Pro Se

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Supreme Court, Second Circuit, and DOCS Weigh In on Exhaustion of Administrative Remedies

Since 1996, prisoners have been required to exhaust "such administrative remedies as are available" before filing federal lawsuits. This requirement, part of the Prison Litigation Reform Act of 1996 ("PLRA"), has resulted in extensive litigation over what just it means to "exhaust" available administrative remedies--and whether there are any circumstances in which inmates may be excused from doing so.

This issue of ***Pro Se*** takes a look at three recent legal developments concerning "exhaustion." First, we look at a new Supreme Court decision which addressed the question of whether a California inmate had exhausted administrative remedies when his grievance was rejected as late but he appealed the rejection as far as he could within the grievance system. The Court held that he had not.

Second, we look at a recent Second Circuit decision which addressed the question of whether a New York inmate, who *failed* to exhaust administrative remedies, should be allowed to proceed with his lawsuit anyway, where his failure to exhaust was due to misinformation given him by prison staff. The Court held that he should.

Finally, we look at recent amendments to the Department of Correctional Services' ("DOCS'") grievance policies intended, according to DOCS, to "eliminate ambiguities [in the grievance system] that have been revealed by litigation."

First, the Supreme Court decision.

In Woodford v. Ngo, 126 S.Ct. 2378 (2006), the Court essentially held that not only must inmates exhaust their administrative remedies, they'd better do it right, and they'd better do it on time. How this decision will affect New York prisoners is not yet

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clear. It does, however, reinforce the lesson that if you want the option of filing a lawsuit, you must promptly determine your administrative remedies--the grievance system, a disciplinary appeal, or other applicable remedy--and you must pursue them correctly.

The full story is this:

Inmate Ngo was excluded from several prison programs as a result of his security level. Six months after learning about this, he filed a grievance. He gave no reason for having waited so long to file the grievance.

Under the California grievance system, an inmate must file a grievance within fifteen working days of the event he is complaining about.

California prison officials rejected Ngo's grievance as too late. He appealed the rejection all the way up the grievance system, but lost. He then filed a lawsuit in federal court. A lower court held that, because Ngo had appealed the decision that his grievance was late all the way up the grievance system, he had "exhausted" his administrative remedies and could proceed with his lawsuit.

The Supreme Court reversed. It held that the exhaustion requirement requires "proper exhaustion." "Proper" exhaustion "demands compliance with an agency's deadlines and other critical procedural rules because no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings." If a prisoner does not "properly" exhaust, he or she has committed a "procedural default," which means the federal case must be dismissed. The bottom line: If prison officials reject a grievance because the prisoner made a procedural error, the prisoner's subsequent lawsuit is doomed.

The Woodford decision resolved a conflict between federal courts. Some courts had imposed a "proper exhaustion" rule, but others had said that as long as the prisoner takes the grievance to the end of the line, it is exhausted, even if it had been rejected for lateness or other procedural reason.

How will Woodford affect New York prisoners? That is not immediately clear because the Second Circuit had previously taken a middle position, rejecting both a procedural default approach and the notion that prisoners can ignore grievance rules. Instead, the Second Circuit's pre-Woodford decisions held that there were several situations where a prisoner's failure to exhaust according to prison rules would not bar the prisoner's lawsuit. First, it said, administrative remedies that were available in theory might not be available "in fact" in a given situation. Hemphill v. New York, 380 F.3d 680, 686, 688 (2nd Cir. 2004) (holding threats of retaliation by prison staff can make a remedy "functionally unavailable"). Or actions by prison staff inhibiting the plaintiff's exhaustion might estop the staff members from raising the defense of failure to exhaust. Hemphill, 380 F.3d at 688-89 (holding allegations of verbal and physical threats by staff and fear of further assault if the prisoner filed a grievance could support a finding of equitable estoppel).

There may also be "special circumstances" that justify the prisoner's failure to comply with administrative procedural requirements. Giano v. Goord, 380 F.3d 670, 686 (2nd Cir. 2004) (holding that a prisoner who didn't file a grievance about alleged tampering with his drug test samples was justified by the special circumstance that DOCS' rules were not clear and he could reasonably have understood that a disciplinary appeal was the only available remedy).

So, after Woodward, are these arguments taken away from prisoners? We don't know yet, but the first court to rule on the question has said "no." In Collins v. Goord, 2006 WL 1928646 (S.D.N.Y. Jul 11, 2006), the court said that Woodford had left the question open, but observed that:

> Justice Breyer, concurring in the Court's judgment in Woodford, cited with approval our Circuit's opinion in Giano, which held that exhaustion is "mandatory" but subject to the "caveats" outlined in Hemphill, *See*, Giano, 380 F.3d at 677-78…

The Collins decision went on to say:

> Although it is open to doubt whether Woodford is compatible with the results reached in some of the cases in this Circuit applying Hemphill, and parts of the Hemphill inquiry may be in tension with Woodford, to the extent the Hemphill inquiry bears directly on the facts of this case, I do not believe that anything in Woodford would change the result.

The Collins court seems to be saying that the Second Circuit rules are probably still the law, but their application may not be as favorable to prisoners as before Woodford. That is, courts will be less likely to find "special circumstances" justifying failure to exhaust correctly.

Practice pointer: *DOCS' lawyers can be expected to argue that after Woodford, any mistake a prisoner makes, however minor, means the case must be dismissed. The first thing to know is that even under a procedural default rule, if the grievance system addressed* ***the merits*** *of your complaint (rather than dismissing your grievance as untimely or for other procedural or technical reasons) – and (if the decision goes against you) you appeal all the way up – you have exhausted. Any procedural error you may have committed is waived. Pozo v. McCaughtry, 286 F.3d 1022, 1025 (7th Cir.), cert. denied, 537 U.S. 949 (2002); accord, Gates v. Cook, 376 F.3d 323, 331 n.6 (5th Cir. 2004) (noting that the Plaintiff sent a form to the Commissioner rather than the Legal Adjudicator but the Defendants did not reject it for noncompliance; in addition, the grievance was submitted by the prisoner's lawyer and not by the prisoner, as the rules specify); Spruill v. Gillis, 372 F.3d 218, 234 (3rd Cir. 2004); Ross v. County of Bernalillo, 365 F.3d 1181, 1186 (10th Cir. 2004).*

But if your grievance has been rejected on ***procedural*** *grounds, or if there is any argument that you didn't take the grievance far enough, you may be at risk of dismissal for non-exhaustion when you file suit. Protecting yourself starts at the time the incident occurs that you may want to sue about. You must know your rights under the state's administrative procedures, and you must exercise them as correctly as you can and in compliance with time deadlines. You should also err on the side of doing more rather than less to exhaust, in order to increase the likelihood that you will get the benefit of the doubt in a close case. Here are some suggestions:*

- *If your grievance is late or may be viewed as late, explain the reasons it took you so long and ask for permission to file late based on "mitigating circumstances." That's the phrase in the Directive; use it. If your grievance is rejected as untimely anyway, file a second grievance, complaining about the rejection of your first grievance. Be sure to raise the "mitigating circumstances" at all stages, all the way up to the Central Office Review Committee ("CORC").*

- *If your problem is resolved either without filing a grievance or after you file at the facility, appeal anyway. There is law saying that once you resolve your problem informally, Marvin v. Goord, 255 F.3d 40, 43 (2nd Cir. 2001), or once you get a favorable decision, Abney v. McGinnis, 380 F.3d 663, 669 (2nd Cir. 2004), you have exhausted administrative remedies. But there is also law saying that even if your immediate problem is solved, if you don't appeal you haven't exhausted, because the system might have developed better policies or disciplined staff if you had. Braham v. Clancy, 425 F.3d 177, 183 (2nd Cir. 2005). So you are best advised to grieve or appeal no matter what, to state that the action you want is for prison officials to consider how to prevent any*

recurrence of what happened to you, and that you want to exhaust administrative remedies.

- *The dividing line between disciplinary appeals and grievances is not very clear, See, Giano v. Goord, supra, and DOCS has done little to clarify it since the Giano case. Anything related to a disciplinary proceeding other than decisions the Hearing Officer makes at the hearing or how the Misbehavior Report is written should probably be raised in the disciplinary appeal and be the subject of a grievance. If grievance personnel say it's not grievable, then you are protected from having a court say later that you should have grieved it.*

- *If you obtain additional information or something else happens that makes you see your problem in a new light, file a new grievance about it, explaining the reasons for it. For example, in Brownell v. Krom, 446 F.3d 305 (2nd Cir. 2006) (see below), the prisoner filed a claim and a grievance about lost property, but much later learned information that caused him to believe that his property had been taken intentionally by staff; the court said he had not exhausted because he failed to put that allegation into his grievance, 446 F.3d at 311; however, it let the case go forward because of other special circumstances.*

Second Circuit Reaffirms "Special Circumstances" Doctrine; Holds Inmate Justified in Failing to Exhaust Administrative Remedies

Brownell v. Krom**,** 446 F.3d 305 (2nd Cir. 2006)

In Brownell v. Krom, decided shortly before the Supreme Court decision in Woodford (see the previous article), the Second Circuit Court of Appeals expanded upon its prior holdings regarding the "special circumstances" that may excuse an inmate's failure to exhaust administrative remedies.

In 2000, the Plaintiff, Hardy Brownell, was transferred from Woodbourne to Eastern to Southport, and finally to Shawangunk. When he left Woodbourne, he had 14 bags of property, and much of the property consisted of legal papers and transcripts he needed to file a habeas corpus petition. By the time he got to Shawangunk, he only had three bags of property, and the legal papers were missing.

At Shawangunk, Brownell filed a lost property claim for the missing property. However, DOCS' property claim process, which can be found at 7 N.Y.C.R.R. (New York Code, Rules and Regulations) 1700, is designed only to provide reimbursement for lost property. It is not intended to cause an investigation of the loss or a search for the missing property. Brownell's property claim was promptly denied on the grounds that he had failed to submit documentation of the value of the lost property.

After the property claim was denied, Brownell spoke with the Grievance Supervisor at Shawangunk. Since what Brownell wanted was to recover the lost property, the Inmate Grievance Review Committee ("IGRC") Supervisor advised him to file a grievance concerning the lost property, rather than appeal the denial of the property claim. Brownell took this advice. He filed a grievance describing the missing property, including thousands of pages of legal work needed for a habeas corpus, and requested that the property be found "via a thorough investigation." The IGRC at Shawangunk, however, denied the grievance and recommended that Brownell file *a property claim* ***at Woodbourne***. However, since 7 N.Y.C.R.R. 1700.5(a) only permits an inmate to file a property claim at "the facility in which the inmate is housed at the time the claim is filed," Brownell could not file a property claim at Woodbourne.

Brownell appealed the grievance decision to the Superintendent. The Superintendent denied the appeal of *the grievance* and recommended that Brownell appeal the denial of the now-abandoned *property claim*. However, since, pursuant to 7 N.Y.C.R.R. 1700.4(d), an appeal of a property claim denial must be filed within five days, by the time the Superintendent denied the grievance, the deadline for appealing the property claim had

passed; and, moreover, as noted above, a property claim could not give Brownell the relief he sought, *i.e.*, an investigation into the loss of his property.

