Pro Se

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"Boot the SHU" Bill Gains Momentum, Despite Governor's Veto

A coalition of inmates, former inmates, family members of inmates, mental health advocates, and civil rights supporters vowed to pass the "Boot the SHU" law, notwithstanding Governor Pataki's recent veto of the bill passed this summer by both houses of the State Legislature.

The law would ban the practice of placing seriously mentally-ill inmates that have violated prison disciplinary rules in the Special Housing Unit ("SHU") and keeplock and redirect them instead to secure residential treatment facilities operated jointly by the Department of Correctional Services ("DOCS") and the Office of Mental Health ("OMH").

The coalition believes that the law, which has received broad public support, can be passed again in the next legislative session when the new Governor, Eliot Spitzer, takes office.

Governor Pataki's veto came in the face of continued public outcry against housing inmates with serious mental illness in isolated confinement.

It has been estimated that there are some 7,000-8,000 inmates in New York State who suffer from a serious mental illness. A recent Department of Justice study found that as many as 56% of state prison inmates suffer from some form of mental illness.

Many such inmates with mental illnesses are unable to adjust to the stringent rules and regulations of the general prison environment. They often receive misbehavior reports and penalties for conduct that is a symptom of their mental illnesses.

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Once in SHU or keeplock, inmates are locked down 23 hours per day, with one hour out of the cell for daily recreation. In some solitary confinement cells a shower and a small recreation area are attached directly to the cell, meaning inmates never actually leave their cells during the day. Inmates generally cannot access educational or work programs, and eat meals alone in their cells.

In such isolated environments, inmates often experience a decline in their mental health. Inmates who suffer from mental illness prior to being placed in isolation can experience a sharp decrease in their ability to function and an increase in the severity of their symptoms. For many, this means complete dysfunction. As their illnesses--which include schizophrenia, bipolar disorder, and severe depression--spiral out of control, they accrue additional disciplinary infractions, resulting in additional SHU penalties and loss of good time. A vicious cycle begins, in which misbehavior born of mental illness leads to SHU time, which in turn leads to increased symptoms associated with mental illness, and even more SHU time.

In New York State there is no time limit on how long an inmate may be housed in SHU. There is also no maximum amount of SHU time that can be issued for an infraction of a prison disciplinary rule. The rate of suicide in isolated confinement settings is three times that of the general prison population. The great majority of those who survive end up released from isolation directly to their communities, with no transitional services prior to release.

For three consecutive years, the Democratic-controlled State Assembly passed legislation preventing the housing of inmates with serious mental illness in isolation for disciplinary purposes. This year, for the first time, the Republican-controlled State Senate passed identical legislation, sending the bill to the Governor for his review.

The bill the legislature passed would create residential mental health treatment programs jointly operated by the New York State Office of Mental Health and the Department of Corrections to house inmates with serious mental illnesses and recurrent disciplinary problems. The housing programs would provide clinically-appropriate mental health treatment while maintaining appropriate safety and security. It also required: screening and ongoing assessment of inmates for mental illness; annual training provided for correction officers, including training on the types and symptoms of mental illnesses, the goals of mental health treatment, and effective and safe management of inmates with mental illness; and also significant amounts of additional training regarding mental health to the correction officers assigned to work in the new treatment facilities.

The bill also created a mechanism for outside oversight of the mental health treatment provided in the prisons, to be performed by the New York State Commission on Quality of Care and Advocacy for Persons with Disabilities. The State Commission is to work with a committee that includes representatives of professional associations of psychiatrists, psychologists and social workers, mental health advocacy groups, the New York State Commission on Corrections, and the Correctional Association of New York.

The bill included a provision that inmates with a substantial risk of suicide or a history of psychiatrically deteriorating in isolated confinement would be considered for transfer to a residential mental health treatment program.

Newspaper editorials throughout New York State supported the legislation and called upon the Governor to sign the bill. (See sidebar, pages 4 and 5.) These editorials came not only from large urban centers of New York City,

Albany, Rochester and Syracuse but also from communities where a substantial percentage of the workforce is employed by the New York State prison system, including Elmira, Plattsburgh, Auburn, and Poughkeepsie. Even the union that represents the New York State correction officers supported the bill.

In his veto message, the Governor noted the prison system's need to impose disciplinary segregation "to protect inmates and staff from those that are unwilling to adhere to even the most minimum levels of civilized behavior…."

Bill supporters charge that the Governor's statement reflects a lack of understanding of the behaviors associated with mental illness and the harmful effects of isolated confinement.

The wide support the "Boot the SHU" bill has received is one step toward creating humane treatment settings for inmates with mental illness while also assuring prison safety. This support will be vital as public momentum for this measure grows, notwithstanding Governor Pataki's veto.

News and Briefs

Court of Appeals Rejects Pataki Effort to Civilly Commit Sex Offenders but Leaves Door Open to Future Efforts

On November 21, 2006, the New York Court of Appeals rejected Governor Pataki's efforts to civilly commit sex-offenders, holding, in Harkavy v. Consilvio, 2006 WL 3359081 (November 21, 2006), that the State cannot use Mental Hygiene Law procedures instead of Corrections Law procedures to involuntarily commit inmates to a mental hospital beyond their release dates.

This decision is a *limited* victory for inmates convicted of a sexual offense who fear that they will be involuntarily committed to a mental facility rather than released to the community. Below, we explain the decision's background, what it means, and what the future holds.

Background: Efforts to Involuntarily Commit So-Called "Sexual Predators"

Over the years, New York state legislators have introduced bills in both houses of the legislature calling for the involuntary commitment of so-called "sexual predators." The proposed laws differ in details, but all provide that inmates convicted of a felony sex offense (or a sexually motivated homicide or kidnapping), may be involuntarily committed to a mental facility if found to suffer from a mental abnormality which makes it likely that they will commit another sexual offense in the future.

Governor Pataki has long been among the most vocal supporters of such legislation. By September 2005, he had grown frustrated that the Legislature had not yet passed his proposed bill, and he decided to take matters into his own hands. He ordered the OMH and DOCS to ensure that, prior to their release, every inmate convicted of a felony sex offense be evaluated for involuntary commitment. As of November 2006, OMH and DOCS had screened over 787 inmates. One hundred and twelve of them have been involuntarily committed to mental health facilities rather than released to the community.

In doing so, Pataki publicly stated that he was "pushing the envelope" of the law. He argued that he could proceed pursuant to procedures provided by the Mental Hygiene Law. Those procedures required only that the inmate be evaluated by two OMH physicians, who would decide if the inmate suffered from a mental illness that would make it likely that the inmate would commit another sexual offense if

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Remembering Attica:
A veto by Gov. Pataki shows N.Y. may have too easily forgotten

Rochester Democrat & Chronicle Editorial September 8, 2006

In this season of seemingly unrelenting anniversaries of major tragic events, the 35th anniversary of the Attica prison riot may have slipped the minds of many. However fatigued people may be of looking back at horror, the worst prison riot in American history must not be forgotten. The *Attica* uprising and massacre, which claimed the lives of 43 people, including 10 hostages, and resulted in 90 others being wounded, should serve as a reminder to stay vigilant about prison conditions. It was prisoner abuse and mistreatment and/or the perception of both that led to the Sept. 9, 1971, rioting.

Sadly, Gov. Pataki recently vetoed legislation that took a major step toward allaying concerns about prisoner mistreatment, He said no to a reasonable proposal adopted by the Legislature that would have banned placing mentally ill inmates in solitary confinement. Never mind that an estimated 7,500 inmates suffer mental illness and that there are only 700 beds set aside for them.

Because Pataki's veto was one of 70 he issued around the same time this summer, this page can only hope that he took enough time to seriously consider the impact of his action. Does he really believe that it's OK to keep mentally ill inmates in solitary confinement for 23 hours a day as a study by the Correctional Association of New York found? The association also found that a third of those inmates reported self- mutilation and more than 40 percent reported attempted suicide.

Even states with reputations for being tough on crime such as Texas and Florida already have laws banning solitary confinement for mentally ill prisoners. It shouldn't have to take another prison riot and the loss of *lives* before New York acts responsibly. Now it's left to the state's next governor, to be elected in November, to make sure that New York doesn't repeat the mistakes of the past.

Pataki's No-Care Package:
Govs Move Will Keep Mentally Ill Inmates In Solitary And Is Sure To End More Lives

by Errol Louis, New York Daily News. August 18. 2006

It looks like Gov. Pataki won't be running for President as a compassionate conservative. A few days after hobnobbing with potential voters at the Iowa State Fair - a well-known early stop for White House hopefuls - Pataki flew back home and this week and vetoed a bill, overwhelmingly approved by the New York State Legislature, that would ban state prisons from putting mentally inmates in solitary confinement.

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Pataki should be ashamed of himself. Putting mentally ill people in solitary confinement is an indefensible practice that should have been halted long ago. An estimated 8,000 state prisoners - 12% of the overall population - are mentally ill, often in ways that make them disruptive. Our state prisons often put these sick people in isolated confinement for 23 hours a day, mostly in what are euphemistically called special housing units.

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The mind-bending state of these units has been documented by the Correctional Association of New York, which runs a prison visitation committee that spoke with 162 mentally ill prisoners locked in solitary. "We interviewed men who were weeping in their cells, who mutilated their own flesh, who hadn't left their cell in months, who smeared feces on themselves or repeatedly attempted suicide," the group testified in 2003. At times, the visits had to be suspended because of "inmates yelling or banging on their doors, calling out for help." Solitary lock-down only makes sick prisoners more ill, according to Community Access, Inc., an advocacy group for the mentally ill that has been pushing for change. And the Urban Justice Center, another advocacy group, estimates that 700 mentally ill people are in lock-down right down.

Ten states have already banned the practice of putting mentally ill inmates in solitary. The list includes California, Colorado, Connecticut, Florida, Indiana, New Jersey and Texas - places not known for being soft on crime or prisoners. The New York Legislature, in a rare show of bipartisanship, voted overwhelmingly this year to ban the practice of locking mentally ill prisoners in solitary and instead give them treatment in secure prison hospital wards. The Republican-led state Senate, which often balks at expanding prisoners rights, approved the bill unanimously. Even the main guards union, the New York State Correctional Officers and Police Benevolent Association, supported the bill, recognizing that decisions on how to confine mentally troubled prisoners should be made by medical staff, not guards.

