmate From Hearing

Matter of Holmes v. Drown, 804 N.Y.S.2d 823 (3rd Dept 2005)

An inmate facing disciplinary sanctions has a right to be present at his or her disciplinary hearing "unless he or she…is excluded for reasons of institutional safety or correctional goals." 7 NYCRR 254.69(a)(a). The courts have interpreted this language to mean that a Hearing Officer may remove an inmate from a hearing for being "unruly"

or "disruptive." *See, e.g.*, Matter of Berrian v. Selsky, 763 N.Y.S.2d 111 (3rd Dept 2003) (inmate who yelled and became "loud and threatening" in waiting room outside hearing was properly excluded from hearing); Matter of Alexander v. Ricks, 779 N.Y.S.2d 606 (inmate who engaged in a fight with corrections officers after one session of his hearing was properly excluded from the remainder of the hearing).

Exactly where the line is drawn between the kind of "unruly and disruptive" conduct which may get you kicked out of your hearing, and vigorous, but appropriate, self-representation, is difficult to say.

The Petitioner in this case was removed from his Tier hearing because he repeatedly interrupted, refused to obey instructions, and made requests that the Hearing Officer found to be deliberately designed to harass and frustrate the hearing process. The Court, however, found that there was no indication that the Petitioner posed a threat to institutional safety or correctional goals. The record demonstrated that the Petitioner "slowed the hearing process by asking questions about information that he thought could vindicate him." At no time, however, did the Petitioner's behavior "rise to the level of disruption that would have necessitated his removal."

Consequently, the hearing was reversed.

Right to be Present: Inmate Refused to Attend Hearing

Matter of Abbas v. Selsky, 802 N.Y.S.2d 798 (3rd Dep't 2005)

The Petitioner commenced an Article 78 proceeding challenging a number of separate prison disciplinary hearings, several of which he did not attend. In court, he argued that he was denied his due process right to attend the hearings. The Court found, however, that the transcript of the hearings revealed that the Hearing Officer questioned correction officers regarding the Petitioner's absences, and was informed that he refused to attend the hearings or sign written waivers although he was advised of the consequences of doing so. Under these circumstances, the Court held, the Hearing Officer was warranted in conducting the hearings in the Petitioner's absence.

***Practice pointer**: DOCS should not prevail on an argument that an inmate has waived a fundamental right, such as the right to be present at a disciplinary hearing, unless it can show that the waiver was knowing and intelligent, that is, that the inmate was informed of the existence of the right and advised of the consequences of not exercising it. Here, the Court found that the testimony of the correction officers that the Petitioner's waiver of his right to attend the hearing was knowing and intelligent.*

Drug Testing: "Frequent Smoker" Defense Fails to Impress

Matter of Callender v. Goord, 2005 WL 3543707 (3rd Dep't 2005)

The Petitioner was charged with unauthorized use of a controlled substance in a misbehavior report after his urine sample tested positive for the presence of cannabinoids. At his disciplinary hearing, he argued that the positive test results were caused by residual marijuana from the earlier drug use for which he had already been disciplined. He presented evidence that detectable amounts of marijuana can remain in the urine of long-term chronic marijuana users for up to 30 days and, he stated, he was such a user. Consequently, he argued, the test results did not constitute substantial evidence that he had used marijuana since his prior positive test.

The Hearing Officer rejected that argument. On appeal, the Court held that it was within the province of the Hearing Officer to reject the Petitioner's "self-serving" testimony that he was a

frequent user of marijuana, and noted that the Petitioner had admitted to using marijuana after his urine sample was collected. Under those circumstances, the Court held, the misbehavior report, supporting documentation, and testimony at the hearing provide substantial evidence to support the determination of guilt.

Hearing Record: Failure to Tape Hearing Results in Reversal

Douglas v. Goord, 2005 WL 3312965 (3rd Dep't 2005)

The Petitioner was involved in a physical altercation with a correction officer. After a disciplinary hearing, he was found guilty of assaulting staff. He filed an Article 78 proceeding to challenge the hearing. On review, the Court found that some of the hearing testimony, including the entire testimony from an inmate who testified at the hearing on the Petitioner's behalf, was missing from the hearing transcript. The Petitioner argued that the absence of this testimony deprived him of his right to present certain arguments and constitutional objections relating to his claim of innocence of the charge of assaulting a staff member. DOCS disputed this. The Court found, however, that the contents of the inmate's testimony were irrelevant. "The fact remains," held the Court, "that the Hearing Officer cited the inmate's testimony as one of the factors considered in rendering the determination of guilt on this charge. Accordingly, the failure to record that testimony precludes meaningful review of the hearing and, therefore, annulment of the charge of assault on staff is required."