Brownell therefore appealed his *grievance* to the Central Office Review Committee ("CORC"). CORC, however, agreed with the Superintendent that Brownell should appeal his property claim to the Superintendent.

At some point after Brownell filed his grievance, he came to believe that his property had been deliberately destroyed by staff at Woodbourne. His grievance had not alleged deliberate destruction of his property because he was not aware of that until after the grievance process was completed.

Brownell eventually filed a section 1983 action in federal district court, alleging that staff at Woodbourne had violated his right of access to court by deliberately destroying papers he needed for his habeas corpus.

The Attorney General made a motion for summary judgment, alleging that Brownell failed to exhaust his administrative remedies. He argued that Brownell did not exhaust his administrative remedies because his grievance only referred to lost property, and did not allege that his property was lost through any deliberate staff misconduct.

The Court agreed that Brownell did not exhaust his administrative remedies. His grievance did not allege intentional misconduct, and therefore did not give DOCS an opportunity to investigate and address the allegedly deliberate staff misconduct which was the basis of his lawsuit. However, the Court held that "special circumstances" justified Brownell's failure to exhaust: Despite the fact that Brownell had filed both a property claim and a grievance over his lost property, DOCS never investigated what had happened to his property. Instead, it denied both on technicalities. His property claim was denied on the grounds that the relief he sought was not available in that process, and his grievance was denied on the grounds that he should pursue the property claim process, even though the deadlines for filing and appealing a property claim had expired. In addition, although his grievance did not allege intentional misconduct by staff, that was because at the time he filed the grievance he was not aware that officers might have deliberately destroyed his property. When he learned that his property might have been deliberately destroyed, he reasonably believed that it was too late to file a new grievance alleging deliberate misconduct.

Practice pointer: *DOCS' lawyers often rely on inmates' confusion over the proper grievance procedures to try and prevent inmates' claims from being heard in court. Fortunately, Brownell now joins such other Second Circuit cases as Hemphill v. State of New York, 380 F.3d (2nd Cir. 2004) and Giano v. Goord, 380 F.3d 670 (2nd Cir. 2004), in holding that "special circumstances"--including, as here, a justifiable mis-understanding of the rules (or, in other cases, DOCS' failure to follow the rules or an inmate's legitimate fear of retaliation for filing a grievance)--may, in some cases, excuse exhaustion of administrative remedies.*

As noted, however, Brownell was decided prior to the Supreme Court's decision in Woodford. Will the Second Circuit's "special circumstances" doctrine survive Woodford? For the reasons discussed in the prior article, we think so. The inmate in Woodford advanced no "special circumstances" for the lateness of his grievance. Under those circumstances, the Court held, an inmate is bound by the rules of the particular correctional department's grievance process. But that decision does not appear to overrule the Second Circuit rule that, in some cases, special circumstances may justify a failure to follow the rules.

The inmate in this case was represented by the Prisoners' Rights Project of the Legal Aid Society and Prisoners' Legal Services of New York.

DOCS Amends Grievance Regulations; PLS and Prisoners' Rights Project Critical

Since the PLRA was passed, many courts have noted the complicated, ambiguous, sometimes contradictory nature of DOCS' grievance process. Caselaw has repeatedly shown that inmates and staff alike can easily become confused about how to exhaust their administrative remedies for a given

complaint. DOCS itself recently conceded that "cases have made it obvious that the language in the current [grievance regulations] is unclear."

This Spring, DOCS amended its grievance rules with the goal, it said, of "eliminat[ing] ambiguities in the grievance system and reinforc[ing] the program's primary function as a non-adversarial and effective problem resolution mechanism."

Among other things, the new amendments:

- Extend the time frames for various actions, as follows:
  - filing the grievance: from 14 calendar days to 21 calendar days;
  - IGRC resolution or convening of a hearing: from 7 working days to 16 calendar days;
  - grievant's appeal to Superintendent or to CORC: from 4 working days to 7 calendar days;
  - Superintendent's response: from 10 working days to 20 calendar days;
  - Superintendent's response to harassment or illegal discrimination grievance: from 12 working days to 25 calendar days; and
  - CORC response to an appeal: from 20 working days to 30 calendar days;
- Allow inmates to request an extension of the time limits at any stage of the process for mitigating circumstances, but emphasize that granting such requests are within the discretion of DOCS' personnel and that no "exception to the time limit may…be granted more than 45 days after an alleged occurrence" or "more than 45 days after the date of the [IGRC or Superintendent's] decision" *unless the late appeal asserts a failure to implement the decision*.
- Attempt to "clarify the relationship between the grievance mechanism and other formal or informal means of problem resolution." The new amendments state that if an inmate receives a decision from a program that has a separate appeal mechanism, outside the grievance system, "the *decision* rendered during that process…is not grievable while all other aspects of the other program and its implementation, remain grievable." For example: If you have a disciplinary hearing and you want to challenge both the disposition of the hearing (the finding of guilt) *and* allege that the charges were filed against you for retaliatory reasons, you would have to file your appeal of the disciplinary hearing within the disciplinary system and file a separate grievance within the grievance system concerning the retaliation complaint. The new amendments caution, however, that "if an inmate is unsure whether an issue is grievable, he/she should file a grievance and the question will be decided through the grievance process."
- Permit a grievant to appeal in cases where a decision has not been implemented. The new text at 7 N.Y.C.R.R. 701.5(c)(4) states: "If a decision (of the Superintendent requiring action) is not implemented within 45 days, the grievant may appeal to CORC citing lack of implementation as a mitigating circumstance."
- Require inmates to follow up on their grievance appeals. The new text at 7 N.Y.C.R.R. § 701.5(d)(3)(I) states: "If a grievant does not receive a copy of the written notice of receipt within 45 days of filing an appeal (to CORC), the grievant should contact the IGP supervisor in writing to confirm that the appeal was filed and transmitted to CORC."
- Address the procedures to be followed when an inmate is transferred to another facility while his grievance is being processed. The new 7

N.Y.C.R.R. § 701.6(h) states: "Any response to a grievance filed by an inmate who has been transferred shall be mailed directly to that inmate, via privileged correspondence, at his/her new facility or location. An inmate transferred to another facility may continue an appeal of any grievance."

- Provide a new section, 7 N.Y.C.R.R. § 701.10, describing an "expedited procedure" for review of grievances alleging violation of the Department's strip search or strip frisk policy. The expedited procedure basically mirrors the "expedited procedures" already in the books for review of grievances alleging staff harassment or discrimination.

- Provide extra security to inmate grievance representatives and clerks by providing a "reasonable assurance" that they will be able to return to their former job assignments, and preventing inadvertent transfers of IGRC representatives by placing a "marker" in their institutional files, indicating that the inmate is an IGRC representative and cannot be transferred without a due process hearing.

Do the new grievance amendments meet DOCS' goal of eliminating ambiguity in the system and providing an "orderly, fair, simple and expeditious" method of resolving grievances? Neither PLS nor the Prisoners' Rights Project believe so. We have called on DOCS to completely overhaul the grievance system to make it simpler, fairer, and clearer. At a minimum, we believe DOCS should institute the following reforms:

1. Dramatically extend the time limit for filing grievances to 180 days;

2. Require the IGRC to accept, file, and provide a grievance number to all grievances submitted, including those that are untimely or procedurally improper for some other reason;

3. Institute a straightforward appeal method that would allow inmates to appeal all grievances, including those that have been rejected as untimely or dismissed for other procedural reasons;

4. Mandate that grievances filed at the wrong facility be accepted, filed, and transferred to the right facility, with notice to the prisoner;

5. Overhaul, simplify, and clarify confusing and ambiguous aspects of the "expedited" review procedures for harassment, discrimination, and strip search complaints;

6. Provide prisoners a means to complain confidentially within the grievance process about sensitive matters;

7. Eliminate ambiguous decisions and require that grievances be either accepted or denied;

8. Provide prisoners with a comprehensive, unambiguous, and *brief* explanation of what they must do to exhaust administrative remedies to DOCS' satisfaction;

9. Eliminate the requirement that a grievance state the "action requested," since prisoners do not necessarily know what must be done to correct the problem; and

10. Promulgate guidelines for both prisoners and staff as to the meaning of "mitigating circumstances" for filing a late grievance.

DOCS has rejected virtually all of these suggestions.

A copy of the full text of DOCS' grievance amendments can be obtained from Anthony J. Annucci, Deputy Commissioner and

Counsel, Department of Correctional Services, 1220 Washington Avenue, Albany, NY 12226-2050.

A copy of PLS' and PRP's criticisms of the proposed amendments and our suggestions for reform can be obtained by writing to Central Intake, Prisoners' Legal Services of New York, 114 Prospect St., Ithaca, NY 14850.

News and Briefs

Parole Class Action Survives Summary Judgment

The "abrupt and steep decline" in the parole release rate for A-1 violent felons presents "at least circumstantial evidence" that the Parole Board is relying on gubernatorial policy rather than legislatively directed law, a federal judge has held, denying the Governor's motion to dismiss the case.

The decision in the case, Graziano v. Pataki, 2006 WL 2023082, S.D.N.Y. (July 17, 2006),comes in a class action alleging that the Parole Board under Governor Pataki is not properly following the statutory criteria for the consideration of parole release of violent felons but is, instead, following gubernatorial directives and automatically denying release in almost all cases. In its decision, the Court noted that under Mr. Pataki, the release rate for A-1 violent felons fell from 28% to 3%.

The Court held that while there is no due process right to parole release, there is a constitutional right to have parole determinations made in accordance with the statute.

Under Executive Law §259-i, the Parole Board is required to take into consideration a number of factors, including the seriousness of the offense, the inmate's institutional adjustment, and academic and other achievements.

The Graziano court held that while the Parole Board has the discretion to give as much weight as it deems appropriate to any of those factors,, it may not refuse to exercise any discretion at all and automatically deny release to violent felons.

"Without suggesting that he has done so, the Court can hold with confidence that the Governor would not be permitted to effect a 'policy' as an end run around the legislature, in order to accomplish the goal of amending the statutory criteria to deny parole to a class of violent offenders," the Court wrote. "Such an end run is precisely what is alleged by the Plaintiffs."

The Court acknowledged that there have been dozens of cases in which individuals denied parole have made allegations similar to those in this case. However, it found the allegation in this case of a "policy or practice to deny parole based solely" on the offense "transcends what all previous Court decisions have addressed, namely, whether a particular parole denial constituted a violation of one or more Constitutional rights." While agreeing that there may be reasons to deny a violent prisoner parole and grant parole to a non-violent convict, the Court wrote, both are entitled to the same statutory consideration. "The violent nature of the offense may obviously be considered, but may not serve to make a denial a foregone conclusion, in contravention of the statutorily-prescribed process of consideration," wrote the Court.

Governor Pataki has long been opposed to parole. In1998, he succeeded in eliminating parole for violent felons by replacing indeterminate sentences with determinate sentences, but he has not persuaded the Legislature to eliminate parole for all felons. Moreover, many inmates convicted of violent felonies prior to 1998 are still serving indeterminate sentences and have been appearing before the Parole Board since then. Critics, such as the Plaintiffs in this case, allege that the Governor has sought to achieve, through a Parole Board he appointed, that which he has been unable to achieve in the Legislature.