Pataki vetoed the bill anyway, despite compelling evidence that his action will cost lives. From 1998 to 2004, at least 52 state prisoners committed suicide while housed in isolated confinement. One them was the son of Elsie Butler, part of a group of bereaved mothers who petitioned Pataki, in vain, for a measure of compassion. "On June 3, 2000, my son James Butler hung himself with a sheet while in solitary confinement in the Fishkill Correctional Facility,' says Butler. "He had bipolar disorder and was suffering after being in the box for nearly 200 days straight." Pataki, pursuing his political dreams in Iowa and New Hampshire, was not swayed by the pleas and petitions of Butler and other mothers. Ray Ortiz, a former inmate who now works at the Urban Justice Center and meets weekly with inmates who have psychiatric illnesses, was bluntly truthful in describing the result of Pataki's hard-hearted approach at a recent press conference. "There are young men and women in these cells right now. Some will kill themselves," said Ortiz. "Others will cut themselves - each of them hearing voices and going deeper into the darkness."

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released to the community. If both OMH physicians agreed, then the prison superintendent would complete an application for involuntary commitment, and the inmate would be transported to an inpatient OMH hospital rather than released to the community. The inmate would not be provided notice of the pending involuntary commitment, an opportunity to be heard, or legal representation until *after* he had already been committed.

The *Harkavy* Case

Not long after OMH and DOCS initiated this program, Mental Hygiene Legal Services ("MHLS") filed a lawsuit seeking the release of twelve ex-prisoners who had been transferred from prison to mental hospitals rather than released. In its suit, MHLS did not claim that DOCS had no authority to civilly commit an inmate. Instead, it argued that the proper procedure was provided for in Correction Law § 402, not the Mental Health Law. Correction Law § 402 differs from the Mental Hygiene Law in several meaningful ways. First, the Correction Law requires a judge to be involved in the process and to appoint two *independent* physicians, rather than OMH physicians, to examine the inmate, and the examination must take place *before* the inmate is involuntarily committed. Second, if the independent physicians agree that the inmate should be committed, then the inmate must be 1) notified; 2) provided a hearing, upon request; 3) appointed counsel; and 4) provided a chance to seek an independent medical opinion. *See* Correction Law § 402(3). All of this must occur *before* the inmate is involuntarily committed.

DOCS and OMH argued that they could use the Mental Hygiene Law, which provides inmates virtually no rights prior to being involuntarily committed. They rationalized that it was permissible to use the Mental Hygiene Law because the inmates were no longer undergoing a sentence of imprisonment at the point that they were committed. The lower court disagreed, stating that "the plain truth of the matter is that each of the Petitioners were, in fact, imprisoned at the time of their commitment," and DOCS and OMH were thus bound to comply with Correction Law § 402. *See* Harkavy v. Consilvio, 809 N.Y.S.2d 836, 839 (N.Y. Sup. Ct. 2005).The State appealed this decision, and in March 2006, the Appellate Division reversed the lower court, stating that it was permissible to use the Mental Hygiene Law to involuntarily commit inmates about to be released. *See* Harkavy v. Consilvio, 812 N.Y.S.2nd 496 (1st Dep't 2006). MHLS appealed this decision to the Court of Appeals, New York's highest court.

The Court of Appeals agreed with the lower court. Reversing the Appellate Division, it held that because the inmates were imprisoned at the time of their commitment, DOCS and OMH must comply with the procedures set forth in the Correction Law § 402. Harkavy v. Consilvio, 2006 N.Y. Slip. Op. 140, N.Y.C.A., November 21, 2006, at 4 ("We disagree that proceeding under the Mental Hygiene Law was proper, since Petitioners were still prison inmates and therefore subject to the provisions of the Correction Law at the time the applications were initiated."). The Court, however, declined to release the inmates who had been improperly committed under the Mental Hygiene Law, and instead ordered that they be afforded "an immediate retention hearing pursuant to Article 9 of the Mental Hygiene Law--now controlling since they are no longer serving a prison sentence." Harkavy at 9. The Court used "public safety" to justify its decision not to release those former inmates improperly committed under the Mental Hygiene Law, stating, "we understand how in an attempt to protect the community from

violent sexual predators, the State proceeded under the Mental Hygiene Law. We do no propose that these Petitioners be released, nor do we propose to trump the interests of public safety. Rather, we recognize that a need for continued hospitalization may well exist." Harkavy at 8-9.

Understanding *Harkavy*

The Court of Appeals did *not* hold that it is illegal to involuntary commit inmates who have been convicted of a felony sexual offense. There is good reason for this. Currently, 18 states have enacted legislation that permits the involuntary commitment of inmates to mental facilities beyond their release date, and the United States Supreme Court has upheld such legislation. In Kansas v. Hendricks, 521 U.S. 346 (1997), for example, the Supreme Court upheld a law that allowed inmates to be involuntarily committed to mental hospitals rather than released, reasoning that such legislation was intended to protect the public. Since public safety, and not punishment, was the legislation's ultimate goal, the involuntary commitment was "civil" and not "criminal," and thus, did not violate the Double Jeopardy and *Ex Post Facto* Clauses of the United States Constitution. Kansas at 365.

The Harkavy decision only states that DOCS and OMH cannot rely on the Mental Hygiene Law alone to involuntarily commit inmates, but must use the Correction Law, which provides the inmate with several procedural protections. Once committed, however, Correction Law § 404 specifically authorizes OMH to use the procedures set forth in the Mental Hygiene Law to commit an inmate beyond his or her release date. *See* Harkavy ("An inmate committed to a psychiatric facility who is nearing the end of a term of imprisonment may, on application by the director of the hospital be admitted to the care of OMH pursuant to the Mental Hygiene Law."). In short, involuntary commitment can lawfully occur as long as DOCS and OMH initially follow the procedures set forth in Correction Law § 402.

What the Future Holds

In addition to outlining legally-permissible procedures for involuntarily committing inmates deemed to be "sexual predators" beyond their release dates, the Harkavy decision also prompted Governor Pataki to urge New York legislators to pass legislation specifically designed to involuntarily commit so-called "sexual predators." The day the Court of Appeals decided Harkavy, the Governor issued a press statement in which he stated that "in the coming days I will call a special session to consider legislation to address this critical issue." It remains to be seen if Governor Pataki's proposed legislation will be enacted before January 2007, when Governor-elect Spitzer is sworn in. Even if it is not enacted under Governor Pataki's tenure, there is a strong possibility that efforts to involuntarily commit those convicted of a felony sexual offense will continue under Governor-elect Spitzer's administration, as he has publically stated that he supports such efforts.

Many inmates, of course, want to know if they will be involuntarily committed rather than released to the community. Unfortunately, it is impossible to predict who will be subject to involuntary commitment--whether it be done through the method endorsed by the Court of Appeals in Harkavy or accomplished through the legislation that Governor Pataki has proposed. Both methods require physicians to determine if an individual convicted of a felony sexual offense is likely to commit another sexual crime if released to the community. There is no precise formula for making this determination, and as a result, neither PLS nor MHLS can predict in individual cases whether

involuntary commitment is a likely possibility.

We can tell you, however, that if you have been convicted of a sexual offense, or a kidnapping or homicide that was sexually motivated, it is likely that prior to your release, DOCS may use the procedures set forth in Correction Law § 402 to involuntarily commit you to a mental hospital, and that once there, OMH may try to use the Correction Law and Mental Hygiene Law to keep you past your release date. Fortunately, because of the Court of Appeals' decision in Harkavy, you will have advance notice of any efforts by DOCS to involuntarily commit you, and you will be afforded the right to counsel and to a hearing.

Questions Re Post-Release Supervision Lead to…More Questions

In 1998, when the State Legislature introduced determinate ("flat") sentences, it included a provision requiring that every such sentence be followed by a period of "post-release supervision"("PRS"). (*See* Penal Law § 70.45.) When sentencing courts began to impose these sentences, however, they often neglected to mention PRS, either at the sentencing hearing or on the commitment sheet. As a result, many inmates arrived in DOCS with determinate sentences--but no PRS.

In response, DOCS adopted a policy of administratively adding PRS to the determinate sentence if the sentencing court had failed to do so. If, for example, an inmate entered the system with a determinate sentence and the sentencing court had failed to specify that the sentence would be followed by a period of PRS, DOCS simply adjusted the inmate's Legal Date Computation to reflect the amount of PRS it believed the law required. (According to one DOCS' official, DOCS did not keep track of the sentences that they amended in this way, but believe post-release supervision has been administratively added in this way to more than 1,000 determinate sentences over the past eight years.)

Until recently, state courts had upheld DOCS' policy. In Matter of Deal v. Goord, 778 N.Y.S.2d 319 (3d Dep't 2004), appeal dismissed 786 N.Y.S.2d 814 (2004), for instance, the Petitioner argued that DOCS had no authority to add PRS to his sentence if the sentencing court had not done so. He asked the court to strike it. The court refused, holding that in adding the PRS term, DOCS was merely "enforcing a statutorily-required part of [the] sentence" and was not performing an impermissible judicial function.

As we reported in the last issue of ***Pro Se***, however, a federal appeals court last summer held the policy unconstitutional. In Earley v. Murray, 451 F.3d at 74 (2d Cir., June 19, 2006), the court held that PRS may only be added to a sentence by the sentencing court. Any administrative addition of PRS by DOCS is a "nullity."

Later in the summer, the State moved to re-argue Earley. In a decision dated August 31, 2006 (462 F.3d 147), the court denied the State's motion, holding: "A judicially-imposed sentence includes only those elements explicitly ordered by the sentencing judge.… The sentence imposed remains the sentence to be served unless and until it is lawfully modified." The court noted that its decision "may call into question the validity of the PRS components of numerous sentences." Nevertheless, the court held, "[w]e…adhere to our [prior] ruling." Earley v. Murray, 462 F.3d 147.

Because Earley is a federal decision which conflicts with earlier state decisions on the same issue, it is not directly binding on state courts. In People v. Kin Kan, 78 N.Y.2d 54 (1991), the New York Court of Appeals held that while the state courts (like all courts) are controlled by the constitutional interpretations of the United States Supreme Court, they are not bound by the interpretations of the lower federal courts (like

the court that decided Earley). DOCS has refused to voluntarily abide by Earley. It argues that unless the Supreme Court addresses this issue, or the state courts change their mind, it can continue to add PRS to inmates' sentences and enforce PRS periods that it previously added. This means that an inmate cannot go to state court, cite Earley, and expect the court to automatically strike PRS from the sentence.