PAROLE

Court Finds Denial of Parole to 87-Year-Old Inmate On Ground That He Presented a "Propensity For Extreme Violence" Irrational Bordering on Impropriety

Matter of Friedgood v. Board of Parole, 802 N.Y.S.2d 268 (3rd Dep't 2005)

The Petitioner is an 87-year-old former orthopedic surgeon who was convicted in 1977 of the crimes of murder in the second degree and grand larceny in the second degree after he killed his wife by injecting her with a lethal dose of Demerol; he stole property from her estate, and attempted to leave the country to join his paramour and their two out-of-wedlock children in Denmark. He was sentenced to concurrent prison terms of 25 years to life on the murder conviction. At his second appearance before the Parole Board, in September 2003, his request for release on parole was again denied and, after the denial was affirmed on administrative appeal, the Petitioner commenced an CPLR Article 78 proceeding.

The Court reversed the Board.

The Court noted that parole determinations are discretionary and will not be disturbed as long as they meet the statutory requirements of Executive Law § 259-i, and that, although the law requires the Board to consider all relevant statutory factors, it is not required to give them equal weight or even to articulate each and every factor that was considered.

Here, the Court found, the record showed that the Board was aware of the following: the Petitioner's rehabilitation; his positive contributions to his prison community; his debilitating medical conditions, which include terminal cancer, a colostomy, and incontinence; his expressions of remorse and his good disciplinary record. The Board's decision, however, acknowledged none of those factors and its decision was based instead

solely on the seriousness of the crime, stating that the Petitioner's offense "represents a propensity for extreme violence." "Our review of the record here finds no support for this cryptic conclusion," wrote the Court. "Given the unique features of Petitioner's crime, his severe physical limitations and need for continuous medical care, we find the notion that he is prone to engage in violent conduct to be without any support in the record and so irrational under the circumstances as to border on impropriety."

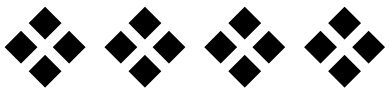
Disbarred Lawyer Denied Parole, Despite Earned Eligibility Certificate

Matter of Romer v. Dennison, 804 N.Y.S.2d 872 (3rd Dep't 2005)

The Petitioner in this case was a disbarred attorney serving a prison sentence based upon convictions of grand larceny and other charges stemming from his theft of funds from former clients. He made his fourth appearance before the Board in 2004 and was again denied parole. He then commenced an Article 78 seeking to annul the Board's determination. The lower court granted his application but the Board appealed. The Appellate Division reversed.

Although the Petitioner had obtained an "earned eligibility certificate," the Court noted that that, in and of itself, did not preclude the Board from denying parole. The statute, Correction Law § 805, states that an inmate who has been issued an earned eligibility certificate "shall be granted parole release at the expiration of his minimum term…unless the board of parole determines that there is a reasonable probability that, if such inmate is released, he will not live and remain at liberty without violating the law and that his release is not compatible with the welfare of society." If the Board's determination that the inmate will not "live and remain at liberty without violating the law" is made in accordance with statutory requirements, the determination will not be disturbed absent a "showing of irrationality bordering on impropriety."

Here, the Court found, the record revealed that the Board considered all the statutorily relevant factors, not merely the seriousness of the Petitioner's crime. The Board's decision referred to the Petitioner's positive institutional record, which, the record showed, indicated that he served as a program aide for chaplain services and as a paralegal assistant in the facility law library, in addition to teaching a legal research class and, on occasion, a Hebrew reading class. The Petitioner's institutional record also showed that he has not received any disciplinary tickets during the entire period of his incarceration. At the parole hearing, the Board noted the Petitioner's lack of prior involvement with the criminal justice system, the absence of a drug or alcohol problem, his desire to reimburse his former clients, and his post-release plans. According to the Court, however, "the record also reflects…that the Petitioner continues to maintain his innocence of the crimes for which he stands convicted--crimes that, the Board observed, involved 'devious, manipulative and cunning acts perpetrated against vulnerable individuals' who had placed their trust in petitioner." The Board also noted the Petitioner's "total disregard" for the impact that his actions had on his clients. "In light of the foregoing," the Court wrote, "we simply cannot agree with [the] Supreme Court that the Board's decision to deny Petitioner parole release was based solely upon the seriousness of the underlying crimes and/or evidenced irrationality bordering on impropriety."



