Pro Se

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GOOD NEWS / BAD NEWS

Governor Cuts Calling Costs

Seven days into his first term, Governor Eliot Spitzer issued an executive order which will sharply cut the cost of a collect call from a prison.

The governor's move, which will become effective on April 1, 2007, came one day before the State was scheduled to defend its prison telephone rates before the Court of Appeals in a lawsuit brought by inmates and their family members.

At issue was a sur-charge that the State had imposed on collect calls made from prisons. Advocates for inmates and their family members had charged that the surcharge raised the rates of prison telephone calls by as much as 300 percent over that paid by regular consumers. Under the State's contract with MCI, some 60 percent of that excess revenue was kicked back to the Department of Correctional Services ("DOCS"). DOCS, in turn, used the extra revenue to pay for special security systems associated with the prison phone system, some aspects of prison health care, and a variety of other programs, such as the family reunion program. Under Governor Pataki, DOCS had long defended the charges as a reasonable way to raise revenue to provide services that it is not obligated to provide

…article continued on page 3

Governor Signs Civil Commitment Bill

The New York State Legislature has passed a sweeping new law aimed at sex offenders which would permit the civil commitment of such offenders long after their terms of incarceration have ended. Governor Spitzer has announced that he will sign the bill.

The new law comes in response to growing public pressure for a civil commitment bill and after the Court of Appeals, late last year, ruled that outgoing Gov. Pataki's efforts to civilly confine

…article continued on page 3

Also Inside…

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PRO SE KEEPS GROWING

A Letter From Susan Johnson, Executive Director

With the beginning of the new year comes a new volume of *Pro Se*. But, as with any project, there are costs and expenses and as *Pro Se* expands, the costs associated with production continue to grow. In 2002, the New York State Bar Foundation provided PLS with a three-year grant of $15,000.00 per year to help offset the production and distribution costs of *Pro Se*. That grant helped tremendously and we are eternally grateful to the New York State Bar for its generosity. In addition, for the second year in a row, we have received a donation from the Tompkins County Bar Association for *Pro Se*. I would like to personally thank members of the Tompkins County Bar Association for their continued generosity and support.

The history of *Pro Se*, and of Prisoners' Legal Services, has been interesting, to say the least. As an organization, PLS has suffered through tumultuous times, but we have remained steady with respect to our commitment to publishing *Pro Se*. The first issue of *Pro Se* was published in November 1984. It was six pages long. Our goal was to produce four issues annually, and for the most part, we met that goal. As word got out and new readers wrote to us asking to be added to our mailing list, each issue saw an increase in length and distribution. By January 1986, *Pro Se* had jumped to 12 pages in length and over 2,000 prisoners in New York State were on our mailing list.

December 1987 brought about computer production of *Pro Se*. The ease of editing resulted in the Winter 1988 issue of *Pro Se* leaping to 16 pages. At the same time, the first PWA ("Persons With AIDS") Support Newsletter was produced as an insert to *Pro Se* to respond to the increasing concerns over HIV/AIDS in our prisons. We were on a roll--providing crucial information concerning legal rights and remedies to prisoners across New York State. We did not foresee the possible demise of *Pro Se*, PWA, or PLS. The 1994 election of Governor Pataki opened our eyes.

The cover of the 1995 Winter issue of *Pro Se* read: "This Could Be The Final Issue of *Pro Se*." Prior to 1995, PLS had been in the Governor's budget for 17 years, but in 1995, Governor Pataki erased PLS from the Executive Budget. We were stunned. Thanks to the efforts of the New York State Legislature, our funding was later restored. In the next edition of *Pro Se*, the cover read, "We Have Survived." That issue was 24 pages long! Although Winter 1995 was not our last issue, the title foreshadowed dark days ahead for PLS. In 1998, Governor Pataki not only failed to include PLS in the Executive budget but he vetoed the state legislature's allocation of 4.75 million dollars for PLS. The 1998 Winter issue of *Pro Se* was a goodbye issue. The 1998 Summer issue of PWA Support, which had become a separate newsletter, also noted it may be the last issue, and it indeed was.