State court decisions since Earley have been mixed. Some state courts have found Earley persuasive, even if it is not controlling, and ordered DOCS to remove PRS from the inmate's sentences. *See, for example*: Waters v. Dennison, Index # 1789/06 (Sup. Co., Bronx County, November 3, 2006) (holding that Earley provides "useful and persuasive authority" and granting the inmate's Article 78 proceeding asking that the PRS be stricken from his term); People ex rel Jackie Lewis v. Warden, 2006 WL 3391221 (Sup. Ct., Bx Co., Nov. 24, 2006) (finding Earley "extremely persuasive" and granting the Petitioner's habeas corpus proceeding); and People v. Ryan, 13 Misc.3d 451 (Sup. Ct., Queens Co., July 28, 2006) (applying Earley). Others, however, have concluded that they are bound by the pre-Earley decisions of the state appellate courts, and until those courts change their minds, they are bound to follow them. *See, for example*: People ex rel Nelson v. Warden, Index # 51575/06 (Sup. Ct., Bronx Co., October 23, 2006) (holding that Earley was not controlling and prior state court decisions prohibited the court from ordering DOCS to strike the PRS term from the sentence.)

Where do these cases leave inmates who have had PRS administratively added to their sentence? Prisoners' Legal Services' best advice, at present, is this:

1. If you are serving a determinate sentence and have *not yet been released to parole*, you *could* file an Article 78 proceeding in state court asking the court to order DOCS to strike the PRS term. *See, for example*, Waters v. Dennison, cited above. There is no guarantee you will win, however. Therefore, if you still have a year or more left to serve on your sentence, the best thing to do at present may simply be to wait. If you are not scheduled to be released from prison in the immediate future, we see little reason for you to rush to court. The conflict between the state and federal courts is likely to be addressed by the state appeals courts within the next six months. If those courts decide to follow Earley, you can go to court at that time and be assured a win. If the appeals courts decline to follow Earley, you will be in no worse a situation than you are currently in, and you would still have the option of pursuing this matter in federal court once you are released. (Remember: If you *do* decide to bring an Article 78 proceeding, you must first exhaust your administrative remedies. To do this, you should write a letter to your IRC asking him or her to vacate the PRS term that DOCS imposed. If and when they refuse, you could appeal the decision by writing to the Commissioner of Correctional Services, in Albany.)

2. If you are currently in prison based on solely a *revocation of PRS*, you should file a habeas corpus proceeding in state court. *See* People ex rel. Lewis v. Warden, cited above. Given the unsettled nature of state law, you might lose (as the Petitioner did in Nelson, above). However, Earley provides a strong argument that you are entitled to immediate release. Furthermore, since you would be entitled to immediate release should you prevail, there is no reason for you to "wait and see" how the issue is resolved. In addition, you will need to exhaust your state court remedies in order to

bring this issue to federal court at a later date.

3. One thing you should probably not do is file a CPL "440" motion with your sentencing court. Such motions are used when the sentencing court has imposed an illegal sentence. A determinate sentence, without post-release supervision, *is* an illegal sentence. However, the only remedy that the sentencing court can offer you in a 440.20 motion is the opportunity to vacate your plea bargain. You might then be able to re-negotiate your sentence, but any sentence you received would, of necessity, include PRS. (It is even possible that the end-result will be a sentence that is longer than the sentence the court originally gave you. *See, for example*, People v. DeValle 94 N.Y.2d 870 (2000)[holding that the Defendant who received an illegal sentence and refused to withdraw his guilty plea could be re-sentenced to a term longer than the bargained-for sentence.]) So unless you are prepared to withdraw your plea bargain, a "440" motion is not the way to go.

Why can't you bring a habeas corpus proceeding immediately in federal court? The reason is two-fold. First, in order to bring a habeas corpus proceeding, either in state or federal court, you must be able to show that, if you win, you will be eligible for immediate release from prison. Thus, the only persons who could bring a habeas corpus proceeding are those who are in prison based solely on a revocation of PRS. If you are still serving the original incarceration period of your determinate term, you could not bring a habeas corpus proceeding.

Second, in order to bring a habeas corpus proceeding in federal court, you must first exhaust your state court remedies.

As we stated in the last issue of ***Pro Se***, this is a rapidly developing area of law. It is difficult at this stage to have more definite answers to the many questions that arise from the Earley case. Stay tuned to future issues of ***Pro Se*** for any new developments.

Rockefeller Drug Law Reform: New Drug Sentences Held Not Retroactive; Lower Court Decision Holding That A-II Offenders Must Be 3 Years From Parole Eligibility Date for Re-Sentencing Remains the Law

The Drug Law Reform Acts ("DLRA") of 2004 and 2005 were welcome, if modest, reforms of the harsh, Rockefeller-era drug laws. They provided for new, less severe, sentences for drug offenses committed after January 13, 2005. They also allowed persons convicted of A-I drug offenses and *some* persons convicted of A-II drug offenses prior to January 13, 2005, to apply to be re-sentenced to one of the lesser sentences.

Several outstanding questions about the law were recently addressed by the Court of Appeals.

One question concerned persons whose offense occurred *prior* to January 13, 2005, but who were not sentenced until *after* that date. Should they be eligible for one of the new, lesser sentences? Wouldn't it be unfair to give them one of the old, longer sentences, even after the Legislature has declared that those sentences were excessive? As it happens, there is a legal doctrine which provides just that. It says that when a legislature lowers the penalty for a crime, any further imposition of the old penalty would therefore be unfair. It is called the "amelioration doctrine."

In People v. Utsey, 7 N.Y.3d 398 (2006), however, the Court of Appeals held that the amelioration doctrine did not apply to the DLRA. In the DLRA, the Court noted, the New York Legislature specifically provided that the new sentences would only apply to crimes committed after January 13, 2005. In doing so, the Court held, "the Legislature manifested a clear intent to negate the amelioration doctrine" with respect to the new law. Therefore, according to Utsey, the amelioration doctrine does not apply, and no person who committed their crime prior to January 13, 2005 is eligible for one of the new sentences, even if they received the sentence after that date.

Another outstanding question concerned the criteria that A-II drug offenders who were sentenced prior to January 13, 2005 must meet in order to be eligible to apply for re-sentencing. The relevant statute lists several criteria. One of them is that the offender be "more than twelve months" from being eligible for temporary release.

An inmate is eligible for temporary release if he is "eligible for release on parole *or*…will become eligible for…parole or conditional release within two years.…" *See* Correction Law § 851(2) (emphasis supplied).

The question arose: Must an A-II offender be "more than twelve months" from his parole eligibility date (*i.e.*, more than one year from parole eligibility)? Or must he be "more than twelve months" from being "*within two years*" of his parole eligibility date (*i.e.*, more than *three years* from parole eligibility)?

Several trial courts had divided over this question. In People v. Bautista, 809 N.Y.S.2d 62 (1st Dep't 2006), however, the Appellate Division, First Department, held that, when read together, the two sections of the Correction Law require that an A-II drug offender be more than three years from his or her parole eligibility to be eligible for re-sentencing.

The Court of Appeals side-stepped the question on the grounds that it did not have any statutory authority to review the decisions of the lower courts in re-sentencing cases.

That means that the decision in Bautista--that A-II offenders must be more than three years from their parole eligibility dates to be eligible for re-sentencing--stands.

Efforts of Shi'a Muslim Inmates to Obtain Separate Services **Falter**

Orafan v. Goord, 411 F.Supp.2d 153 (N.D.N.Y. 2006)
Matter of Holman v. Goord, 12 Misc.3d 1174(A) (Sup. Ct., Sullivan Co., June 29, 2006) (LaBuda, J.)

Six years ago, in Cancel v. Goord, 278 A.D.2d 321 (2d Dep't 2000), a state appeals court held that there was "overwhelming evidence" of significant differences in belief and practice between Sunni and Shi'a Muslim communities. As a result, the court held, the denial of a Shi'ite inmate's grievance requesting separate worship facilities "was arbitrary and capricious and in violation of Correction Law § 610." (Correction Law § 610 provides that DOCS "shall recognize the right of the inmates to the free exercise of their religious belief.…") The court ordered DOCS to conduct administrative proceedings "to determine the manner in which to best afford Shi'ite inmates separate religious services, under appropriate Shi'a religious leadership, in a time and placed that comport with legitimate penalogical concerns."

In response to this order, DOCS consulted with Islamic organizations all over New York to seek direction in Islamic doctrine, tradition and ritual. As part of that effort, DOCS officials met with Shayk Fadhel Al-Sahlani, a religious scholar at the Imam Al-Khoei Foundation, the

Shi'ite Islamic Center in Jamaica, Queens, that had served as outside ecclesiastical advisor to the Plaintiff in the Cancel litigation. Shayk Al-Sahlani advised the DOCS officials that Shi'ite inmates could worship in the same religious services as Sunni Muslims, but that special care was needed to ensure that Shi'ite inmates were not harassed because of their beliefs. Accordingly, DOCS designed a new protocol to ensure that the rights of Shi'ite inmates were respected and protected. The new protocol called for all employees, including Chaplains, volunteer Chaplains, and inmate facilitators to:

- ✓ refrain from making disparaging remarks about a religion or its followers;
- ✓ designate the Imam Al-Khoei Islamic Center as DOCS' official Muslim authority;
- ✓ allow Shi'ite Muslim inmates to attend separate Shi'ite religious education and study classes, and to utilize Shi'ite Muslim inmate facilitators;
- ✓ give Shi'ite Muslim inmates a full and equal opportunity to participate in the weekly Friday Jumah service;
- ✓ include observances unique to Shi'ites in DOCS' revised religious observance calender; and
- ✓ give Shi'ite Muslim chaplains the opportunity to officiate at the service.

Further, at least one member of the Muslim Majils, the governing boards of the individual prisons' Muslim communities, is required, under the protocol, to be a Shi'ite Muslim.

The new protocol did not, however, call for a separate Jumah service for Shi'ite inmates. DOCS has argued that it fulfilled its obligations under Cancel in good faith by meeting with respected Shi'ite leaders and learning from them that separate Jumah services were not necessary, and by instituting a protocol to insure respect for Shi'ite practices. DOCS also argued that it would be overly burdensome to permit separate Jumah services, because such services would heighten rivalry among inmates belonging to different groups, thereby causing increased security concerns, and would increase pressure upon DOCS to recognize other sub-groups that may be used as a subterfuge for gang-related activity and require it to set-aside additional prison space and personnel to supervise the program.

Many Shi'a, however, were dissatisfied by the new protocol, and continued to litigate the question of whether the constitution requires DOCS to provide them with separate Jumah services. Federal and state courts have ruled against them.

Four years ago, in Pugh v. Goord, 184 F.Supp.2d 326 (S.D.N.Y. 2002), a federal district court for the Southern District of New York held that the protocol represented a "reasonable" compromise: it adequately balanced Shi'ite inmates' interests against DOCS' assertion that providing separate Jumah services would be overly burdensome. The court emphasized that the underlying tenets of Shi'ite and Sunni belief are the same and that, to the extent that practice differs, the protocol protects Shi'ites from discrimination and provides a complaint mechanism to be used if its provisions are violated.