Name Change Application Denied To Sex Offender

In the Matter of the Application of Gutkaiss, 2005 WL 3421911 (Supreme Court, Columbia Co., December 12, 2005)

The Petitioner was an inmate convicted of a sex offense, who sought an order pursuant to Article 6 of the Civil Rights Law to change his name to "Timothy George Dunagan," on the grounds that he wished to honor his mother's maiden name, since she had passed away in 1996. He gave no other rationale for the request.

In general, in the absence of a demonstrable reason, an application for a name change should be granted by the Court. *See*, In re Madison, 261 A.D.2d 738 (3rd Dept. 1999). Here, however, the Columbia County Sheriff's Department opposed the petition on the grounds that it would not be in the best interests of society to allow the Petitioner to change his name. The Court held a hearing to determine whether there was a reasonable objection to the Petitioner's application. The Petitioner argued that changing his name while incarcerated would not affect his obligation to register as a sex offender under the Sex Offender Registration Act, since he is still incarcerated and he will need to register under his new name upon his release. He also argued that DOCS would not be affected because it relies upon an inmate's DIN Number rather than his name for identification purposes. Finally, he argued, the law provides that a person may change his name freely so long as there is no fraud, misrepresentation, or interference with the rights of others.

The Columbia County Sheriff argued that the name change was inappropriate, since the Petitioner was a sex offender convicted of a Class B Felony: "Society at large," he argued, "has an interest in knowing who this gentleman is, where he is, and what his history is."

The Court found that although it was true that, upon his release, the Petitioner would be forced to register as a sex offender using his new name, it is possible that those familiar with his original name prior to his incarceration would not be alerted to his presence unless his name were to remain the same. "People may change their appearance," the Court wrote. "[But] if the Court allows Petitioner to change his name he may, in effect, create a new identity for himself." The Sex Offender Registration Act, the Court found, "is designed to protect unwary members of the public from convicted sex offenders. To allow sex offenders to change their names from that which they were called at the time of their crime, would undermine the purpose of the statute."

Consequently, the Court denied the Petitioner's application for a name change "in order to protect the rights and interests of the public."

Court of Claims Denies Compensation for Injured Finger

Mangano v. State, 2005 WL 3434693 (3rd Dep't 2005)

The Claimant, an inmate, was engaged in a work program with Corcraft, DOCS' construction program. During one project, he was using an angle grinder for the first time. When he turned it off and set it down on his workbench, the rotating abrasive disk continued to spin. The Claimant suffered an injury to his finger. He sued the State, claiming that DOCS should have provided him some warnings or instructions regarding the proper use of the angle grinder.

The Court disagreed. It found that DOCS owes a duty to inmates engaged in work programs to provide them with reasonably safe equipment and sufficient warnings and instructions for safe operation of the equipment. However, it continued,

inmates are still required to exercise ordinary care when engaging in work programs. In this case, the testimony at trial established, the Claimant had worked in the construction industry for 20 years prior to his incarceration. He had owned his own construction company, he was familiar with many power tools, he had seen other people operate angle grinders, and he was familiar with how angle grinders worked. He conceded that the grinder that DOCS gave him was safe for its intended use. He admitted his awareness of the common-sense propositions that coming into contact with a spinning disk was an obvious danger, it would be foolish to put down the grinder while it was still running and, based on the distinctive winding-down sound of the grinder, he was aware that the disk was still rotating as he placed the grinder on the workbench.

Based on this testimony, the Court held, further warnings and instructions were unnecessary. The claimant was aware of the dangers which caused his injury, and DOCS should not be held liable for his injury.

Sentencing: Sentences for Repeat Felony Offense Must Run Consecutively to Any Previously-Imposed Sentence Which Has Not Yet Been Discharged

Matter of Rivera v. Goord, 2005 WL 3485661 (2nd Dep't 2005)

Penal Law § 70.25(a) concerns concurrent and consecutive sentences. In general, under the statute, sentencing courts have the discretion to decide whether multiple sentences run consecutively or concurrently to each other. The statute also states that if the court fails to specify, then the sentences must run concurrently.

There are exceptions to this rule, however. The principal exceptions concern repeat felony offenders. Under Penal Law §70.25(2-a), when a person is adjudicated a repeat felony offender and he or she is still subject to an undischarged sentence, the new sentence must run consecutively to the prior sentence.