Robert Isseks, the attorney for the Plaintiffs in the Graziano case, stated, "Unlike the parole challenges that have come before, this class action enables the Plaintiffs to present proof that the Pataki Parole Board has been systematically using the fact of a murder conviction, without more, to keep prisoners from being considered for release."

The case will now move to discovery.

In a related story, the New York Law Journal recently reported the filing of a case called Frederick v. Pataki. In that case, an inmate was granted parole by one Board and was about to walk out the prison door, after having given away his belongings and his in-prison job, when his release was abruptly rescinded by a new Board. Mr. Frederick alleges that in August 2003, two Parole Commissioners, Vernon C. Manley and Daizzee D. Bouey, voted to release him. Although Mr. Frederick had been convicted of murder, the Commissioners were persuaded he had reformed. He took responsibility for his crime, made considerable accomplishments in prison, compiled a spotless institutional record, and won endorsements from, among others, the Superintendent of Sing Sing, who described him as a "poster child" for the type of offender for whom the parole system is supposed to work.

The two commissioners who voted to release Mr. Frederick, however, were also responsible for the release of Kathy Boudin, a 1960s radical convicted of felony murder and robbery in connection with an incident that left two police officers and a Brinks security guard dead. That decision was publicly denounced by Mr. Pataki.

While Mr. Frederick was preparing for release, another member of the Board, Robert Dennison, met with relatives of one of the victims. After Mr. Dennison asked if they thought Mr. Frederick "should die in jail," a relative agreed that "he should never go free." Mr. Frederick was then subjected to a parole rescission hearing based on "newly discovered evidence." The newly discovered evidence was that the victim's relatives opposed release.

Commissioners Manley and Bouey, who had voted to release Ms. Boudin and Mr. Frederick, were meanwhile suspended and a new Parole Board, with Mr. Dennison sitting on the panel, reconsidered and voted to deny release, according to the complaint.

Mr. Dennison was subsequently promoted to Chairman of the Commission and the chairman who had been presiding when Ms. Boudin was released was replaced. The Governor also recently replaced Commissioners Bouey and Manley.

Officials with the Division of Parole have denied that there is any correlation between Mr. Dennison's promotion and the Frederick or Boudin cases, or that there is any political interference with the Board.

Vivian Shevitz, the attorney representing Mr. Frederick, however, argues that the Parole Board and state court judges who upheld the rescission "were apparently intimidated by the Governor's political agenda." "The policy and practice carried forward by Commissioner Dennison and approved by the New York courts was a sham; it is a violation of due process and equal protection in that it forwards a political agenda…," wrote Ms. Shevitz in her complaint.

For additional parole cases, see page 21 below.

Rockefeller Drug Law Reform: DOCS Amends CASAT Policy; Will Enroll Inmates With Judicial CASAT Orders in Phase I Of Program, But Only When Six to 12 Months From Earliest Release

The Rockefeller Drug Law Reform Act of 2004 amended the Penal Law to allow sentencing courts to order DOCS to enroll drug offenders in the Comprehensive Alcohol and Substance Abuse Treatment ("CASAT") program. DOCS, however, has resisted such orders. It argued that the new statute did not alter its statutory discretion to determine who would be admitted to the program and that it could exercise its discretion to refuse to place an inmate in CASAT, regardless of whether the inmate had a court order.

After losing several court decisions, however, DOCS has now modified its policy. It now concedes that inmates with judicial CASAT must be admitted into *Phase 1* of CASAT. But, it states, such inmates need not be admitted into either Phases 2 or 3 of the program--unless they are eligible for work release. Further, it states, inmates with CASAT orders who are not eligible for work release will not be admitted into Phase 1 until they are from six to 12 months from their earliest possible release date.

DOCS argues that this new policy is legal. The CASAT statute, Penal Law 60.04(6), states that a sentencing court may order DOCS to place a drug offender in CASAT "*in an alcohol and substance abuse correctional annex*," provided the offender will "*satisfy the statutory eligibility criteria for the program*."

CASAT is a three-phase program. Only Phase 1 of CASAT takes place in an "alcohol and substance abuse correctional annex." (Phase 2 consists of six months of either residential treatment in a residential treatment facility or work release in a work release facility. Phase 3 consists of early release to parole supervision.) *See, generally*, 7 N.Y.C.R.R. § 1950.2.

Therefore, DOCS argues, a judicial CASAT order only requires that an inmate be placed in Phase 1 of the program. Phases 2 and 3, DOCS argues, are not covered by the order.

The statutory eligibility criteria for transfer to a correctional annex are contained in Correction Law § § 2(18) and 851. For drug offenders, the criteria are that he be within 30 months of a parole or conditional release date. Thus, a drug offender who is within 30 months of a parole or conditional release date should meet the statutory eligibility criteria for Phase 1 of CASAT.

DOCS argues, however, that the mere fact that a CASAT ordered inmate meets the eligibility requirements for Phase 1 does not mean that he must be placed in CASAT immediately. In fact, DOCS argues, the new statute says nothing about *when* such inmates must be placed in the program. In addition, DOCS notes, inmates who are ineligible for *work release* will not be able to take advantage of Phases 2 or 3 of CASAT, the phases of the program that involve early release. Therefore, DOCS has decided that it will only place such inmates in Phase 1 when they are from 6 to 12 months from their earliest release date.

This is a disappointing result. Many inmates had understood that a judicial CASAT order would entitle them to a prompt CASAT placement and the opportunity to complete all three phases of the program, including work release or residential treatment and early parole.

PLS' analysis of the relevant statutory language, however, suggests that DOCS' new policy, however disappointing, conforms to the letter of the law. PLS does not believe it is susceptible to further legal challenge.

Practice pointer: *Some inmates received CASAT orders as part of their plea bargain. We are aware of some cases in which sentencing courts have permitted inmates to vacate their pleas under such circumstances on the grounds that DOCS will not carry out the terms of the plea bargain. If you received a CASAT order as part of a plea bargain and you do not believe that DOCS is carrying it out as you and your sentencing court understood that it would be carried out, and that it would be to your benefit to re-negotiate your plea bargain, you should contact your public defender or criminal defense attorney.*

See more on the Rockefeller Drug Laws, this issue, p. 23.

Federal Cases

Sentencing: Second Circuit Holds DOCS May Not Add Period of Post-Release Supervision to Sentence Where Sentencing Court Failed to Do So

Earley v. Murray, 451 F.3d 71 (2nd Cir. 2006)

In 1998, the Legislature extended determinate sentencing to all first-time violent felonies and mandated that all determinate sentences be followed by a period of mandatory Post-Release Supervision ("PRS"). *See*, Penal Law § 70.45(1).

In February of 2000, Sean Earley plead guilty to attempted burglary in the second degree, a violent felony, and was sentenced to a determinate term of six years in prison. Neither Earley, his counsel, the prosecutor, nor the judge was aware of the requirement that a term of post-release supervision be included with the determinate sentence, and no such term was mentioned in either the sentencing minutes or the written commitment order. Sometime after Earley arrived in DOCS' custody, DOCS administratively added a five-year term of post-

release supervision to Earley's sentence without informing Earley. Earley became aware of DOCS' actions only in 2002, after hearing rumors from other inmates that DOCS was administratively adding terms of post-release supervision to all determinate sentences.

After exhausting his administrative remedies within DOCS, Earley moved in state court pursuant to § 440.20 of the New York Criminal Procedure Law to be re-sentenced according to the terms imposed by the sentencing judge. He argued that DOCS' modification to his sentence violated his due process rights and that he had received ineffective assistance of counsel.

The state court denied Earley's motion. The Court acknowledged that Earley should have been told about the PRS term, but found that, since a PRS term is mandatory under New York law, Earley's request to eliminate it from his sentence could not be granted.

After his state court appeals were denied, Earley filed a habeas corpus petition in federal court. The Second Circuit Court of Appeals granted his petition.

The Court relied on a 1936 Supreme Court case, Hill v. United States ex rel. Wampler, 298 U.S. 460. In that case, the Court held, "The only sentence known to the law is the sentence or judgment entered upon the records of the court…" The Second Circuit took Wampler to mean that "a sentence may not be increased by an administrator's amendment." In this case, the Court held, "The sentence imposed by the court on Earley was six years in prison. The judgment authorized the state to incarcerate him for six years and no more. Any addition to that sentence not imposed by the judge was unlawful." The Court, therefore, ordered that the period of PRS be excised from Earley's sentence.

***Practice pointers**. This case merits several comments. First, a period of Post-Release Supervision remains a mandatory part of a determinate sentence. The Court here held that what was unlawful was the way in which the PRS term was added to the sentence. The Court pointed out that when DOCS discovered the oversight made by Earley's sentencing judge, "the proper course would have been to inform the state of the problem, not to modify the sentence unilaterally." The state could then have "moved to correct the sentence through a [440 motion], in the Defendant's presence, before a court of competent jurisdiction." The Court's order that the Post-Release Supervision be excised, it pointed out, was "not intended to preclude the state from moving in the New York courts to modify Earley's sentence to include the mandatory PRS term." (Note, however, that under Criminal Procedure Law § 440.40, the state has only one year from the entry of judgment in which to move to correct an erroneous sentence.)*

Second, there is a question concerning whether Earley is enforceable in state court. Although state courts are required to apply the constitutional rulings of the United States Supreme Court, the interpretation of a constitutional question by the lower federal courts is not binding on state courts' interpretation of the same question. See, People v. Kin Kan, 78 N.Y.2d 54, 59-60 (1991). In People v. Catu, 729 N.Y.S.2d 887 (2005), the New York Court of Appeals addressed an issue similar to that addressed by the federal court in Earley. In that case, the defendant was not told that PRS would be a mandatory part of his sentence. Later, he sought to withdraw his plea, on the ground that it was not made knowingly and voluntarily, since he was not aware that PRS would be included as part of the determinate sentence. The Court agreed that the proper remedy was to allow the inmate to withdraw his plea.

DOCS officials have argued that under Catu, they may continue to correct legally erroneous commitment papers to reflect a PRS term, if the sentencing court failed to do so. They argue that an inmate's only remedy in state court is that offered by Catu: withdrawal of the plea.

In one recently-decided case, however, a state court chose to follow Earley, even though it was not required to. In that case, People v. Ryan,---N.Y.S.2d ---, 2006 WL 2085473 (N.Y. Sup Ct., July 28, 2006), a defendant was erroneously sentenced to 2½ years of PRS when the correct sentence was 5 years PRS. DOCS administratively changed the 2½ years to five years. After the inmate had served both his incarceration and more than 2½ years on parole, his parole was revoked. He then filed a 440 motion, seeking enforcement of the 2½-year PRS sentence, and directing the Division of Parole to withdraw its citation for a violation of parole. The sentencing court granted the motion. Citing Earley, the court held: "A Department of Correction clerk is unauthorized to unilaterally amend a sentence imposed by a sentencing judge. Under these circumstances, the defendant is entitled to enforcement of the sentence imposed by the court which included a two and one half year term of PRS."