More recently, in Orafan v. Goord, Shiite plaintiffs tried again in federal court, this time bringing their claims under the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), which provides more legal protection to inmates' religious rights than the First Amendment (*See* ***Pro Se***, Summer 2006, for more discussion of RLUIPA.). In the new complaint, the inmates argued that not only are they not provided with separate Jumah services, but they cannot receive proper religious guidance from Sunnis, they have suffered acts of hostility and discrimination against them based on their religion, and DOCS has violated the Establishment Clause by making Sunni Islam the official version for the prison system.

The court rejected all of these claims. It held that DOCS' practices had not substantially burdened Shi'a inmates' rights to practice their religion. Some Shi'a, the court noted, do attend the congregate Jumah service and others may satisfy their prayer requirement by individual prayer. The court also agreed with DOCS' arguments that unified Shiite/Sunni services served a compelling state interest because separate services would require additional staffing. The court took notice of DOCS' reference to a time "when Muslim prisoners were divided into two groups: a generic faith and the American Muslim Mission. Inmates in the two programs competed for members, and violence ensued on many occasions. To combat the divisiveness, DOCS unified the programs, and Muslim inmates have since peacefully coexisted in the generic Islamic program."

Most recently, in Matter of Holman v. Goord, 12 Misc.3d 1174(A) (Sup. Ct., Sullivan Co., June 29, 2006), a State court found that the term "separate religious services" in the Cancel decision did not require that DOCS provide separate Jumah services for Shi'ite and Sunni Muslims, but only referred "generally to various services DOCS may provide to accommodate inmates' religious practices." "If the [Appellate Division] truly intended to provide a specific, Friday Jumah service, it would not have remanded the case to DOCS with orders to structure a remedy," the court continued.

> The record is clear that DOCS complied with the court's order to determine the manner in which to best afford Shi'ite inmates religious services within the state's penological interests. DOCS spent over two years reaching out to Islamic organizations, including several Shi'ite organizations and leaders, in efforts to learn matters of Islamic doctrine, tradition, and ritual. The end-product was the Protocol, which is a sincere and adequate effort to provide for the needs of the Shi'ite inmate population. Thus, Petitioner's assertion that DOCS has not complied with the court order in Cancel, is incorrect.

Nor, the court continued, does denial of separate Friday Jumah services violate the constitution. "Even assuming that a separate Jumah service is required by Shi'ite beliefs," the court wrote, "an inmate's entitlement to it would still have to be balanced against DOCS' compelling and legitimate penological objectives of maintaining safety and security within the prison." The protocol, the court continued, "provides Shi'ites full opportunity to participate in the Friday Jumah service and extends invitation to Shi'ite chaplains to officiate at those services. "The alternative," the court concluded--providing every religious denomination with a separate service--would have a "disastrous" affect on DOCS' ability to safely and securely manage its facilities.

Thus, both State and Federal courts have now upheld DOCS' protocol for the treatment of Shi'ite inmates, even though it does not require separate services, and rejected Shi'a claims of unconstitutional discrimination.

Federal Cases

Second Circuit: A Compromise on Damages for Time in SHU

Inmates often write to PLS asking whether they can file a 1983 action in federal court, seeking money damages for time they spent in SHU. Generally, the answer is "no"--unless the disciplinary hearing about which the inmate wants to sue has been previously reversed by DOCS or by a state court or in a federal habeas corpus proceeding. A recent decision by the

Second Circuit Court of Appeals, however, changes this rule. Now the answer is "yes"--*if* you are willing to forego damages for any good time you may have lost at the hearing. This article is intended to inform you of the recent decision, Peralta v. Vasquez, 467 F. 3d 98 (2d Cir. 2006), and to give you some of the background that led to the decision.

Background

Inmates have a constitutional right to minimal due process protections before they can be disciplined. In 1974, the Supreme Court established the procedural protections that must be provided inmates before the state may take away their good time. Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963 (1974). They are:

1) written notice of the charges at least 24 hours before appearing at a hearing;
2) the right to call witnesses and present oral and documentary evidence at the hearing unless doing so would present too great a risk to prison safety or penal goals; and
3) the right to receive a written statement of the findings of fact which explains the evidence relied upon and the reasons for the penalty.

Lower courts have extended those protections in which an inmate may be placed in solitary confinement, such as SHU.

Since Wolff, thousands of lawsuits have been filed by inmates seeking money damages on the grounds that they either lost good time or were placed in SHU in violation of their due process rights. In some of these cases, inmates prevailed and were awarded monetary damages for the time they spent in SHU.

Over the years, however, the Supreme Court has made it more and more difficult for inmates to prevail in such cases. First, the Court held that in order to obtain anything more than nominal damages (*i.e.*, $1.00), an inmate must prove not only that his due process rights were violated in the disciplinary hearing, but also that the result of the hearing would have been different if his rights had *not* been violated. Carey v. Piphus, 435 U.S. 247 (1978). Second, the Court held that inmates are only entitled to due process protections at all if the penalty imposed at the hearing resulted in conditions of confinement that were "atypical and significant" in relation to the ordinary prison conditions. Sandin v. Conner, 115 S.Ct. 2293 (1995). Third, in Edwards v. Balisok, 520 U.S. 641 (1997), the Court held that inmates can only obtain damages for time spent in SHU if they can show that the hearing that resulted in the SHU time had been previously reversed, either by the state itself in an administrative or court proceeding, or in a federal habeas corpus proceeding.

The Favorable Termination Rule

The Balisok case was rooted in the desire of the Supreme Court to distinguish between habeas corpus proceedings and§ 1983 proceedings. Habeas corpus proceedings are used to challenge an unlawful detention. Section 1983 proceedings are used to obtain damages for violations of federal rights. Sometimes, however, the two can overlap. In some cases, for instance, you may want to get damages for an unlawful detention. In those cases, the Court had held, you must first bring a habeas corpus proceeding to have the detention declared unlawful, then bring a § 1983 to try and obtain damages. The rationale for this is to avoid a situation in which one court is awarding damages for a detention that has never formally been declared illegal, in contravention of the "strong judicial policy against the creation of two conflicting resolutions arising out of the same…transaction."

The result was the Court's declaration in Balisok that if you want to get damages for a disciplinary hearing in which you lost good time, and if the damages action would

necessarily imply the invalidity of the loss of good time, you must first get the good time restored through state proceedings or a federal habeas corpus after exhaustion of state remedies. This is known as the "favorable termination rule."

The favorable termination rule, however, only applies if you lose good time at your disciplinary hearing. This is because, if you have not lost good time, your 1983 action would not constitute a challenge to the length of your incarceration and, therefore, the habeas statute would not be implicated. So, in Jenkins v. Haubert, 179 F3d 19 (2d Cir. 1999), the Second Circuit Court of Appeals held that Balisok does not apply when the case involves only SHU time or administrative segregation, with no loss of good time. Furthermore, in Gomez v. Kaplan, 2000 WL 1458804 (S.D.N.Y. Sept. 29, 2000), the Southern District of New York held that the Balisok rule also does not apply if there is a recommendation for loss of good time in addition to a segregation term, but the plaintiff is serving a life sentence and therefore is not eligible for good time.

Thus, prior Peralta, the state of the law was this: If you did not receive a recommended loss of good time at your disciplinary hearing (or if you received a recommendation of loss of good time but you were serving a life sentence), you only had to exhaust your administrative remedies by filing an appeal of the disciplinary hearing in order to file a § 1983 seeking money damages for the time you spent in SHU. Whether the appeal was successful was not crucial. But if you did receive a recommended loss of good time at the disciplinary hearing and you were not serving a life sentence, you had to either:

1) successfully appeal the disposition at the administrative level;
2) prevail in a state court proceeding such as an Article 78; or
3) prevail in a federal habeas corpus petition

before you could file a § 1983 action.

The Peralta v. Vasquez Rule

In October 2006, the Second Circuit decided Peralta v. Vasquez, adding a new twist to Balisok's favorable termination rule. The Court held that an inmate can maintain a § 1983 action seeking damages for time wrongfully spent in SHU in cases where he has also lost good time *without* meeting the Balisok requirements--if he agrees to abandon all claims relating to his loss of good time.

The facts of the case were as follows: Jose Peralta, an inmate, was charged with assaulting another inmate and was subject to a disciplinary hearing. The Hearing Officer found Peralta guilty and imposed a penalty of five years in SHU and five years recommended loss of good time. Peralta appealed and the penalty was modified to 24 months across the board. Peralta then filed an Article 78 petition in state court, but the petition was dismissed because he did not pay the filing fee.

Peralta then sued in federal court, alleging that the disciplinary hearing violated his due process rights because he was denied "adequate assistance, witnesses, and a fair and impartial hearing officer." He sought damages for the time he had spent in SHU. The Defendants moved to dismiss his claim because Peralta could not show that the disciplinary hearing had been "invalidated in a state or federal proceeding" *i.e*, he had not met the Balisok rule.

Peralta responded by arguing that he was only seeking damages for "those sanctions affecting his conditions of confinement" (*i.e.*, the time he spent in SHU). He was not challenging his loss of good time and, therefore, he should be allowed to proceed on his action. The district court, however, granted the Defendants' motion to dismiss.

On appeal, the Second Circuit reversed. It concluded that a prisoner subject to "mixed" sanctions (*i.e.*, both SHU confinement and loss of good time), "can proceed separately, under § 1983, with a challenge to the sanctions affecting his conditions of confinement without satisfying thefavorable termination rule, but…he can only do so if he is willing to forgo once and for all any challenge to any sanctions that affect the duration of his confinement." The court went on, "[i]n other words, the prisoner must abandon, not just now, but also in any future proceeding, any claims he may have with respect to the duration of his confinement that arise out of the proceeding he is attacking in his current § 1983 suit."

What does Peralta mean for you?

Under Peralta, if you were wrongfully confined in SHU because you were denied your due process rights at a disciplinary hearing, you do not have to prevail on your administrative appeal or in state court in order to file a § 1983 claim in Federal court, even if you also received a penalty of loss of good time--but you *do* have to state in your papers that you are abandoning any and all claim to damages as a result of your loss of good time. If you do not say this in your initial papers, it is likely that your case will get dismissed, pursuant to the Balisok rule.

Peralta may have some strange consequences. Under Peralta, you could theoretically obtain money damages from a federal court for having to serve SHU time that was imposed in violation of your right to due process of law, but not for the loss of good time that accompanied it. You could get money damages for the time you were wrongfully confined but the alleged misbehavior will still be on your record and you will still be subject to the loss of good time that was imposed for that misbehavior.