The Petitioner in this case was sentenced in 1993 to a number of prison terms for various burglary-related crimes. In 2001, he was paroled. In 2002, he was convicted on new charges, adjudicated a repeat felony offender, and sentenced to 12 years to life imprisonment. The sentencing court did not address whether these sentences would run concurrently or consecutively to the unexpired portion of the 1993 sentences.

The Petitioner argued that because the sentencing court was silent on the issue, the sentences had to run concurrently. The Court disagreed. Under Penal Law § 70.25(2-a), his status as a repeat felony offender required that the new sentences run consecutively to the undischarged sentence on the Petitioner's prior convictions, despite the sentencing court's silence on the issue.

"Son of Sam Law" Passes Constitutional Muster: Inmate's Malpractice Verdict Subject to Suit By Crime Victim

Ciafone v. Kenyatta, — N.Y.2d — 2005 WL 3485877 (2nd Dep't 2005)

Executive Law § 632-a, the so-called "Son of Sam" law, was intended to help crime victims recover damages from their assailants. It does so by requiring DOCS to notify the Crime Victims' Board ("CVB") whenever an inmate receives a sum of $10,000.00 or more. The CVB, in turn, must notify the crime victim and may help him or her initiate a lawsuit to recover compensatory damages. The law also allows a crime victim to bring such suits within three years of the date upon which they receive notification that the perpetrator of a crime has received a sum of more than $10,000.00,

notwithstanding any other statute of limitations.

In this case, the Plaintiff, Salvatore Ciafone, was a Transit Authority Police Officer. In 1974, he witnessed the defendant, Mr. Kenyatta, jump a turnstile. When the Plaintiff attempted to stop the defendant, a struggle ensued: the defendant wrested the plaintiff's service revolver and shot him six times in the legs. Kenyatta was subsequently convicted of attempted murder and has been incarcerated ever since.

In 2000, Kenyatta commenced a medical malpractice suit against DOCS, claiming that DOCS had misdiagnosed his kidney failure, resulting in permanent disability and the potential need for a kidney transplant. The case was settled for slightly more than $600,000.00. Pursuant to the provisions of the Son of Sam law, Mr. Ciafone was notified of the impending payment to Kenyatta and, in January 2003, within the three-year statute of limitations provided for by the law, Ciafone and his wife sued Kenyatta for damages. Kenyatta moved to dismiss, arguing that the Son of Sam Law violated the *ex post facto* clause of the U.S. Constitution, on the grounds that it amounted to additional punishment for his crime.

In denying Kenyatta's motion, the Court left little doubt about the Son of Sam law's constitutionality. In Kennedy v. Mendoza-Martinez, 372 US 144 (1963), the Supreme Court identified seven factors that determine whether a statute constitutes additional punishment. Applying those factors in this case, the Appellate Division concluded that the intent of the Son of Sam law was not to impose additional punishment. The Court found, for instance, that the law does not impose any new disability or restraint on criminal defendants; it simply extends the statute of limitations for civil lawsuits from crime victims which could have been brought under prior law. It also does not provide for automatic damages for the crime victim; it only provides an opportunity for the crime victim to recover damages. Finally, the Court found, that the statute's purpose was not to promote retribution or deterrence, but only to compensate crime victims, and it is narrowly drawn and rationally related to that purpose. Consequently, the Court held, the Son of Sam law does not violate the *ex post facto* clause.

Know Your Rights: A Guide to Civil Commitment In New York

In light of Governor Pataki's ongoing efforts to civilly commit sex offenders following their terms of incarceration, ***Pro Se*** takes a detailed look at the provisions of the two current civil commitment statutes. Governor Pataki has been relying on the provisions of the Mental Hygiene Law to civilly commit inmates. At least one court has held that the Mental Hygiene Law does not apply and, in addition, does not provide constitutionally adequate due process protections; however, that decision is currently on appeal. *See story, page 3 above*. The other law the Governor could rely upon is Correction Law § 402. Both statutes are summarized here. Inmates convicted of sex offenses who may be subject to civil commitment proceedings should know their rights.