The Ryan cases suggests that an inmate's options in state court are not limited to merely revoking the plea. He may also seek specific performance of the commitment order even if the commitment is legally wrong. This remains, however, a quickly developing area of law.

(Note that Earley can presumably be enforced against DOCS in a federal court. However, to get into federal court, an inmate would have to file a federal habeas corpus petition, and to file a federal habeas corpus petition, the inmate would first have to exhaust state court remedies [as Mr. Earley did]).

The final comment that should be made about this case is this: Prisoners' Legal Services has received a number of letters from inmates asking whether the reasoning of Earley can be extended to challenge DOCS' practice of administratively ordering that the sentences of predicate felons run consecutively to time owed on a prior sentence under Penal Law 70.25(2-a), where the sentencing court did not specify consecutive sentences. We are skeptical. Earley stands for the proposition that only a court, and not DOCS, may impose a sentence. In the case of offenders serving predicate sentences, however, the finding that they are predicate offenders is made by a court and is incorporated as part of the sentence. The requirement of Penal Law § 70.25(2-a), that such sentences run consecutively to time owed on previous sentences, is more akin to a rule of sentence calculation, properly the realm of DOCS' administrators, than it is part of the sentence itself. (See, also, Adams v. Goord, discussed below, p. 24.)

District Court Dismisses Class Action Challenging Double-Bunking

Jones v. Goord, 435 F.Supp.2nd 221(S.D.N.Y)

In Jones v. Goord, a federal district court judge dismissed the inmates' class action suit which challenged DOCS' program of double-bunking maximum security inmates. The case, one of the oldest cases in the district court's calendar, is better understood with some background.

In the late 1980s and early 1990s, New York, like many states, experienced a dramatic increase in its prison population. New York's maximum security prisons were so crowded that inmates often would languish in local jails for months after before DOCS could receive them. This led to several local jails and counties suing DOCS. In response, DOCS decided to adopt a double-bunking program to open up more bed space. DOCS implemented its double-bunking policy in 1995, affecting 13 maximum security prisons and a total of 796 cells.

Soon after, several inmates from different maximum security prisons sued DOCS, stating that the double-bunking program violated their constitutional rights. The suit took years to litigate because of the exhaustive discovery, the need to certify it as a class action, and because the court stayed the proceedings to await another federal court decision on double-bunking in medium

security prisons. In that case, Bolton v. Goord, 992 F.Supp. 604 (S.D.N.Y. 1998), the federal court decided that the manner in which DOCS double-bunked inmates at Woodburne did not constitute cruel and unusual punishment. The Bolton decision rested in large part on Rhodes v. Chapman, 452 U.S. 337 (1981), in which the Supreme Court held that double-bunking per se does not violate the Eighth Amendment. Together, Bolton and Rhodes established a high bar to a successful challenge to a double-bunking policy: Under those cases, a double-bunking program would have to constitute or cause a "serious deprivation of basic human needs" before it would be found to have violated the Eighth Amendment.

The Plaintiffs in Jones persevered despite the high bar. They completed discovery in 2003, and over the next two years, argued DOCS' motion to dismiss the case before trial.

The Court has now granted DOCS' motion.

The Court's decision is best understood in terms of the Plaintiffs' two main constitutional arguments.

The Plaintiffs first argued that DOCS' double-bunking program constitutes cruel and unusual punishment under the Eighth Amendment because forcing two inmates to live in such a small space causes unsanitary conditions, increases inmates' exposure to second-hand cigarette smoke, and also increases the risk that inmates will be injured or contract diseases such as HIV, hepatitis, and tuberculosis. In addition, the Plaintiffs argued that double-bunking subjects inmates to a substantially increased risk of violence, and that there is a great deal of unreported violence and sexual assault between inmates in double-bunked cells. Finally, the Plaintiffs noted that DOCS' officials often violate their own screening procedures for double-bunking. To support all these assertions, the Plaintiffs relied upon logic, common-sense, and anecdotal evidence from inmates and their experts.

The Court rejected this argument on the ground that the Plaintiffs had provided insufficient factual support. It found that, while double-bunking is not without problems, the Plaintiffs had failed to show that the rate of disease, injury, violence, and sexual assault had increased since the inception of the double-bunking program.

The Plaintiffs' second argument was that the double-bunking program impairs inmates' ability to practice their religion, in violation of the First and Fourteenth Amendments. This is especially true for Muslim inmates, the Plaintiffs argued, because their religious tenets call for a clean and private place to pray. The court did not contest that the double-bunking program may burden inmates' religious practice. However, the court concluded that the First Amendment claims nevertheless failed because double-bunking is "rationally related to the goal of finding sufficient bed space to house all maximum security inmates." The court reasoned that "the need to house each inmate in a cell is indeed a 'legitimate' interest for DOCS, and placing two inmates in a single cell is 'reasonably related' to that interest."

Although the Court dismissed the Plaintiffs' class action claims, it did not dismiss their individual claims against DOCS. The Court found that although the Plaintiffs "failed to produce sufficient evidence to show that [DOCS'] double-celling policy is unconstitutional as a *general matter*…nothing in this Court's opinion forecloses [them] from showing that, with respect to *particular* plaintiffs in *particular* circumstances, double-celling may result in a violation of an inmate's constitutional rights."

It remains to be seen what will happen with the Plaintiffs' individual claims.

Practice pointers:

1. *Most inmates are aware that their freedom to practice the religion of their choice is protected by the First Amendment to the U.S. constitution. Many are unaware, however, that freedom of religion in prison receives even greater protection from a federal statute, the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc-1. Here, the Court only analyzed the inmate Plaintiffs' constitutional claims. It refused to analyze a RLUIPA claim on the grounds that the Plaintiffs*

had failed to plead such a claim in their complaint. To determine whether the Plaintiffs had a constitutional claim, the Court used a "reasonable relationship" test. Under that test, a policy that burdens inmates' exercise of their constitutional rights is nevertheless constitutional if it is "reasonably related" to a "legitimate" penal interest. Under RLUIPA, by contrast, any policy which imposes "a substantial burden" on the free exercise of religion will be found illegal unless DOCS can show that the policy is: (1) in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that interest.

In this case, the Court found that double-bunking was reasonably related to a legitimate penalogical interest and therefore met the test of constitutionality. Would the Plaintiffs have fared better if they had pled a RLUIPA claim?

2. *A practice or policy may be found unconstitutional "per se," i.e., unconstitutional as applied in all circumstances; or it may be found unconstitutional "as applied," i.e. unconstitutional as applied to a particular case, even if it is generally constitutional. Here, the Court found that double-bunking was constitutional "per se," but held the door open to complaints that it was unconstitutional as applied in particular circumstances. Under what kind of circumstances might double bunking be unconstitutional "as applied?" What about a situation in which an inmate is required to double-bunk with another inmate who is known by DOCS staff to be assaultive?*

Disciplinary Cases

Defenses: Inmate Failed to "Prove" Psychiatric Defense

Matter of Williams v. Goord, 817 N.Y.S.2d 428 (3d Dept. 2006)

When a Correction Officer directed the Petitioner, an inmate, to exit his cell for a urinalysis test, the Petitioner allegedly refused, used profane language, and yelled to other inmates that he was being set up. As a result, he was charged in a Misbehavior Report with failing to comply with urinalysis testing procedures, refusing a direct order, interfering with an employee, creating a disturbance, and harassment. After being found guilty, he filed an Article 78 proceeding, arguing that the Hearing Officer had denied him the right to present a psychiatric defense. The Court rejected this claim. "Assuming, without deciding, that Petitioner sufficiently raised this issue at the administrative hearing," the Court wrote, " his failure to prove this defense and/or present any evidence in support of it is fatal to his claim." The Court also rejected the Petitioner's employee assistance claim, noting that although the Petitioner criticized his employee assistant's failure to interview two correction officials, he did not request these officials as witnesses at his hearing, and his assistant interviewed four inmates that the Petitioner wished to have testify and provided him with a large amount of documentary evidence. "In view of this," the Court found, "we find that Petitioner was provided meaningful assistance."

Practice Commentary: *The right to present a psychiatric defense at a prison disciplinary hearing was established through litigation over the past 20 years and is now embodied in DOCS' regulations,at 7 N.Y.C.R.R. 254.6(b). In general, the regulations*

provide that when an inmate's mental state is "at issue" in a disciplinary hearing, the Hearing Officer must take evidence about it, including confidential testimony from an Office of Mental Health ("OMH") clinician. The Hearing Officer must then consider whether the inmate is capable of proceeding with the hearing. If he concludes that the inmate is capable of proceeding with the hearing, and he ultimately finds the inmate guilty of the underlying conduct, he must consider whether the misbehavior should be excused or the penalty mitigated on account of the inmate's mental state.

An inmate's mental state is considered "at issue" under the regulations if:

- *the inmate is classified as level 1 by OMH;*
- *the inmate is charged with engaging in an act of self-harm;*
- *the incident occurred en route to or from or while the inmate was in the Central New York Psychiatric Center ("CNYPC") or an OMH satellite unit or intermediate care program or was at CNYPC within nine months prior to the incident; or*
- *"it appears to the Hearing Officer, based on the inmate's testimony, demeanor, the circumstances of the alleged offense, or any other reason, that the inmate may have been mentally impaired at the time of the incident or may be mentally impaired at the time of the hearing."*

In light of these regulations, the decision in this case seems questionable. If an inmate's mental state is "at issue," which the Court here assumes to be the case, the burden should be on the Hearing Officer to determine whether the inmate is capable of participating in the hearing and whether the penalty should be reduced or eliminated on account of the inmate's disability. The inmate has no burden to "prove" the defense.

Prisoners' Legal Services' motion asking the court to reconsider its decision was, however, denied.

Drug Testing: Circumstances Giving Rise to Drug Test Held Irrelevant

Matter of Mullen v. Superintendent, 815 N.Y.S.2d 778 (3d Dep't 2006)

The Petitioner was asked to submit a urine sample based on an investigation into possible drug use. After the urine sample twice tested positive for the presence of cannabinoids, the Petitioner was charged in a Misbehavior Report with violating the prison disciplinary rule which prohibits the unauthorized use of a controlled substance. Following a disciplinary hearing, the Petitioner was found guilty of the charge and the determination was affirmed on administrative appeal. The Court here rejects the Petitioner's contention that he was denied relevant documentary evidence in the form of a report relating to the investigation prompting the request for urinalysis because that information was irrelevant; the Misbehavior Report and determination of guilt resulted from the two positive drug test results and not from any information obtained from the investigation leading to the request for the Petitioner's urine sample.

***Practice pointer**: Inmates often argue that a disciplinary conviction for drug use or possession was invalid because the search or test that revealed the drugs was based on an improper motive, such as retaliation, or because there was no basis upon which to conclude that a confidential source who suggested the presence of the drugs was reliable. The New York courts have rejected such claims. They have held that the presence of drugs or other contraband in an inmate's possession constitutes an independent violation of the rules. The only relevant question is whether possession of the contraband can be fairly attributed to the inmate in whose possession it was found. The factors that gave rise*

to the search which revealed the contraband are irrelevant.