Peralta may also be short lived. It is unclear what the Supreme Court will do with this case if it decides to review it. But for now, under Peralta, if you believe that your due process rights were violated and you were wrongfully confined to SHU and given a recommended loss of good time, as long as you:

1) have exhausted your administrative remedies;
2) can demonstrate that you have suffered an "atypical and significant hardship;" and
3) are willing to abandon any claim you have regarding your recommended loss of good time,

you can sue in Federal court and your case will not be dismissed under the Balisok rule.

***Practice pointe**r: Prisoners' Legal Services has a form memo titled "Damages for Time Spent in SHU." It can be obtained by writing to Prisoners Legal Services of New York, 114 Prospect St., Ithaca, NY 14850.*

State Cases

Disciplinary Cases

Drug Testing: Chain of Custody Established by Officer's Testimony

Matter of Costner v. Goord, 818 N.Y.S.2d 359 (3d Dep't 2006)

A positive urinalysis test resulted in a Tier III hearing against the Petitioner for drug use. After being found guilty of the disciplinary charges and exhausting his administrative remedies, he filed an Article 78 proceeding. In his proceeding, he challenged the chain of custody of the urine sample. He noted that the chain of custody form failed to state the name of

the officer who removed the sample from the freezer and tested it as required (*See* 7 NYCRR § 1020.4[e][1][i]). The court found this an insufficient basis for reversing the hearing result. The testing officer explained at the hearing that he had sole custody of the sample during the relevant time period and inadvertently neglected to write his name on the Chain of Custody portion of the form. That testimony adequately "cured" the defect in the forms and adequately established the chain of custody of the sample. Other "minor" irregularities in the test documentation were likewise sufficiently explained by the testing officer.

***Practice pointer**: Seven N.Y.C.R.R. § 1020.4(e)(1)(i) states that all persons handling a urine specimen "shall make an appropriate notation under Chain of Custody on the request for urinalysis test form. The number of persons handling the specimen shall be kept to the minimum. The specimen shall be kept in a secure area at all times." Federal courts have held that minimal due process requires that "a prison disciplinary body…establish a reasonably reliable chain of custody as a foundation for introducing the results of urinalysis tests." Soto v. Lord 693 F.Supp. 8 (2d Cir. 1988). Despite these rules, state courts have held that in order to establish a break in the chain of custody sufficient to obtain a reversal of a disciplinary hearing, an inmate "must point to evidence…indicating that the specimen could have been confused with similar samples or that there was no evidence to substantiate the chain of custody." Matter of Price v. Coughlin, 498 N.Y.S.2d 209 (3d Dep't 1986). Possible discrepancies in the paperwork regarding such things as "the time[ ] the specimen was removed from the refrigerator and the time[ ] the test[ ] w[as] performed" will generally be insufficient (Price v. Coughlin) and, in any event--as the case reported above shows--such discrepancies may be easily "cured" by testimony from the officers who handled the sample.*

Substantial Evidence, Employee Assistance: Evidence Did Not Support Hearing Officer's Conclusion That Petitioner Had Absconded From Work Release

Matter of Rice v. Goord, Index # 400447/06 (Sup. Ct. N.Y. Co., July 26, 2006) (Cahn, J.)

Petitioner Rice was charged with absconding from a work release program when he allegedly failed to return to the facility by 6:30 P.M., as he was required to do. He stated that following a work-related appointment, he had gone to exercise at a friend's house. While exercising, he lost consciousness. His friend returned home, found him unconscious, and brought him to a local hospital where he was diagnosed with acute rhabdomyolysis, a disorder that causes muscle function to shut down, as well as blood loss, anemia, and hypertension. Hospital records indicated that he was admitted at 6:24 A.M., twelve hours after he was due to report back to the facility. When he regained consciousness, he gave his treating doctor a card with information relating to the correctional facility, which the doctor contacted. Correction Officers then arrived and took charge of the Petitioner. His diagnosis was later confirmed by doctors at two correctional facilities. Nevertheless, he was found guilty of absconding at his disciplinary hearing and removed from work release. After his administrative appeals were exhausted, he filed an Article 78 proceeding.

A prison disciplinary determination must be supported by substantial evidence. This means "that in order to sustain a determination of guilt, a court must find that the disciplinary authorities have offered such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact." Matter of

Bryant v Coughlin, 77 N.Y.2d 642, 647 (1991). That court found that that standard was not met in this case. The Petitioner's argument that he was not guilty because he had been unconscious during the twelve hours in question was uncontradicted by the available medical information "and should have been developed at the hearing, by a careful reading of the hospital records, and the calling of the unnamed friend who brought Petitioner to the hospital, as a witness." His inability to remember the details of the timeline of his collapse, arrival at the hospital, and the beginning of his treatment, the court found, was "not surprising since he was allegedly unconscious throughout those events."

Moreover, the court held, the Petitioner had been denied adequate employee assistance to prepare for the hearing: His uncontradicted testimony at the disciplinary hearing was that his assistant informed him that "there was nothing he could really do," since the hearing would be in a different facility than the one in which they were meeting. "Had Petitioner received greater assistance in preparing for the hearing, he might have been advised to consult with his friend on the subject of the precise timing of events, possibly call his friend as a witness."

The court annulled the hearing and remanded it to DOCS "for additional factual determinations." At the new hearing, the court held, "Petitioner should be offered assistance in the preparation of his defense, including assistance in obtaining any additional medical records and contacting potential witnesses."

In Absentia Hearings

Alicea v. Selsky, 819 N.Y.S.2d 202 (3d Dep't 2006)
Hamilton v. Goord, 819 N.Y.S.2d 624 (3d Dep't 2006)
Tafari v. Selsky, 819 N.Y.S.2d 349 (3d Dep't 2006)

"[A]n inmate has a fundamental right to be present at his or her disciplinary hearing." Matter of Rush v. Goord, 770 N.Y.S.2d 191 (2003). When an inmate is alleged to have waived that right by refusing to attend the hearing, the Hearing Officer must determine that the refusal was "knowing, intelligent and voluntary"--that is, that the inmate understood that the hearing would be held in his absence, that he would be waiving his rights to present evidence and make procedural objections, and that his refusal to attend was voluntary. Matter of Hakeem v. Coombe. 650 N.Y.S.2d 819 (3d Dep't 1996).

In three cases this past quarter, an inmate was alleged to have refused to attend his hearing, and the hearing was held in absentia. The inmate, after exhausting administrative appeals, then claimed in court that his refusal to attend was not knowing, intelligent, or voluntary. In two of the cases, the inmate lost. In the third, he won.

In Tafari v. Selsky, 819 N.Y.S.2d 349 (3d Dep't 2006), the Petitioner was charged with creating a disturbance after he started banging on his cell door and yelling at a captain who was making rounds on his floor. Although he initially attended the Tier III disciplinary hearing, following two adjournments, he refused to attend or to execute waiver forms. The Hearing Officer proceeded with the hearing in the Petitioner's absence and found him guilty of the charge. The court affirmed, finding that "the Hearing Officer took the necessary steps to ascertain the legitimacy of petitioner's refusal and unwillingness to sign a waiver by questioning the officers present at the time. Inasmuch as petitioner forfeited his right to attend the remainder of the hearing, the Hearing Officer properly continued it in his absence."

In the Matter of Hamilton v. Goord, the Petitioner was charged with using controlled substances after a sample of his urine tested positive for cannabinoids, for which he was

found guilty at a disciplinary hearing held in his absence. The court found that the Petitioner "knowingly waived his right to be present at the hearing when he refused to attend despite being afforded the opportunity, and having been fully informed by the Hearing Officer both that any concerns would be addressed at the hearing and regarding the consequences of his refusal."

By contrast, in the Matter of Alicea v. Goord, in which the Petitioner was charged with drug possession and smuggling, the court found that the Hearing Officer had failed to take sufficient steps to verify that the Petitioner's refusal to attend the hearing was voluntary. The Petitioner had expressly stated to the Correction Officer who was to escort him to the hearing that he was not waiving his right to attend, but he was unable to attend due to back pain that prevented him from standing or walking. The Hearing Officer concluded that this claim had been refuted by a facility nurse, but the court concluded otherwise: The nurse "had not evaluated or treated Petitioner" and, in fact, verified that he had been complaining of back pain for approximately two weeks, had been prescribed medication, and had been last seen that morning by a different nurse, who had treated the Petitioner in his cell. She had noted that he continued to complain of back pain and did not get out of bed. Consequently, the court held, "there was an insufficient basis for the Hearing Officer to find that petitioner willfully refused to attend the hearing."

Practice pointer: *Matter of Hakeem v. Coombe, cited above, is similar to Alicea. In Hakeem, the inmate stated on a Refusal Form that he was unable to walk and could attend the hearing only by dragging himself. Correction officers refused to permit him to do that and the Hearing Officer, rather than arranging to bring the Petitioner to the hearing by wheelchair or arranging to have medical personnel examine him to verify his claim that he could not walk, summarily determined that his conduct amounted to a refusal to attend the hearing. The court reversed. In the absence of any evidence that the Petitioner "knowingly, voluntarily and intelligently relinquish[ed] his right to attend the hearing," the court held, there was no basis to uphold the hearing.*

As the other cases above suggest, however, medical excuses for refusing to attend a hearing are rarely successful. Alicea and Hakeem can be contrasted with a number of other cases in which courts found that the Hearing Officer did adequately investigate an inmate's claim to be medically unfit to attend the hearing and found it wanting. See, for example, Matter of Davis v. Goord, 800 N.Y.S.2d 634 (3d Dep't 2005), lv. denied 5 N.Y.3d 715 (2005) (holding that the Petitioner's claim that illness prevented him from attending hearing was refuted by the Hearing Officer's personal observation of him as alert and oriented, as well as by a nurse's observation that the Petitioner was fit); Matter of Spirles v. Wilcox, 754 N.Y.S.2d 602 (3d Dep't 2003), lv. denied 100 N.Y.2d 503 (2003) (holding that the Petitioner's claim that he could not walk was belied by testimony of a Correction Officer who observed the Petitioner walking in his cell); Matter of Lebron v. Goord, 732 N.Y.S.2d 282 (3d Dep't 2001), lv. denied 97 N.Y.2d 608, (2002) (holding that testimony that the Petitioner was seen walking without difficulty refuted claims of disabling foot pain).