Mental Hygiene Law Article 9, §§ 27-31, provide:

- ❏ "The director of a hospital may receive and retain…any person alleged to be mentally ill and in need of involuntary care and treatment upon the certificates of two examining physicians, accompanied by an application for the admission of such person."
- ❏ The admission application must be executed within ten days prior to the admission and must "contain a statement of the facts upon which the allegation of mental illness and need for care and treatment are based."
- ❏ The examining physicians must "consider alternative forms of care and treatment that might be adequate to provide for the person's needs without requiring involuntary hospitalization" before signing a commitment certificate.
- ❏ The director of the psychiatric facility to which the allegedly mentally ill person is brought must "cause such person to be examined forthwith by a physician who shall be a member of the psychiatric staff of such hospital other than the original examining physicians whose certificate or certificates accompanied the application." The person may be admitted only if he "is found to be in need of involuntary care and treatment" by the staff physician.
- ❏ Following admission to the hospital, the patient may not be sent to another hospital by any form of involuntary admission unless Mental Hygiene Legal Services has been given notice of the transfer.
- ❏ The director of the psychiatric facility must give written notice of the detention to the nearest relative of the person detained or, if none available, to up to three friends of the detained person.
- ❏ The detained person or his relative or friend may request a court hearing concerning the detention within sixty days of the date of the involuntary admission. He may do so by putting the request in writing to the director of the psychiatric facility. The director, in turn, must notify the court, which must schedule a hearing within five days of receipt of notice of the request from the director.

…article continued on following page

…article continued from previous page

Correction Law § 402 provides:

- ❏ The superintendent of a correctional facility may apply to a judge to cause an examination to be made of an allegedly mentally-ill person in his custody "whenever the physician of [the] correctional facility…shall report in writing…that any person undergoing a sentence of imprisonment…is, in his opinion, mentally ill."
- ❏ The judge appoints two examining physicians.
- ❏ The two physicians must conduct a personal examination. If satisfied after the examination that the inmate is mentally ill and in need of care and treatment, they must issue a certificate to that effect.
- ❏ Before issuing the certificate, they must "consider alternative forms of care and treatment available during confinement in such correctional facility, penitentiary, jail, reformatory or correctional institution that might be adequate to provide for such inmate's needs without requiring hospitalization."
- ❏ If the physicians issue the certificate, the superintendent may apply to the judge for an order committing the inmate to a psychiatric facility.
- ❏ The application must be personally served upon the alleged mentally-ill person, as well as upon either the wife, the husband, the father or mother, or other nearest relative of the alleged mentally-ill person (if known), and also served upon Mental Hygiene Legal Services.
- ❏ Mental Hygiene Legal Services "shall inform the inmate…of the procedures for placement in a hospital and of the inmate's right to have a hearing, to have judicial review with a right to a jury trial, to be represented by counsel and to seek an independent medical opinion," and "shall have personal access to such inmate for such purposes."
- ❏ If no hearing is requested, the judge may immediately issue an order for the commitment of the person to a mental health facility for a period not to exceed six months from the date of the order.
- ❏ If a hearing is requested, either by the inmate or any relative or near friend on behalf of the inmate, the judge must hold a hearing and take testimony regarding the inmate's mental illness. If, after the hearing, the inmate is judged mentally ill and in need of care and treatment, the judge may issue an order committing him to a mental health facility for not more than six months.
- ❏ If the inmate, or someone acting on his behalf, is dissatisfied with such an order, he may obtain a rehearing and a review of the prior proceedings within thirty days of his commitment. If he requests a rehearing, the court must "cause a jury to be summoned and shall try the question of the mental illness and the need for care and treatment of the person."
- ❏ If the director of the mental health facility concludes that the condition of an inmate requires an extension of his stay in the hospital, he may make an application for an extension. The procedures for obtaining an extension are spelled out in Mental Hygiene Law § 9.27.

Subscribe to Pro Se!

Pro Se accepts 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 Street, Ithaca, NY 14850.

Pro Se Wants to Hear From You!

Pro Se wants your opinion. Send your comments, questions or suggestions about the contents of ***Pro Se*** to ***Pro Se***, 301 South Allen St., Albany, NY 12208. *Do not send requests for legal representation to* ***Pro Se***. Requests for legal representation and all other problems should be sent to Central Intake, Prisoners' Legal Services of New York, 114 Prospect Street, Ithaca, NY 14850.

EDITORS: JOEL LANDAU, ESQ; KAREN MURTAGH-MONKS, ESQ.
COPY EDITING: ALETA ALBERT; FRANCES GOLDBERG
CONTRIBUTORS: DIANNA GOODWIN
PRODUCTION: FRANCES GOLDBERG
DISTRIBUTION: MORGAN GARDNER; BETH HARDESTY
EXECUTIVE DIRECTOR: SUSAN JOHNSON

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