Drug Testing: Hearing Officer Erred in Refusing to Allow Inmate to Introduce Medical Records; But Error Was Harmless Where Same Defense Has Been Rejected in Prior Case

Matter of Harris v. Selsky 812 N.Y.S.2d 389 (3d Dep't 2006)

The Petitioner was charged in a Misbehavior Report with using a controlled substance after a sample of his urine twice tested positive for cannabinoids. He was found guilty of the charge at the conclusion of a Tier III disciplinary hearing and the determination was affirmed on administrative appeal. He then commenced an Article 78 proceeding. He argued, first, that he was denied adequate employee assistance because the assistant neglected to provide him with some of the documents requested because they were inaccurately referenced by the Petitioner. The Court found, however, that this defect was remedied when the Hearing Officer provided most of the documents the Petitioner had sought and adjourned the hearing to give him an opportunity to review them. The Petitioner next argued that he should have been allowed to submit his medical records in evidence and that the Hearing Officer erred in finding them irrelevant. The Court agreed with the inmate that this was an error because the medical records were relevant to the Petitioner's defense that his use of ibuprofen caused a false positive test result. But the Court also found that the error was harmless because that "ibuprofen defense" had been rejected in past decisions. *See, e.g.,* Matter of Alvarez v. Coombe, 649 N.Y.S.2d 836 (3d Dep't 1996).

Practice pointer: *In Alvarez, the Court noted that "there was evidence in the record that ibuprofen would not have produced a positive result for cannabinoids." The Alvarez Court did not state what the evidence was.*

Disposition: Charges Dismissed Where Hearing Officer Fails To State Evidence Relied Upon

Canzater-Smith v. Selsky, 813 N.Y.S.2d 254 (3d Dep't 2006)

The Petitioner was charged in three separate Misbehavior Reports with violating various prison disciplinary rules arising out of three related incidents. According to the Misbehavior Reports, the Petitioner had asked the Correction Officer standing outside the Sergeant's office to speak to the Sergeant. The Correction Officer refused the Petitioner's request. The Petitioner then refused the Correction Officer's orders to leave the area and began shouting profanities. When the Correction Officer told the Petitioner to place his hands on the wall and stepped toward the Petitioner, the Petitioner struck him in the face with a bag. The Correction Officer then used force to take the Petitioner to the floor, where the Petitioner continued to struggle until he was placed in handcuffs.

The first Misbehavior Report, issued as a result of that incident, charged the Petitioner with violent conduct, assault on staff, refusing a direct order, and interference with an employee. The remaining reports, with similar charges, were issued due to the Petitioner's continued uncooperative behavior while being transported to the infirmary and being admitted to the Special Housing Unit. Following a Tier III disciplinary hearing, the Petitioner was found guilty of all charges and the determination was upheld on administrative appeal. He then filed an Article 78 proceeding.

Seven N.Y.C.R.R. 254.7(a)(5) provides that an inmate in a disciplinary hearing shall be given a written statement of the evidence relied upon by the Hearing Officer in reaching his decision, a rule which codifies a basic due process principle.

Upon reviewing the record in this case, the Court found that the Hearing Officer had failed to

set forth the evidence relied upon in finding the Petitioner guilty of the charges contained in the second and third Misbehavior Reports. It therefore dismissed those charges.

The remaining charges, however, were supported by substantial evidence, including the Misbehavior Report and corroborating testimony at the hearing, including the Petitioner's own testimony.

Hearing Officer Bias: Court Thinks Twice; Inmate Loses Once

Matter of Sime v. Goord, 812 N.Y.S.2d 714 (3d Dep't 2006)
Matter of Sime v. Goord, 817 N.Y.S.2d 733 (3d Dep't 2006)

Petitioner Sime, an inmate, was charged with assaulting an inmate and possessing a weapon after confidential information identified him as having attempted to stab another inmate with a pen. He was found guilty of the charges in a Tier III disciplinary hearing, the charges were affirmed on administrative appeal, and the Petitioner brought an Article 78 proceeding.

In his petition, the Petitioner argued that the determination had to be annulled because the Hearing Officer was improperly appointed to conduct the disciplinary hearing. In a decision dated April 13, 2006, the Appellate Division, Third Department, agreed. The Court noted that the Hearing Officer was specifically named in the unusual incident report as one of the persons who investigated the incident and that, when questioned by the Petitioner about his involvement in the investigation, the Hearing Officer offered nothing but a blanket denial of any involvement at all. The Court held that, "[w]ithout an explanation as to why his name appeared as an investigator, we cannot discern whether the Hearing Officer's involvement in this matter was strictly tangential" and "[i]nasmuch as the documentary evidence gives the appearance that the Hearing Officer was aware of the particulars of the incident leading to the Misbehavior Report prior to the commencement of the hearing, which is in contravention of 7 N.Y.C.R.R. 254.1, the determination [must be] annulled."

DOCS moved to re-argue this decision, however, and, in a decision dated June 23, 2006, the Court reversed its April decision. In the new decision, the Court wrote:

> The unusual incident report does not, as petitioner claims, indicate that the Hearing Officer was involved in the investigation of the incident. Rather, the document states that the Hearing Officer, as a Deputy Superintendent of Security, was notified of the incident which led to the disciplinary charges. Furthermore, at the disciplinary hearing, the Hearing Officer denied being involved in any investigation into petitioner's alleged misconduct. The fact that the Hearing Officer served as the review officer with respect to a recommendation that petitioner be placed in involuntary protective custody due to the assault incident does not constitute an investigation into the incident precluding him from presiding as a hearing officer at the disciplinary proceeding.

Practice pointer: *Seven N.Y.C.R.R. 254.1 provides that the following persons shall not serve as a Hearing Officer:*

- ✓ *"a person who actually witnessed the incident;*
- ✓ *a person who was directly involved in the incident;*
- ✓ *the Review Officer who reviewed the misbehavior report; or*
- ✓ *a person who has investigated the incident."*

As the court's decision in this case reflects, however, persons with more tangential involvement in the case may serve as Hearing Officers.

Substantial Evidence: Court Finds Insufficient Evidence that the Petitioner Was Providing Unauthorized Legal Assistance

Matter of DeLeo v. Selsky, 814 N.Y.S.2d 798 (3d Dep't 2006)

Petitioner DeLeo worked as a prison law library clerk until he was removed due to a disciplinary matter. After he was removed, he was directed to delete all materials from his computer disks that had not been authorized by the Deputy Superintendent of Programs. Later, during a random search of inmate computer disks, a Correction Officer discovered legal documents on disks belonging to the Petitioner. Specifically, there was an August 7, 2004 letter from an inmate named "Alfrodo Nuesi" to the Commissioner of Correctional Services inquiring about the requirements for participating in the Residential Substance Abuse Treatment ("RSAT") program. There was also a September 3, 2002 letter from an unknown inmate to the Governor inquiring about executive clemency. Finally, there was an "Affidavit in Opposition to District Attorney's Motion to Reargue" by an inmate named Ramon Duran. As a result, the Petitioner was charged with refusing a direct order, possessing documents containing the crime and sentence information of another inmate, and providing unauthorized legal assistance. He was found guilty of the charges at a Tier III disciplinary hearing and, after the hearing was affirmed on administrative appeal, he filed an Article 78 proceeding.

The Court found that there was insufficient evidence to find the Petitioner guilty of providing unauthorized legal assistance. The clemency letter and the Duran affidavit, the Court noted, were dated prior to the Petitioner's removal from his job as a law clerk and, thus, did not establish that he was performing unauthorized legal work after this time. The August 2004 letter was evidently drafted after the Petitioner was removed from his law clerk job, but it merely sought clarification on the requirements of the RSAT program. It did not, the Court concluded, "amount to the performance of legal work."

Nor, the Court found, did the record contain sufficient evidence to support the finding that the Petitioner was guilty of possessing documentation containing the crime and sentence information of another inmate. There was no such information in the August 2004 letter. The clemency letter referenced some crime and sentence information but it did not identify the inmate involved. The Duran affidavit also contained crime and sentence information; however, the Petitioner's possession of Duran's crime and sentence information was permissible because Duran was a co-defendant. *See,* Disciplinary Rule 113.27 (7 N.Y.C.R.R 270.2[B][14][xvii]). The Court therefore reversed that charge as well.

The Court affirmed the charge of refusing a direct order, however, as the Misbehavior Report and other documents indicated that the Petitioner failed to delete the unauthorized materials from his computer disks.

Substantial Evidence: Request for Hug Equals Harassment

Matter of Ellis v. Selsky 815 N.Y.S.2d 345 (3d Dep't 2006)

The Petitioner allegedly gave a note to a female teacher stating that he would miss her when she left for the summer and would like to give her a hug. As a result, he was charged in a Misbehavior Report with violating disciplinary rules prohibiting solicitation of a sexual act and harassment. He was found guilty of both charges at a Tier III hearing. On administrative appeal, the charge of sexual solicitation was dismissed and the penalty was reduced, but the Petitioner nevertheless filed an Article 78 proceeding to challenge the remaining charge. In it, he argued that the Misbehavior Report failed to provide adequate notice of the charges. The Court rejected this claim. According to the

Court, the Misbehavior Report specified that the harassment charge arose from the communication of a message of a personal nature as conveyed in a note from the Petitioner and the note was attached to the Misbehavior Report. Therefore, the Court found, the Petitioner was given sufficient notice of the charges against him to enable him to prepare a defense."

Substantial Evidence: Inmate's False Complaint About a Correction Officer Did Not Violate Rule Against Harassment, But It Did Violate Another DOCS Commandment: Thou Shalt Not Lie

Matter of Royster v. Goord, 810 N.Y.S.2d 212 (2d Dep't 2006)

The Petitioner, an inmate, was alleged to have made a single, false complaint to a sergeant that a Correction Officer had assaulted him. As a result, he was charged in a Misbehavior Report with harassment of the officer and with lying, in violation of Disciplinary Rule Numbers 107.11 and 107.20, respectively. After being found guilty of these charges, the Petitioner filed an Article 78 proceeding.

The Court held that a single, non-abusive complaint about a Correction Officer, made to another Correctional Officer, does not constitute "harassment" under Rule 107.11, even if the complaint is later found to be false. Therefore, the Court dismissed the harassment charge.

The Court upheld the Hearing Officer's determination that the Petitioner had lied about the alleged assault, however. Rule 107.20 provides that an inmate "shall not lie or provide an incomplete, misleading and/or false statement or information." Here, the Court noted that at a medical examination conducted approximately four hours after the alleged assault, there was no physical evidence that the Petitioner had been assaulted. In light of the Petitioner's statement at the disciplinary hearing that, after the incident, his eyes were "so bloody [he] could barely make out the pupils," the lack of any physical evidence was sufficient to support the Hearing Officer's determination that the Petitioner lied about the assault.