Substantial Evidence: Unauthorized Mail Watch Leads to Reversal of Hearing

Matter of Keesh v. Smith, 821 N.Y.S.2d 486 (3d Dep't 2006)

The Petitioner, an inmate, was charged with violating a prison disciplinary rule prohibiting inmates from sending outgoing mail that includes material for a person other than the one who is the addressee on the envelope. The Misbehavior Report alleged that he sent letters

to three different people in one envelope that was addressed to only one of them. After being found guilty of the charge, and exhausting his administrative remedies, he challenged the decision in an Article 78 proceeding.

In his Article 78 proceeding, he argued that the decision had to be reversed because there was no evidence in the record that his facility Superintendent had authorized that his outgoing mail be read.

Seven N.Y.C.R.R. 720.3(e)(1) states that outgoing mail may only be read when a facility's superintendent "has reason to believe that the provisions of any department directive, rule or regulation have been violated…or that such mail threatens the safety, security, or good order of a facility or the safety or well being of any person."

Since neither the Misbehavior Report nor the testimony of the Correction Sergeant who wrote it contained any evidence that the Superintendent had authorized a mail watch, and the Petitioner's request to call the Deputy Superintendent as a witness on this issue was denied, the court found no evidence to support the Hearing Officer's assertion that the Petitioner was subject to a "lawful Mail Watch." Accordingly, the court reversed the hearing.

Other Cases

Institutional Records: Inmate Fails in Bid to Expunge Sex Crime Information From His Institutional Records

Loliscio v. Goord, 817 N.Y.S.2d 776 (3d Dep't 2006)

The Petitioner applied to expunge the reference in his security classification guideline sheet to a sex crime because his convictions for rape, and felony murder based upon the rape, had been overturned. DOCS refused the Petitioner's application and the Petitioner filed an Article 78. The court held that DOCS' refusal had a rational basis. Although the Petitioner's rape and murder charges had been reversed, he had conceded during his criminal trial that he engaged in intercourse, allegedly consensual, with the 14-year-old victim. His re-sentence report mentioned that admission and indicated that he had sex with his victim before killing her. Accordingly, DOCS' determination that the Petitioner's criminal conduct involved a sexual element was based upon his explicit admissions made during his trial. Under these circumstances, there was a rational basis for the inclusion of a reference to a sex crime characteristic in the Petitioner's institutional records.

Practice pointer: *Information about you contained in your institutional records, such as your security classification guideline sheet, must be supported by a "rational basis." Where the information is derived from your pre-sentence report, the report itself must have a rational basis. In Brown v. Goord, 796 N.Y.S.2d 439 (3d Dep't 2005), the Department, as in this case, relied on information in the Petitioner's pre-sentence report to conclude that he was a sex offender. On reviewing the pre-sentence*

report, however, the court found that its assertion that the Petitioner had committed rape and sodomy were based solely on charges for which he had been acquitted. By contrast, in this case, the information was based not solely on the charge for which the Petitioner had been acquitted, but also on his admissions at trial.

The proper method for bringing an administrative challenge to information in your institutional records is outlined in 7 N.Y.C.R.R. §§ 5.50, 5.51 and 5.52. Those provisions state, in part:

> *If the completeness or accuracy of any item of information contained in the personal history or correctional supervision history portion of an inmate's record is disputed…the inmate shall convey such dispute to the custodian of the record or the designee of the custodian reviewing the record with him…. If the custodian, after investigation, shall determine the disputed information is erroneous or incomplete, he shall make such changes as are necessary and shall report to the inmate the results of the investigation and the changes, if any, which have been made no later than 45 days after the custodian or the custodian's designee has been advised of the dispute…. If the inmate still disputes the accuracy or completeness of the information after investigation and determination, the inmate may appeal the determination of the custodian to the Inspector General, Department of Correctional Services, State Campus, Building 2, Albany, NY 12226. The appeal shall be in writing. The Inspector General shall affirm, modify or reverse the determination of the custodian and shall notify the inmate of his decision within 30 days of receipt of the appeal.*

If, after exhausting administrative remedies, you are still dissatisfied with the results, you can challenge DOCS' decision in court, via an Article 78 proceeding.

Programs

Simmons v. Taylor, 820 N.Y.S.2d 329 (3d Dep't 2006)
Crispino v. Goord, 818 N.Y.S.2d 357 (3d Dep't 2006)
Tucker v. Nuttall, 819 N.Y.S.2d 602 (3d Dep't 2006)

Inmates' dissatisfaction with assigned programs or DOCS' denial of a preferred program are frequent subjects of litigation in New York. Courts generally analyze these cases under a "rational basis" standard. They ask solely whether DOCS had a "rational basis" for its actions or whether they were, instead, "arbitrary and capricious." This is the lowest standard of legal review. DOCS will almost always be able to advance some rationale for its actions that passes the "rational basis" test. In each of the following cases, for instance, the inmates involved had apparently good reasons to question DOCS' decision regarding their program. In each case, however, the court found that DOCS has offered at least a "rational basis" for its decision and, thus, rejected the inmate's claim.

In Simmons, the Petitioner challenged the denial of his grievance concerning DOCS' refusal to admit him to the "Close to Home" program. According to DOCS, he could not be admitted to the program because he had failed to complete Alcohol and Substance Abuse Treatment ("ASAT"), a prerequisite to "Close to Home." The Petitioner argued that a memorandum he had received from his ASAT supervisor stating that the Petitioner "deserved a successful [ASAT] completion and…[was] given…one in 1995" demonstrated that DOCS'

decision was irrational. The court disagreed. "[I]nasmuch as a review of the record reveals that there was no ASAT program certificate of completion contained anywhere in Petitioner's file, along with the fact that it does not appear that Petitioner ever finished the minimum amount of treatment required by the ASAT program prior to the issuance of a valid certificate of completion, we cannot say that the determination in question was irrational, arbitrary or capricious."

In Crispino, the Petitioner, an ex-attorney serving a prison sentence for theft of client funds, applied to participate in the work release program. His application was initially approved at the facility level but then reversed on review by Central Office. The Petitioner argued that the initial approval of his application was not reviewable by the central office and was, in any event, irrational. The court disagreed, holding: "Participation in a temporary release program is a privilege not a right and our review of a determination denying an application to participate in such a program is limited to whether there was a violation of any positive statutory requirement or constitutional right and whether the determination is irrational." The Petitioner's argument about Central Office review was incorrect, the court held, since he was convicted of more than three felonies, and DOCS' regulations require Central Office review of grants of temporary release to persons with three or more felonies. (*See* 7 NYCRR 1900.4[n][4][iv]). Nor was DOCS' action irrational: It considered the Petitioner's positive institutional accomplishments as well as the seriousness of his offense and concluded that his crimes so violated the public trust that community reaction would detrimentally affect the Petitioner's successful participation in the program.… [W]e cannot conclude that the denial of his request was irrational or arbitrary and capricious.

In Tucker, the Petitioner brought an Article 78 proceeding to challenge two determinations of the Central Office Review Committee ("CORC") holding that his participation in a sex offender counseling program at prior facilities did not satisfy DOCS' requirement that he take a sex offender counseling program at his current facility. The court notes that in order for the Petitioner to prevail, he must demonstrate that the determinations of CORC are irrational, arbitrary, or capricious. It finds that they were not. The first determination by CORC--that the Petitioner's 1997 participation in a sex offender program at Oneida Correctional Facility in Oneida County did not obviate the need for him to complete the sex offender program at Mid-State--was rational, the court held, because the prior program was not as comprehensive as the current one and "did not constitute treatment in the manner that the current one does." CORC's second determination--that Petitioner's 1998 participation in the alcohol and substance abuse treatment program at Auburn Correctional Facility--did not excuse his completion of a similar program at Mid-State, was rationally based because the previous program was only three months long and did not satisfy the institutional requirement of six months' worth of treatment, as in the present program.

Parole: Tide Turning?

Matter of Phillips v. Dennison, Index # 103509/06 (Sup. Ct., NY Co. Sept. 29, 2006) (Friedman, J.)

Matter of Coaxum v. New York State Board of Parole, Index # 2470/2005 (Sup. Ct. Bronx Co., July 26, 2006) (Billings, J.)

Matter of Marciano v. Goord, Index # 102892/02 (Sup. Ct., NY Co., September 8, 2006) (York, J.)

Judicial scrutiny of the Parole Board has, for years, wavered between lax and non-existent. A recent federal class action challenging the Board's handling of the cases of violent offenders, as well as a lengthy "exposé" of the Board's work in the New York Law Journal, however, have brought renewed public attention to the Board.

Several judicial decisions over the past few months suggest that the courts, too, are less likely to tolerate arbitrary and unlawful decision-making by the Board.

In the Matter of Phillips v. Dennison, for instance, Manhattan Supreme Court Justice Marcy Friedman told the Board to release a convicted killer unless it can come up with a valid reason, other than the crimes he committed nearly 40 years ago, for keeping him behind bars.

The Petitioner, William R. Phillips, is a 76-year-old, half blind, diabetic cancer victim and stroke survivor who the Board itself described as a "model prisoner" posing no threat to society, but who has been denied parole four times. The Board found that to release him would "deprecate the seriousness of his offenses and undermine respect for the law."

Justice Friedman didn't buy that.

She held that the Board's decision merely paid "lip service" to the factors it is required to consider under Executive Law § 259-i. In fact, she held, the Board's decision was based on impermissible considerations of penal policy, rather than the law.

She pointed to comments at the Petitioner's parole hearing by Parole Board Chairman Dennison, who noted the Petitioner's unblemished prison record, but then asked, "How many years is enough for taking two lives and trying to kill a third?"

That question, the court wrote, was answered by the sentencing court 31 years ago.

> [T]he board impermissibly based its denial on a non-statutory factor--its opinion as to the proper penalty for the crime--while in effect disregarding both that the Petitioner has achieved a complete rehabilitation and that the statutory scheme required the Board to take this factor into account.

Judge Friedman also said the Board's prior denial of parole to Mr. Phillips, when it claimed that he was a danger to society, "now appears to have been pretextual." She said that both it and the most recent parole denial were based on an improper 'disposition' of the Board to deny parole "rather than a fair consideration of the statutory factors." "[W]here the Parole Board abdicates its responsibility to follow the statute, as here, the court may properly intervene." Ordinarily, when reviewing a determination of the Parole Board, the judiciary's sole remedy is to afford the Petitioner a new hearing. The court did that in this case. But it also went one step further and restrained the Board from considering anything other than Mr. Phillips' behavior since his last parole denial, in 2003. His prison record at least through 2005 is unblemished.

In the Matter of Coaxum v. New York State Board of Parole, the court addressed the case of a female inmate who, like Mr. Phillips, was convicted of murder but who has long been considered a "model inmate." According to the court, she "took full responsibility for her acts," expressed "sincere remorse" and "amassed outstanding accomplishments in prison programs [as well as] unanimous endorsements from prison officials and staff." She had nevertheless been denied parole four times. As with Mr. Phillips, the Board held that, despite her positive accomplishments, her release "at this time would deprecate the seriousness" of her offense.

The court found this reasoning to be both irrational and in violation of the statutes governing the Board's work.

> The Board's decision…accorded no weight and no emphasis whatsoever to any factor apart from the seriousness of Petitioner's offense. By relying solely on [that one] unchangeable factor…and declaring that Petitioner could not had done...anything more or differently to obtain a decision granting her parole, the Board denies her even [the] possibility [of parole].…the Board's unjustifiable, exclusive reliance on the severity of the Petitioner's offense…exceeds its administrative discretion [and] contravenes the statutory scheme.

In the Matter of Marciano v. Goord, the Petitioner, a non-violent offender, had successfully participated in temporary release, received an earned eligibility certificate and all of his merit time, and been granted on open date for parole on his merit date. Shortly prior to his scheduled release date, his wife, with whom he was going through an acrimonious divorce, filed a police complaint asserting that he had threatened to kill her. DOCS learned of the police report nine days prior to the scheduled release date. When the Petitioner returned to his work-release facility, two days later, DOCS placed him in keeplock and told him of his wife's complaint. The next day, his facility Superintendent told him he would be 'going upstate' as a result of his wife's allegations and the Temporary Release Committee suspended his work release pending further investigation. DOCS then circulated a memo stating "Petitioner has violated temporary release rules and will be programmatically removed from the temp rel program. [H]is merit certificate has been cancelled, his merit open date has been cancelled. [P]lease make sure that he is NOT released on [his open date]." The Division of Parole then voided his merit release date on the grounds that he had "incurred a temporary release violation."

The following day, the Petitioner was brought to a Temporary Release Committee ("TRC") hearing. At the hearing, he denied having threatened his wife and told the Committee that she had harassed and threatened him--an allegation which, he said, he could support with witnesses. The TRC did not inform him he could call witnesses. Instead, they made it clear that they were interested only in the police report: "We can go by this paper. We rather go by this paper and see it in black and white than to go by what somebody else is telling us, you know, verbally, verbalizing to us." The next day, the Petitioner was formally removed from work release and transferred to the Oneida Correctional Facility. After his administrative appeals were denied, Petitioner filed an Article 78 proceeding.

The due process clause provides that the state may not take your "life, liberty or property" without "due process of law." Inmates have no constitutional right to be admitted to temporary release, granted merit time, or released on parole. However, once those benefits have granted, they have a "liberty interest" in keeping them. The state must provide "due process" before revoking them.

DOCS' regulations outline the due process rights that courts have held that inmates are entitled to before they can be removed from a temporary release program. They include: (i) "notice of specific reasons at least 24 hours prior to the [TRC] meeting"; and (ii) if the inmate is keeplocked or the charges complex, the "opportunity for an inmate to request an inmate assistant." This is to be followed by a hearing, at which the inmate should have the "opportunity for the inmate to call witnesses"; the "opportunity to reply and produce

evidence," and the inmate is entitled to a written statement "setting forth the decision and the evidence relied on." 7 N.Y.C.R.R. § 1904.2. In addition, courts have held that inmates are entitled to a decision-maker who has not pre-judged the outcome of the hearing. The only time an inmate is not entitled to these rights is if he is removed from the program as a result of being found guilty of misbehavior in a disciplinary hearing. (In that case, due process rights are provided by the disciplinary hearing.)

The court found that the Petitioner in this case had been granted none of those rights. He received no notice of the TRC hearing; he was not told that he was entitled to an employee assistant; he was not told that he could produce evidence or witnesses on his behalf; the Committee refused to consider any evidence other than the police report; and the Committee had clearly made its decision prior to the hearing.

In addition, the court noted, the one piece of evidence upon which the committee did rely--the police report of the Petitioner's wife's accusation--was hearsay. The court noted that neither the police nor DOCS had placed enough confidence in the wife's hearsay allegations to support either the Petitioner's arrest or a Misbehavior Report.

In brief, the court found that DOCS' removal of the Petitioner from the Temporary Release Program was irrational and improper and in violation of his right to due process of law.

The court's lengthy decision is worth reading. It describes in detail how each of the other decisions made by DOCS and Parole--first, to strip the Petitioner of his merit time and his temporary release and then rescind his parole--violated the rules and regulations of the DOCS and Parole, as well as the Petitioner's due process rights.

Here is one excerpt from the court's conclusion:

> [W]ithout any regard for petitioner's due process rights or respondents'own regulations, respondents stripped petitioner of every expectation of liberty he had earned, not because there was credible evidence that he had done something wrong but because they feared that "if anything happens to somebody, the question always comes up later, wasn't he supposed to be locked up 24/7"? (TRC hearing transcript, p 24, ll 18-20). Thus, to avoid even the slightest chance of bad press, respondents punished petitioner for a crime he had not yet committed (much like society's solution to the crime problem in Spielberg's 2002 futuristic nightmare, "Minority Report"), and indeed might never commit….
>
> Respondents' statutory and regulatory discretionary powers do not allow them to charge, convict and sentence someone who has been assiduously following all their rules and trying to rehabilitate himself, scarcely paying lip service to due process and statutory guidelines, based solely on self interest and an allegation which their own investigation showed could not be substantiated…petitioner was not arrested nor charged with any misconduct… He was also not given a full and fair hearing on those possible charges. Nevertheless, he was punished for them, as well as for the future behavior claimed by his wife. The concept is simple – if respondents believed petitioner had committed a disciplinary infraction, he should have been punished in accordance with the procedures set forth in the regulations (7 N.Y.C.R.R. Subchapter A). If he did not do anything wrong, he should not have been punished at all.

Practice pointer: *Where you file a challenge to a parole denial may have something to do with your likelihood of success. The majority of inmates in DOCS' custody were convicted in one of the five boroughs of New York City. Their parole hearings, however, typically occur in an upstate county, where most prisons are located. The courts in those departments have historically given short shrift to challenges to parole denials.*

New York's Civil Procedure Law and Rules (the "CPLR") § 506(b) states that an Article 78 proceeding--the kind of proceeding one would use to challenge a denial of parole--may be brought"in any county within the judicial district where the respondent made the determination complained of…or where the material events otherwise took place, or where the principal office of the respondent is located…."

In the past, inmates have usually brought challenges to parole denials in the county in which their prison was located (i.e., "where the respondent [the Parole Board] made the determination complained of") or in Albany County ("where the principal office of the respondent is"). Upstate courts, however, have shown little inclination to challenge the Parole Board.

In consequence, many inmates have recently attempted to file their parole challenges in the counties in which they were sentenced and convicted--frequently, the Bronx, Brooklyn, Queens, or Manhattan. The judges in those counties are perceived to be more sympathetic to parole appeals. (All three of the cases reported above, for instance, were decided by downstate judges.) Inmates have been arguing that the CPLR permits them to file their parole appeals in the County in which they were sentenced because the sentence was a "material event" related to their parole hearings.

That argument received a boost in the Coaxum case, above. There, the court held that "petitioner's offense, its impact on the victim, petitioner's guilty plea, and the court's sentence" were all "material events" related to the denial of parole and that therefore venue in Bronx County, rather than Westchester (where the hearing had been held) or Albany, was appropriate.

Did the strategic choice of the inmate in Coaxum to file her case in the Bronx, rather than Westchester (where she was incarcerated) or Albany (where Parole has its main office) make the difference in this case? That is hard to know. But it is good to know you have the choice.

Pro Se Practice*: *Inmates' Right to Provide Legal Assistance to One-Another

Almost thirty years ago, the Supreme Court held that inmates have a constitutional right to access the courts. To effectuate that right, prison authorities are required to assist inmates in the preparation and filing of meaningful legal papers. They can do this by either providing prisoners with adequate law libraries or providing them with adequate assistance from persons trained in the law. Bounds v. Smith 430 U.S. 817, 97 S. Ct. 1491 (1977). The states are also allowed, however, to impose "reasonable restrictions and restraints" in carrying out that obligation. Johnson v. Avery, 393 U.S. 483 (1969).

New York relies largely on its law library system to meet its "Bounds" obligations. DOCS' Directives require that the law libraries be staffed with a sufficient number of inmate

employees, trained in legal research, to assist inmates in using the law library. Inmates may request legal assistance from either a trained law library clerk or from any other inmate in the same facility. Such requests are generally made to the Law Library Supervisor. The Supervisor may approve the request "if the security, order or discipline of the facility would not be endangered thereby." DOCS Directive # 4483(iii)(e).

DOCS' disciplinary rules prohibit the provision of legal assistance "without prior approval" of the superintendent or his designee, and state that no payment of any type can be exchanged for legal assistance. 7 N.Y.C.R.R. § 270.2 (Disciplinary Rule 180.17).

Case law has revealed gray areas in the "prior approval" requirement. In People ex rel. Hicks v. James, 571 N.Y.S.2d 367 (Sup. Ct., Erie Ct., 1991)(Doyle, J), for instance, an inmate law clerk had been providing assistance to two inmates while at his previous correctional facility. After being transferred to the new correctional facility, he continued to assist these inmates. When discovered, he was charged with providing unauthorized legal assistance. The court held that the superintendent of the correctional facility has the authority to grant or deny permission to an inmate to become a law clerk, and once this permission has been granted, it cannot be withdrawn without a rational basis or in an arbitrary and capricious manner. The transfer of the inmate in this case to another facility did not provide grounds for terminating his authorization to provide legal assistance to the two other inmates and he had no notice that his transfer would terminate his right to provide assistance. If the inmates were required to seek legal assistance from another legal assistant, this would have amounted to starting the litigation all over again.

In Daniels v. Goord, 819 N.Y.S.2d 205 (3d Dep't 2006), by contrast, an inmate also claimed to have received approval to provide legal assistance to a certain inmate at his prior facility. The court found that his failure to receive authorization by the new facility to continue this assistance constituted a violation of the "unauthorized assistance" rule.

Thus, the safer policy is to obtain approval of the superintendent or law library supervisor of your current facility before providing legal assistance.

Caselaw has also divided over whether merely possessing another inmate's legal papers, without authority to provide legal assistance, constitutes a violation of the rule against providing unauthorized legal assistance. In both Hendrix v. Williams, 684 N.Y.S.2d 730 (3d Dep't 1998), and Hynes v. Girdich, 781 N.Y.S.2d 710 (3d Dep't 2004), the court ruled that mere possession of another inmate's legal papers, without more, did not establish that the inmate had provided unauthorized legal assistance. In Morris v. O'Keefe, 659 N.Y.S.2d 521 (3d Dep't 1997), however, an inmate law clerk who had been terminated from his position was found in possession of legal paperwork belonging to other inmates. He argued that his mere possession of the other inmates' legal papers was not evidence that he provided legal assistance to them after his termination. The court held that his removal of the documents, as well as his statements at the hearing, provided sufficient evidence of his intent to continue providing legal services, constituting an attempt punishable to the same extent as the completed offense.