Witnesses: Informant's Testimony at Hearing Provided Basis For Hearing Officer To Assess Credibility

Matter of Hines v. Goord, 814 N.Y.S.2d 807 (3d Dep't 2006)

After an investigation prompted by accusations from another inmate, Correction Officers alleged that the Petitioner was participating in gang-related activities, including extorting and threatening another inmate. As a result, he was charged in a Misbehavior Report with engaging in unauthorized organizational activities. He was found guilty in a Tier III disciplinary hearing, which was affirmed on appeal. He then filed an Article 78 proceeding, arguing that the hearing was not supported by the evidence because there was no basis in the record upon which to conclude that the inmate who had accused him was either credible or reliable. The Court disagreed. It held that the Misbehavior Report and Internal Memorandum, together with the testimony at the hearing of the Correction Sergeant who authored them both, as well as that of the inmate who accused the Petitioner, provided sufficient evidence to support the determination of guilt. Moreover, since the accusing inmate was not a confidential informant, the Hearing Officer was not required to undertake an independent assessment of his credibility: He could evaluate the inmate's reliability based upon the testimony he gave at the hearing.

Practice pointer: *When a Hearing Officer hears confidential information in a prison disciplinary hearing, he must assess the informant's credibility and reliability, and the record must show that he had sufficient basis upon which to make such an assessment. If the Hearing Officer has not personally spoken with the informant, evidence that he had a sufficient basis upon which to rely on the informant's statement may include the statement's detail and specificity, other evidence in the record*

tending to corroborate the statement, or testimony from Correction Officers stating that the informant has been used, and proven reliable, in the past. Where the Hearing Officer is able to hear the informant's testimony and observe his demeanor personally, however, courts have found that this alone provides a sufficient basis upon which he can assess the informant's credibility and reliability.

Witnesses: Court Holds Inmate Was Not Sufficiently Specific Regarding His Need For Sergeant's Testimony

Matter of Hall v. Goord, 819 N.Y.S.2d 133 (3d Dep't 2006)

The Petitioner received two Misbehavior Reports charging him with possession of a weapon after a pen fitted with a razor blade was found in his attaché case and, later, a razor blade was found in his bed frame. Both counts were heard at a single disciplinary hearing. At the hearing, the Petitioner sought to call a Sergeant to testify that he had told the Sergeant about a prior problem he had had with the two Correction Officers who found the first weapon in his attaché case. The Hearing Officer denied the Petitioner's request on the ground that the testimony would be irrelevant. After the Petitioner was found guilty and he had exhausted his administrative remedies, he challenged the hearing in an Article 78 proceeding. He argued that the Hearing Officer had erred in refusing to call the Sergeant.

The Court was "not persuaded." Although the Petitioner argued in court that he had requested the Sergeant's testimony to show that the Correction Officers involved in the first Misbehavior Report set him up in retaliation for his complaint about them, the Court, in reviewing the record, found that "he did not inform the Hearing Officer that this was the purpose of his request." Rather, the Court found, when asked to explain the Sergeant's relevance, the Petitioner stated only that his testimony "would prove that he had reported an earlier problem with these officers." "This response," the Court held, "failed to sufficiently specify how the Sergeant's testimony would aid a defense to the charges**."**

Practice pointer: *The Court here holds that an inmate must be specific about his reasons for wanting to call a particular witness. But how specific? Here, the Petitioner apparently told the Hearing Officer that he wanted the Sergeant to testify because he had previously complained to him about the same two Correction Officers who later accused him of possessing a weapon. Did he need to actually specify that the Sergeant's testimony would corroborate his allegation that the officers set him up? That seems to us implicit in the statement that he made. We believe that requiring an inmate to be more specific than inmate Hall was in this case is asking too much of inmates without legal training who are required to defend themselves in prison disciplinary hearing. Prisoners' Legal Services is seeking leave to appeal this decision to the Court of Appeals.*

Other Cases

Access to Courts: No Refund of Filing Fee

Matter of Rouff v. Cunningham, 816 N.Y.S.2d 390 (3d Dep't 2006)

The Petitioner, an inmate, brought an Article 78 proceeding challenging a determination finding him guilty of violating a prison disciplinary rule, which had been affirmed on administrative appeal. After he filed his Article 78 proceeding, DOCS agreed to administratively reverse the hearing. The Attorney General then asked that the Article 78 proceeding be dismissed on the grounds that it was moot. The Petitioner objected to this request. He noted that in his petition, he had asked for reimbursement of the $50.00 filing fee paid to commence the proceeding. He argued, therefore, that the proceeding was not moot. The lower court, however, denied the Petitioner's request for reimbursement of his filing fees and the Petitioner appealed.

The Appellate Division held that there was no reason to reverse the lower court's decision to refuse to reimburse the filing fee.

***Practice pointer**: Justice sometimes has a price. Here, the Petitioner found himself obligated to file an Article 78 proceeding to obtain the relief he was entitled to and which DOCS should have granted him without the necessity of litigation. It was, nevertheless, within the discretion of the court to grant or deny his request to have the filing fees returned to him.*

Article 78 Practice: Inmate Misses Four-Month Statute of Limitations to Challenge Parole Hearing

Matter of Purcell v. Dennison 814 N.Y.S.2d 787 (3d Dep't 2006)

The Petitioner was denied parole following an August 2004 hearing and the determination was upheld on administrative appeal. He received notice of the determination on January 13, 2005. Thereafter, he filed a petition and supporting papers in an effort to commence a CPLR Article 78 proceeding challenging the determination. The papers were received by the Columbia County Clerk's office on May 19, 2005. The Court dismissed the petition, since the papers were received by the Clerk's office after the expiration of the four-month statute of limitations, which began to run when the Petitioner acquired notice of the determination.

***Practice pointer**: An Article 78 petition has a four-month statute of limitations. The four months begin to run from the date the notice of the decision you are complaining about is received by you. The petition is considered "filed" on the day that all necessary papers are received by the court clerk. For more information on filing an Article 78 proceeding, including a list and copies of all necessary papers, request a copy of Prisoners' Legal Services memo, "How to File an Article 78 Proceeding."*

Family Law: Unable to Help Plan For Children's Future, Inmate Loses Parental Rights

Matter of Jaylysia, 813 N.Y.S.2d 622 (4th Dep't 2006)

The Respondent, an inmate, resisted the Department of Social Services' petition to have his parental rights terminated on the ground of parental neglect. The Court, however, ruled against him, finding that the Department had met its burden of establishing "by clear and convincing evidence" that it had "fulfilled its statutory duty to exercise diligent efforts to strengthen the parent-child relationship and to reunite the family" without success. Although the Respondent maintained consistent contact with the Department and [the] child[ren], "he failed to plan for the child[ren]'s future in that the resources he proposed…were not realistic alternatives to foster care." Thus, "given the circumstances," the Court held, the Department "provided what services it could" and termination of the incarcerated father's parental rights was appropriate.

Parole: Inmate Denied Parole Despite Favorable Testimony From Victim's Son

Matter of Bottom v. New York State Board of Parole, 815 N.Y.S.2d 789 (3d Dep't 2006)

Petitioner Bottom is serving concurrent prison terms of 25 years to life as a result of his conviction of two counts of murder, arising from the shooting deaths, in 1971, of two police officers. In 2004, he appeared before the Parole Board for the second time. Prior to his appearance, the adult son of one of the police officers appeared at a victim impact meeting and spoke at length in favor of his release. The Board, nevertheless, denied parole. In doing so, the Board cited the *negative* impact of the Petitioner's actions upon the victims' families as one reason to deny him parole, but made no mention of the police officer's son's statement in favor of

parole. Moreover, the Board failed to preserve a transcript of the son's statement.

The Court affirmed the Board's decision, despite these irregularities. "In the instant case," the Court wrote, "although the Board placed significant emphasis on the gravity of Petitioner's offense, his prior record and the probable repercussions of his actions upon the victims' families…it is clear that other applicable statutory factors were brought to Respondent's attention and duly considered." At the Parole Hearing, the Court continued, "there was discussion of Petitioner's significant educational and vocational achievements while incarcerated, as well as his plans for the future. Also considered was an extensive submission by Petitioner's counsel…In sum, inasmuch as the record reveals that Respondent considered the appropriate statutory factors, we decline to disturb its determination and hold that Supreme Court properly dismissed the petition."

With respect to the missing transcript, the Court let the Board go with what amounted to a slap on the wrist. The Court remarked only that, "[w]hile we appreciate that Respondent may weigh the relevant factors set forth in Executive Law § 259-i(2)(c)(A) as it sees fit…and need not discuss each factor in its decisions…where, as here, it is provided with a compelling victim impact statement which advocates for the release of the prospective parolee, explicit reference to such an exceptional submission would facilitate 'intelligent appellate review' of Respondent's required compliance with the dictates of Executive Law § 259-I."

Practice pointer: *The courts obviously remain extremely deferential to decisions of the Parole Board. Here, the Court finds evidence which directly contradicts the Board's findings and chastises the Board for failing to make that evidence part of the record, yet finds insufficient grounds to reverse the hearing.*

Parole Revocation: Eyewitness Testimony Supports Parole Revocation

Kovalsky v. NYS Divsion of Parole,815 N.Y.S.2d 349 (3d Dep't 2006)

The Petitioner, a Risk Level III sex offender, was released from prison to parole supervision in July 2003 after serving approximately 10 years of a controlling 5- to 15-year sentence. In early October 2003, a flyer with the Petitioner's photograph was distributed by the local school district advising parents and students that the Petitioner was residing in the area. At approximately 7:00 A.M. on the mornings of October 14 and 15, 2003, an 11-year-old girl was followed, spoken to, and chased by a man while she was walking to school. She reported both incidents on October 15, and identified the Petitioner as the perpetrator of these acts, initially by reference to the flyer, which had been posted on the refrigerator at her home several days earlier. Following a Preliminary Hearing and a final Parole Revocation Hearing, during which the girl and police officers who had interviewed her testified, an Administrative Law Judge sustained the charges that the Petitioner had violated certain conditions of his parole, revoked his parole, and recommended a time assessment of 36 months. The decision of the Administrative Law Judge was administratively affirmed. The Petitioner appealed.

"A determination to revoke parole will be confirmed if…there is evidence which, if credited, would support such determination." *See*, Matter of Layne v. New York State Bd. of Parole, 684 N.Y.S.2d 4 (3d Dep't 1998), *lv. dismissed* 93 N.Y.2nd 886 (1999).

The Petitioner argued that the girl could not have identified him because: she never got a close view of the perpetrator; she identified him only as

a result of the suggestive use of a photograph; he did not possess the clothes she described him as wearing; and he had a reliable alibi. The Court found, however, that these factual issues were fully explored at the final revocation hearing and, in any event, the record revealed that the young girl identified the Petitioner clearly and with certainty as the man who chased her on both mornings. "As it is within the province of the Board to resolve issues of credibility...and to determine the relative weight to be assigned to the evidence," the Court held, "we find that the Board's determination is supported by substantial evidence and, thus, it will not be disturbed."

Rockefeller Drug Law Reform: A-II Drug Offender May Qualify for Re-Sentencing, Despite "Serious" Disciplinary History

People v. Schulze 816 N.Y.S.2d 699 (N.Y.Co.Ct., March 16, 2006)

The recent reform of the Rockefeller Drug laws allowed certain inmates convicted of A-I and A-II drug offenses to petition their sentencing courts for lesser sentences. A-II drug offenders, however, unlike A-I offenders, must meet certain additional eligibility criteria in order to be eligible for re-sentencing. They must be more than 12 months from being an "eligible inmate" as that term is defined in Correction Law § 851(2), and they must be eligible to earn merit time under Correction Law § 803(1)(d).

These criteria have been the subject of both confusion and litigation. The confusion over the first eligibility criteria has raised the question: When is an inmate "more than 12 months" from being an "eligible inmate" under Correction Law § 851(2)? Is it when he is "more than 12 months" from a parole eligibility date (as some courts have held) or when he is "more than 12 months" from being within two years of a parole eligibility date (*i.e.*, more than three years from a parole eligibility date, as other courts have held)?

That question has recently been taken up by the Court of Appeals in the case of People v. Bautista, which will be argued this Fall.

The question in People v. Shulze concerned the second eligibility criteria: When is an inmate eligible to earn merit time under Correction Law § 803(1)(d)?

Shulze was sentenced to 10 years to life for an A-II drug offense in 2000. After passage of the Rockefeller Drug Law Reform Act, he petitioned his sentencing court to be re-sentenced to a lesser sentence. At the time he filed his petition, he was more "more than 12 months" from being within two years of his first parole eligibility date, so there was no question that he met the first eligibility criteria for re-sentencing.

The District Attorney, however, argued that he did not meet the second eligibility criteria, *i.e.*, being eligible to earn merit time, because he had been found guilty of "serious" disciplinary infractions while incarcerated.

Correction Law § 803(1)(d) states that inmates serving an indeterminate sentence (excluding violent felons and several other felony categories) may earn merit time off their minimum terms if they successfully participate in and complete a work and treatment program, and obtain: (1) a general equivalency diploma; (2) an alcohol and substance abuse treatment certificate; (3) a vocational trade certificate; or (4) perform at least 400 hours of service as a part of a community work crew. The statute goes on to say, however, that a merit time allowance "shall be withheld for any serious disciplinary infraction." DOCS' regulations, meanwhile, define a "serious" disciplinary infraction as one which results in "disciplinary sanctions which total 60 or more days of keeplock time." *See*, 7 N.Y.C.R.R. § 208.2(b)(3).

Inmate Shulze had been convicted of one Tier II disciplinary infraction and one Tier III infraction, for which he had received a cumulative total of 90 days SHU time, *i.e.*, a "serious disciplinary infraction" under DOCS' regulations.

At issue was whether he was still eligible to be re-sentenced.

The Court held that he was.

The Court reasoned that although the statute provides that merit time shall be withheld from any inmate who has been found guilty of a "serious" disciplinary offense, that language does not mean that not having a serious disciplinary history is an "eligibility requirement" for merit time. Rather, it describes conditions under which an inmate who is *already eligible* for merit time shall have his merit time withheld. The *eligibility requirements* for merit time are those stated earlier in the statute (*i.e.*, that the inmate be serving an indeterminate sentence, not be convicted of one of the crimes for which merit time is not available, and have met the program requirements described above). Since Shulze met those eligibility requirements, the Court held, he was eligible for re-sentencing, notwithstanding the fact that he had been found guilty of a "serious" disciplinary violation and would, in all likelihood, have his merit time withheld.

***Practice pointer**: A different court reached the same result in People v. Quinones, 812 N.Y.S.2d 259 (Supreme Court, New York County, December 16, 2005). Thus, although there are as yet no appellate level decisions on this issue, the growing consensus of courts appears to be that an A-II drug offender who meets the other eligibility requirements for re-sentencing will not be disqualified from being re-sentenced because of his or her disciplinary record. (Note, however, that being eligible for re-sentencing is not the same as being granted re-sentencing and a sentencing court may consider your disciplinary record in deciding whether to grant a re-sentencing petition.)*

Sentence Computation: Undischarged Portion of Predicate Sentence Must Run Consecutive to New Sentence

Matter of Adams v. Goord, 817 N.Y.S.2d 159 (3d Dep't 2006)

The Petitioner was convicted of multiple crimes and sentenced in 1981 to an aggregate prison term of 4 to 8 years. Following his release to parole supervision, he was convicted of another crime and sentenced in 1985 as a second felony offender to 1½ to 3 years in prison. He was then again paroled and, upon his convictions for numerous additional crimes, sentenced in 1989 as a second violent felony offender to an aggregate prison term of 20 to 40 years. In 2005, he commenced an Article 78 proceeding, asserting that his 1985 and 1989 sentences should be construed as running concurrently with the remaining years on the pre-existing unexpired sentences, rather than consecutively thereto, since the commitment orders were silent in that regard. The Court rejected that argument, holding, "[b]ecause Petitioner was sentenced as a second felony offender and a second violent felony offender in 1985 and 1989, respectively, it is mandatory that such sentences run consecutively to his prior undischarged sentences, notwithstanding the fact that the sentencing courts did not expressly indicate same in the commitment orders."

***Practice pointer**: Penal Law § 70.25(1)(a) provides that when multiple sentences of imprisonment are imposed on a person at the same time, or when a person who is subject to an undischarged term of imprisonment is sentenced to an additional term of imprisonment, the sentences should run concurrently if the court fails to specify otherwise. Penal Law 70.25(2-a), provides an exception to that rule. It states that if the offender is a predicate offender, as defined in Penal Law § § 70.04, 70.06, 70.08 or 70.10, the sentence must run consecutively to any time owed on a prior sentence. (A predicate felon is any person convicted as a second felony offender, second violent felony offender, predicate felony offender, or predicate violent felony offender.)*

There has been a great deal of pro se litigation over these statutes. Inmates who have been convicted as predicate felons often argue that, because their commitment papers do not specify how their sentences should run with respect to time owed on a prior sentence or sentences, they should run concurrently, and that DOCS lacks authority to run them consecutively. As this case illustrates, however,

state courts have consistently rejected this argument. In the courts' view, the finding that the offender is a predicate felon is part of the sentence and satisfies the judicial function. The requirement that such sentences run consecutively to time owed on prior sentences is mandatory, and may be imposed administratively by DOCS. In addition to this case, See, e.g., Matter of Williams v. Goord, 25 A.D.3d 838, (3d Dep't 2006); Matter of Soriano v. New York State Dep't of Correctional Servs., 21 A.D.3d 1233 (3d Dep't 2005); Matter of Santiago v. Van Zandt, 236 A.D.2d 728 (3d Dep't 1997), appeal dismissed, 89 N.Y.2d 1085 (1997).

Son of Sam Law: Crime Victim Can Garnish Inmate's Military Benefits

New York State Crime Victims Board v. Wendell
815 N.Y.S.2d 438 (N.Y.Co., May 8, 2006)

Under the "Son of Sam" law, a crime victim may bring suit for money damages against the perpetrator of the crime at any time within three years of the discovery of any "funds of a convicted person." "Funds of a convicted person" are defined as "all funds and property received from any source by a person convicted of a specified crime," *excluding* "child support" and "earned income." "Earned income" is defined as income derived from one's own labor, "as distinguished from income from, for example, dividends or investment." *See*, generally, Executive Law § 632-a.

In this case, a crime victim, identified in court only as K.A.S., sought to have funds in inmate Wendell's prison account turned over to her to satisfy a $5,000,000.00 civil judgment she had previously obtained against him under the Son of Sam law. The funds consisted of money received by Wendell as retirement pay from the United States Military. At issue was whether those funds were exempt from being paid to (or "garnished by") the crime victim under provisions of state law, which protect "the pay of a non-commissioned officer…in the armed forces of the United States…from application to the satisfaction of any money judgment. *See*, C.P.L.R. § 5205(e).

The Court found that they were not. The legislative history of the Son of Sam, according to the Court, showed that the Legislature intended the Son of Sam law to enable "crime victims to…recover money and property received by or on behalf of a convicted person from virtually any source." The "earned income" exemption, the Court wrote, was only intended to relieve employers of paroled or probationary convicted persons from notifying the crime victim or the Crime Victim's Board every time they made a payment to a convicted person. But, the Court, noted, "employment income earned by a convicted person, as well as all other forms of earned and unearned income, are always recoverable by a crime victim once the crime victim commences a cause of action pursuant to Executive Law § 632-a." The Court also quoted from the Legislative memo in support of the Son of Sam law:

> Criminals should be held accountable to their victims financially, regardless of their source of wealth. Debts that criminals have with crime victims should not disappear because of passage of time or the notion that they will never be able to pay. Simply put, if a criminal gains the ability to pay while he or she is a ward of the local, State or federal criminal justice system (or acquires a financial or proprietary interest while a ward of the system), then the victim who was injured by the criminal should no longer shoulder expenses that directly relate to the crime. The bill embraces these fundamental principles, and instills responsibility and fairness in the way crime victims are compensated.

It is apparent from the legislative history, the Court concluded, "that the Legislature intended that

a crime victim be compensated from any 'source of wealth' of the criminal." The Court, therefore, found that general exemption of military pay from civil judgments contained in C.P.L.R. § 5205(e), enacted in 1962, "must yield to the specific provisions of [the Son of Sam law] enacted in 2001."

Son of Sam Law: Inmate Ordered to Pay $41 Million Compensation

The Son of Sam law, Executive Law § 632-a(2), provides that whenever an inmate receives income of $10,000.00 or more, the payment must be reported to the State Crime Victim's Board and to any victims of the inmate's crime. The statute also extends the normal statute of limitations of most civil suits to allow a crime victim to sue the perpetrator of the crime at any time within three years of learning that the perpetrator has received an income of $10,000.00 or more.

Anthony LaBorde, now known as Abdul Majid, was convicted more than 25 years ago of killing a police officer, John Scarangella, and wounding his partner, Richard Rainey. In 1999, Majid filed a lawsuit against several Correction Officers whom he accused of using excessive force against him. The lawsuit was settled for $15,000.00. Under the terms of the Son of Sam law, the settlement was reported to Rainey. Rainey then brought suit against Majid for the injuries he suffered more than 25 years ago.

In May of this year, a jury awarded Rainey $42.1 million. As a result, Majid will forfeit the $15,000.00 he won in the lawsuit against the Correction Officers and, moreover, his inmate account will be garnished whenever it exceeds $50.00. The excess will go to Rainey.

Practice pointer: *Perhaps it goes without saying, but this case presents a vivid example of the Son of Sam law in action.*

Pro Se Practice

Litigation Prompts DOCS to Amend Hepatitis C Treatment Criteria

It is estimated that some 14 % of New York State inmates have Hepatitis C.

Hepatitis C is a liver disease caused by the Hepatitis C virus (HCV). HCV infection occurs when blood, or to a lesser extent, other body fluids such as semen or vaginal fluid, from an infected person enters the body of an uninfected person. Injection drug use is the major cause of HCV infection. In about 15% of cases, infection is characterized by an initial "acute" infection with strong, flu-like symptoms, but no long-term or "chronic" infection. In about 85% of cases, however, the infection is chronic and the virus stays in the body long after the acute phase has passed. Most people with a chronic infection do not have symptoms for many years. Over time, however, chronic Hepatitis C infection can lead to liver cancer, liver failure, or cirrhosis. Estimates are that about 20% of people with chronic infections may develop one of these diseases at some point in their lives.