Law clerks should be careful about obtaining proper approval to remove legal materials from the law library. In Cliff v. Tedford, 694 N.Y.S.2d 182 (3d Dep't 1999), an inmate law clerk was charged with providing unauthorized legal assistance after the law library supervisor alleged that he only had permission to remove from the law library six of the eight files found in his cell. The Petitioner

testified that he was authorized to provide assistance to all eight inmates and completed a log sheet indicating as much. The court found that he might have violated a rule prohibiting removal of a file from the law library without completing the proper form but there was insufficient evidence he was unauthorized to give legal assistance. In Deoleo v. Selsky, 814 N.Y.S.2d 798 (3d Dep't 2006), an inmate law clerk, who had been removed from his job due to a disciplinary matter, was directed to delete all legal materials from his computer disk. He was later found to have legal documentation on the disk and was charged with unauthorized legal assistance. The court, as in Cliff, found insufficient evidence that he had violated the rule against providing unauthorized legal assistance; however, he was found guilty of disobeying a direct order.

Evidence that an inmate has accepted compensation for the provision of legal services will almost always lead to disciplinary measures. In Tate v. Senkowski, 627 N.Y.S.2d 100 (3d Dep't 1995), correction officers found an agreement between the Petitioner and another inmate for the Petitioner to provide the inmate with legal services in return for payment in the form of commissary supplies, as well as further correspondence in which the Petitioner asked for more money for his services. The Petitioner argued that because no legal assistance was actually rendered and no money was paid, there was no evidence of the unauthorized provision of legal assistance. The court held that the letter proved his attempt to provide unauthorized legal services, which was punishable to the same extent as the completed offense.

In LaBounty v. Goord, 664 N.Y.S.2d 890 (3d Dep't 1997), a letter to the Petitioner was confiscated due to its suspicious nature: The return address was that of another inmate. In the envelope was a money order for a hundred dollars and a note from the other inmate's sister thanking him for the legal services he provided for her brother. Although the Petitioner claimed that the assistance he provided was for a class action suit for which both inmates were a party, he conceded that he had not received any permission to work on the other inmate's behalf. He was found guilty of both unauthorized legal assistance and receiving compensation for those services.

In Martin v. Goord, 675 N.Y.S.2d 435 (3d Dep't 1998), an inmate received an envelope with a check payable to him and a list of inmates at the correctional facility. An officer testified that the inmate admitted that the money was for legal services that he performed for inmates on the list. Although the inmate testified to the contrary, the court found that there was substantial evidence of his guilt. In Faison v. Senkowski, 679 N.Y.S.2d 480 (3d Dep't 1998), a letter confirming an agreement to do legal work for compensation, as well as a receipt for the payment, were found in the Petitioner's cell. The court found this sufficient evidence of providing legal services for compensation.

The mere acceptance of a payment for legal services, even if the payment was not solicited, may result in disciplinary measures. In Curro v. Goord, 819 N.Y.S.2d 135 (3d Dep't 2006), an inmate's mother sent the Petitioner a money order for one hundred dollars as compensation for providing legal assistance to her son. At the hearing, testimony indicated that the Petitioner did not solicit the payment and that the inmate's mother was not aware that the Petitioner could not receive compensation. Upon receipt of the funds, moreover, the Petitioner arranged to have a third party reimburse the mother. The court found, however, that even if the situation was an honest mistake, because the inmate had not removed the money that was deposited in his account or notify the authorities, he could be found guilty of accepting funds in compensation for his services.

A Letter From Susan Johnson, Executive Director, Prisoners' Legal Services

30 Years of PLS: A Look Back…and Forward

Thirty years ago, in July 1976, the first PLS offices opened. The Attica uprising had occurred five years earlier. The McKay Commission Report had been issued four years earlier, chastising the state police and prison authorities for their poor planning and quick embrace of lethal methods to subdue the prisoners, It criticized then-Governor Rockefeller for his failure to visit Attica before ordering the armed assault and concluded that inmates needed a safety valve--a mechanism to air grievances, a window to the outside, a voice. The Correction Law had been amended one year earlier, establishing a grievance mechanism for inmates. Although permitting inmates to grieve the conditions of their confinement was an important step forward, it was July 1976 when prisoners across New York State were finally given a voice.

A quick search on the Westlaw internet database shows that, since our inception, PLS has been involved in over 500 reported cases: 160 Federal cases and over 340 State cases. However, that number does not begin to do justice to all we have accomplished over the past thirty years. Many of our successes cannot be found on Westlaw. Those successes are all but hidden in hundreds of unreported lower court decisions, significant state and federal settlements, and tens of thousands of hours of administrative advocacy that resulted in drastic improvements in the conditions of confinement for prisoners throughout New York State.

In the 1980s and 90s, PLS litigated literally hundreds of disciplinary cases in state courts. We secured numerous due process rights, including: the right to be present at one's hearing; to call witnesses; to receive notice of the charges; to have the disposition supported by substantial evidence; to obtain a credibility and reliability assessment of confidential information; to have one's mental health considered as a mitigating or justifying factor; to present a defense; and the right to expungement of the charges.

In federal courts, our presence was also made known. We filed numerous excessive force claims resulting in over one million dollars in damages. Yet, money damages were not all we achieved in these cases. Because of our work, there are now cameras in most, if not all, maximum security prisons. DOCS' rules mandate that hand-held cameras be used to videotape the use of force by correctional staff on an inmate during a strip frisk search. After any use-of-force incident, inmates are examined by medical staff and officers, who are then required to complete use of force forms detailing what force was used and how the inmate's injuries occurred. Our work in this area has begun to open the door to a closed prison society.

We filed cases challenging general conditions of confinement which have resulted in significant changes being implemented by the prison administration. In a challenge to conditions for inmates in Protective Custody, we forced DOCS to implement changes that provided more out-of-cell time, communal eating, better recreation, and access to programing. Our challenge also resulted in a seven-year monitoring period regarding those changes. At Attica, we challenged living conditions and treatment of prisoners in the SHU, including inadequate medical and mental health care, and issues surrounding food, exercise, sanitation, religion, and the adequacy of the existing law library. At Bayview Correctional, a women's facility, we sought improvements in the physical plant, the law library, medical care [there was no gynecologist

on staff], and clothing. Both cases resulted in detailed settlements and monitoring periods approved by the courts.

Our litigation stopped DOCS' plan to house inmates with AIDS in a separate dormitory. We successfully mounted a First Amendment challenge to the Department's refusal to allow inmates to receive a PLS report on conditions at Attica: the Second Circuit ensured that inmates could read the report by printing it as an appendix to its opinion. Our freedom of religion challenges have resulted in Rastifarians being exempt for DOCS' initial haircut requirement, Muslim inmates being provided a religious diet, and Native Americans being allowed to practice their religion in prison. We were also successful on a freedom-of-association challenge to DOCS' blanket exclusion of prisoners with HIV/AIDS from the Family Reunion Program.

We challenged DOCS' policy of isolating and refusing to provide medical treatment to an inmate who suffered the loss of much of his face from a self-inflicted gunshot wound. After filing the case, DOCS agreed to provide our client with appropriate plastic surgery and a psychiatric evaluation. We also challenged the lack of a diabetic diet, our challenge resulted in such diets being made available in all prisons. We challenged DOCS' failure to provide adequate medical treatment to a prisoner infected with AIDS. The case settled with DOCS agreeing to establish a comprehensive treatment plan for our client.

In numerous cases, we challenged DOCS' treatment of mentally-ill inmates. Our many cases, including Huggins, Eng, Tomasulo, Langley, Anderson, and now the DAI case, have all brought about significant improvements in the way mentally-ill inmates are treated in our prisons.

Even in cases where are claims were ultimately dismissed, the filing of the litigation alone was the impetus for change. For example, Alston v. Coughlin, a class action challenging conditions of confinement at Fishkill, resulted in the prison administration taking measures to: provide private attorney visit rooms; reduce excessive noise levels; post fire evacuation routes in Spanish and English; ensure food was warm when it was served; construct a new hospital ward; erect a visiting room trailer so that visitors would not be forced to stand in the rain or snow waiting to be processed; provide supervision in underground tunnels where numerous stabbings had occurred; and install a new heating system.

We have succeeded in obtaining damages for our clients who have been wrongfully confined in solitary confinement or administrative segregation. We have handled cases involving immigration, guardianship, sentencing, parole, the exhaustion requirement of the PLRA, and numerous statutory interpretation cases, including the recent statutory issues surrounding the interpretation of the Rockefeller drug laws. We have also litigated Freedom of Information Law ("FOIL") cases that resulted in inmates in SHU being entitled to access to the tape of their own disciplinary proceedings, that gave PLS access to Use of Force Reports and other investigative information, and thus helped to peel away the secrecy behind the prison walls.

Our advocacy has resulted in similar dramatic results. In any given year, we average saving our clients over 16 years of jail time. Our litigation and advocacy just over this past year has resulted in having 53 years of good time returned to our clients and expunging over 54 years of SHU time. This work was done while, at the same time, we responded to over 10,000 requests for assistance.

We have withstood budget cuts, and massive increases in the number of prisons and prisoners. We have withstood layoffs and even being shut down for a year. Our size has ranged from being as large as having six offices with over 70 employees to being as small as having

no offices and two people lobbying the legislature to put us back in the budget. We have existed with a ratio of one attorney for every 400 inmates to what we have today, which is one attorney for every 5,000 inmates. We have had our trials and tribulations, and yet, our record demonstrates that although we have never been able to meet all the demands of prisoners for legal services, we have made a significant mark on the history of prisoners' rights in New York State.

Our litigation, together with our tenacious advocacy, has resulted in significant changes in the way New York prisons are run. We have and continue to demand transparency in the operation of our prisons. It is because of our work that: most disciplinary hearings held in New York State prisons today afford inmates their due process rights; there is less guard brutality in our prisons; many mentally-ill inmates who would have otherwise been languishing in solitary confinement are receiving treatment for their mental illness; prisoners have been able to practice their religion, receive reading materials, visit with their family members, and adhere to their sincere religious beliefs in both their diet, appearance and lifestyle.

New York State prisons are safer and more humane today than they were in 1976 when our work began, and because of our work, prisoners in New York State now have a voice.

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