Some individuals with chronic Hepatitis C may benefit from antiviral therapy. Anti-viral therapy can eliminate HCV from the body and prevent the virus from damaging the liver. The most common course of treatment is a combination therapy of pegylated interferon and ribavirin taken for up to a year. Unfortunately, the therapy has numerous, sometimes severe, side effects. These include flu-like symptoms similar to heroin withdrawal, severe depression, irritability, fatigue, and personality changes. Because of both the side effects and the length of treatment, antiviral therapy can be very difficult to tolerate. Moreover, treatment is only effective in about half of the people treated. Furthermore, because the body

can develop immunities to the antiviral drugs, starting the course of treatment without completing it can make the infection more difficult to treat in the future.

Consequently, DOCS has imposed stringent criteria on who can receive anti-viral treatment. Prior to October 2005, the DOCS' criteria required that to receive antiviral therapy, an inmate with Hepatitis C must:

1. Not have chronic Hepatitis B;

2. Not have an elevated ALT (an enzyme that, when elevated, may indicate liver problems);

3. Have adequate liver function and not have cirrhosis;

4. Not have an uncontrolled thyroid disease;

5. Not have autoimmune disease or a history of a solid organ transplant;

6. Not have a history of major depression or other major psychiatric illness;

7. Not have had active substance abuse during the past 6 months;

8. Have successfully completed or be enrolled in RSAT/ASAT if s/he had a substance abuse history;

9. Be age 18-59 years old;

10. Have had at least 15 months left to serve in prison from the time of the referral for treatment; and

11. Be a highly motivated patient who could deal with potential side effects.

DOCS had a specific justification for each of the above criteria. The absence of Hepatitis B, for example, is critical because antiviral therapy will be ineffective in a patient with both Hepatitis B and C. In fact, antiviral therapy in such a patient is likely to accelerate liver damage.

Elevated levels of the ALT enzyme identify patients whose liver may already be damaged. For patients who have already developed cirrhosis or have severe liver damage, antiviral therapy will not be beneficial, and treatment may instead increase liver damage. On the other hand, patients with normal ALT levels (*i.e.*, very little liver damage) should also not be treated because antiviral therapy may trigger liver abnormalities.

Autoimmune diseases, solid organ transplantation, and uncontrolled thyroid disease are also considered contraindications to antiviral therapy. (A contraindication is a factor that has been identified as making a particular course of treatment dangerous or inadvisable.) For each of these diseases, there is a high likelihood of serious, life threatening complications with antiviral therapy. Thus, a patient with Hepatitis C, who also has one of the above, cannot receive treatment.

The severe side effects associated with antiviral therapy explain DOCS' treatment criteria concerning mental health. People with a history of severe mental illness are more likely to experience the side effects of antiviral therapy. Personality changes, severe depression, and even acute psychosis are likely to develop. As a result, doctors recommend that people with uncontrolled psychiatric illness not receive antiviral therapy. (Note, however, that mental illness should not prohibit antiviral therapy in every case. Patients with a history of mental illness but in whom the condition is well controlled should not be barred from treatment.)

The DOCS' criteria relating to substance abuse had at least two justifications. First, the benefits of antiviral treatment would be virtually eliminated if a

person becomes reinfected. Since injection drug use is the most common way to contract Hepatitis C, it is possible for a patient who continues to use intravenous drugs to become reinfected after completing antiviral therapy. Another justification is to ensure completion of the entire course of treatment. DOCS is concerned that inmates with a history of substance abuse may be less able to tolerate the side effects and, thus, less likely to complete treatment. In addition, the needles used for interferon, plus the side effect of depression, may cause a relapse into injection drug use. No data exist, however, to suggest that long-term substance abuse affects the risk or benefit of treatment.

The justification for requiring an inmate to have at least 15 months left on his/her sentence is unclear. Most likely, DOCS implemented this criteria because the success of antiviral treatment decreases in patients who receive less than 80% of the full course of therapy. Antiviral therapy takes up to one year to complete. Thus, inmates who expect to be released in the middle of treatment may jeopardize the treatment's success if they cannot continue therapy upon release.

DOCS requires that an inmate be between the ages of 18 to 59 because, outside this range, there is an increased risk for serious complications while taking pegylated interferon and ribavirin. Possible complications may include dangerous heart problems such as arrhythmia, cardiomyopathy, angina, or heart attack.

Finally, the DOCS' criteria of a highly motivated patient is also a result of the side effects of antiviral therapy. Treatment which is discontinued or not followed correctly is more likely to be unsuccessful. Thus, given the severity of the side effects of antiviral treatment and the lengthy course of treatment, a willing patient is crucial.

The most controversial aspect of DOCS' treatment criteria was the requirement that potential patients either have completed or be enrolled in ASAT/RSAT prior to receiving treatment. This requirement was applied to anyone with a history of drug or alcohol abuse, no matter how remote. Given the waiting lists for ASAT/RSAT, the requirement resulted in disqualifying many inmates who were otherwise eligible for treatment from receiving it. Prison health advocates charged this was no accident: Treating Hep-C is expensive. The multi-drug regimen can cost as much as $35,000 per patient.

That ASAT/RSAT requirement was dealt severe blows by both federal and state courts, however. In the federal cases, inmates who had been denied Hep-C treatment solely because they had not enrolled in ASAT/RSAT programs were deemed to have stated a claim that the requirement violated their Eighth Amendment rights. *See,* McKenna v. Wright 386 F.3d 432 (2nd Cir. 2004); Johnson v. Wright 412 F.3d 398 (2nd Cir. 2005). Likewise, a state court held that where there is no evidence that an inmate is currently engaged in substance abuse or likely to relapse, the denial of Hep-C treatment for failure to enroll in ASAT results in "a deliberate denial of medical attention to his serious medical needs, in violation of the Eighth Amendment." Domenech v. Goord, 766 N.Y.S.2d 287 (Sup. Ct., N.Y. Co., 2003), *aff'd* 797 N.Y.S.2d 313 (2d Dept. 2005).

In response to these cases, in October of last year, DOCS eliminated the ASAT/RSAT requirement from their treatment guidelines. The amended guideline now require an absence of evidence of *active* substance abuse during the past six months, but no longer requires enrollment in or completion of ASAT/RSAT. Where an inmate has a substance abuse incident within this time frame but would otherwise qualify for treatment, DOCS will evaluate on a case-by-case basis whether treatment is appropriate. The guideline also states that those with a history of substance abuse are "strongly encouraged to complete an ASAT/RSAT, since dealing with alcohol or substance abuse issues is an essential part of their Hepatitis C/liver treatment and protection program."

At the same time, DOCS eliminated another controversial treatment criterion: that which required that, in order to begin Hep-C treatment, an inmate not be eligible for release within 15 months. DOCS amended the guideline in 2005 as a result of its participation in an AIDS Treatment Center "Continuity Program." Now, inmates who are eligible for release in the near future may begin Hep-C treatment and, upon release, participate in a "Continuity Program" to proceed with treatment.

Meanwhile, DOCS is battling yet another case challenging its treatment guidelines, called Hilton v. Wright. In that case, filed before the October 2005 change in the treatment guidelines, inmates who were refused treatment on the grounds that they had not yet completed ASAT/RSAT recently sought to be certified for a class action. After DOCS made its policy change, it moved to dismiss the case. In a recent decision, however, the Federal District Court for the Northern District of New York denied DOCS' motion, pointing out that DOCS had changed its criteria only under pressure from litigation. Since DOCS' "motivation for the change [was] questionable at best," the Court held, there is no guarantee that the ASAT/RSAT requiremet will not be reinstated. Moreover, the Court continued, the revised guideline's description of participation in ASAT/RSAT as "essential" suggests that the program may become mandatory again in the future. Consequently, DOCS' motion was denied.

From Susan Johnson, Executive Director
Prisoners' Legal Services

Greetings.

Sixty-seven percent of persons released from prison are re-arrested on some charge within three years, according to a 2002 Department of Justice study. Assisting inmates to successfully re-enter society is, therefore, critical to reducing both the prison population and crime. Unfortunately, an extensive new report from a special committee of the New York State Bar Association ("NYSBA") has shown that a variety of "collateral" consequences of a criminal conviction--consequences rarely spelled out in a criminal sentence--can have a profound and often negative effect on ex-offenders' ability to re-enter society. The report concludes that the "legal disabilities and social exclusions resulting from [a criminal conviction]...erect formidable societal barriers for...those returning to their communities after incarceration, and their families. Those consequences are far-reaching, often unforeseen, and sometimes counterproductive."

The report provides a detailed examination of those collateral consequences on such things as employment, education, housing, public benefits, voting rights, and immigration status.

For example, the report notes that up to 60% of people formerly incarcerated remain unemployed one year after release, and 83% of those who violate parole are unemployed at the time of the violation. "Without employment, these individuals cannot meet their own or their families' basic needs [and] many revert to their former criminal behavior." Yet, the report states, society erects significant barriers between ex-offenders and employment, starting with the most basic question on a job application: "Have you ever been convicted of a crime?" Although an employer may not generally refuse to hire an applicant based on the prior conviction, if an individual who has been convicted of a crime lies to avoid the social stigma associated with a conviction, his or her employment may be legally terminated for lying on an employment application.

The report also finds a critical connection between education and recidivism rates. It acknowledges that DOCS has set, as a goal, that every person released from incarceration have a high school diploma or its equivalency and the necessary skills to obtain a job. Yet the report finds that limited resources, poorly designed and executed prison programs, frequent transfers of inmates from one facility to another, and greater

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…article continued from page 30

interest in short-term substance abuse and anger management treatment programs have sharply limited the effectiveness of in-prison education programs.

The report also notes other legal disabilities that hamper successful re-entry, including the wide range of financial penalties imposed on persons with criminal convictions--a "vast array of fines, fees, costs, penalties, surcharges, forfeitures, assessments, and restitutions" provided for in dozens of different laws--as well as the costs incurred by inmates and their families as a result of a criminal conviction, such as required program participation fees, access to court and filing fees, collect phone calls, and travel to prisons. In addition, a myriad of legal restrictions are placed on the public assistance available to persons with criminal convictions. Taken together, these fees and costs can create a crushing financial burden for inmates trying to get back on their feet and for the families trying to assist them.

The report also offers detailed discussions of the consequences of a criminal conviction for persons trying to obtain housing, maintain stable family ties, vote, and serve on juries, as well as the sometimes dire immigration consequences of criminal convictions on foreign-born inmates and their families.

It urges various reforms, including requiring judges to inform criminal defendants of all potential civil consequences of a criminal conviction and incorporating those consequences into the sentence; barring discrimination by post-secondary educational institutions; suspending, rather than terminating, the Medicaid benefits of people entering jail or prison; consolidating all financial penalties into one fee; shielding people with criminal records from housing discrimination; encouraging contact between parents and children during periods of incarceration; permitting parolees to vote; and repealing the ban on voting for those released from prison.

The report's detailed study of the collateral consequences of a criminal conviction points the way to additional reform. We urge the State Bar to endorse its proposals.

Copies of the full report, "Re-Entry and Reintegration: The Road to Public Safety," can be obtained, free of charge, by writing to the New York State Bar Association, 1 Elk St., Albany, NY 12207, att'n Frank Sirvo, Liaison to the Special Committee on Collateral Consequences.

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