PLS was closed and remained closed for over a year. In October 1999, PLS was restored to the state budget by the Legislature, but coming back was not that easy. We had lost many experienced staff, had to find office space, buy equipment, and interview and hire new staff. It was not until December 2002 that PLS had the staff and resources to begin producing *Pro Se* again.

Since that time, we have stood by our commitment to producing an informative, educational newsletter that includes descriptions of recent cases, updates on recent legislation, articles on areas affecting inmates' rights, and discussions of DOCS' policy changes. We have also stood by our commitment to providing our newsletter to anyone who requests it free of charge. In demonstration of that commitment, our most recent issue of *Pro Se*, Volume 16 No. 4; December 2006, consisted of 32 pages and was sent to over 4,000 prisoners in New York State and 290 outside agencies. In addition, approximately 600 issues of *Pro Se* were sent to various prison law libraries across the state.

Governor Cuts Calling Costs

…continued from page 1

and which benefit family members. The arrangement is estimated to have earned about $16 million in 2005.

Prisoners and their families had argued, however, that that arrangement amounted to an unlegislated tax imposed solely on the family members of inmates who depend on inmate phone calls to stay in contact with their incarcerated loved ones. They argued that the practice essentially charged family members for their relative's incarceration.

"[DOCS was] taking advantage of the high price to cover the cost of programs and services that the prison system should be providing in any case," said Robert Gangi, the Executive Director of the Correctional Association of New York, a non-profit group that monitors conditions in state prisons.

According to the pending lawsuit, the exorbitant phone rates forced some family members to choose between maintaining their relationship with a loved one or putting food on the table. One plaintiff, for example, Ivey Walton, is 71 years old and disabled, and cannot travel the 350 miles to see her son and nephew in the Clinton Correctional Facility. But, she says, she also cannot afford to receive their phone calls. A bill of 66 minutes worth of calls cost her $54.30.

Under the changes ordered by Governor Spitzer, the State will no longer share in revenue generated from the prison phone calls, and the cost of a 20-minute call would fall to about $3.00 from its current price of about $6.20.

Prisoner advocates praised Governor Spitzer for making the change and, in particular, for doing so without abolishing any of the prison programs for which the fees helped pay. Those programs will now be paid for out of the State's general revenues.

Governor Signs Civic Commitment Bill

…continued from page 1

sex offenders under then-existing laws were illegal.

The new law, however, goes well beyond providing for civil commitment. It is, instead, being characterized as "a comprehensive program for the management of persons convicted of felony sex offenses." In addition to its civil commitment provisions, it creates: a new felony category of "Sexually Motivated Felony;" requires that all sex offenders receive determinate (*i.e.*, "flat") sentences of incarceration; greatly expands the applicable periods of post-release supervision; calls for intensive parole supervision; requires that sex offenders receive in-prison treatment; and creates a new "Office of Sex Offender Management" to coordinate and implement its various provisions.

The following is a summary of the bill's contents.

Civil Commitment

Eligibility: An offender would be eligible for civil commitment if he or she: was convicted and is serving a sentence for a felony sex offense and "suffers from a mental abnormality which results in a serious difficulty controlling illegal sexual behavior."

Initial Screening: Qualifying offenders who are nearing the completion of their sentences would be screened for possible civil commitment by a case review panel at least 120 days before their anticipated release. The case review panel will be established by the Commissioner of the Office of Mental Health and will consist of appropriate mental health professionals with experience in sex offender evaluation and treatment. If the case review panel determines that the offender is an eligible sex offender who suffers from a mental

abnormality, the Attorney General may file a petition and initiate civil commitment proceedings.

Initial Commitment Petition: The Attorney General would be authorized to bring a civil commitment petition before the court in the county in which the offender is located. The offender can designate the county of conviction for hearings and trial.

Counsel: Indigent offenders subject to potential civil commitment proceedings would be represented by the Mental Hygiene Legal Service ("MHLS").

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

Psychiatric Examination: The court can appoint two psychiatric examiners to evaluate the offender, one chosen by the Attorney General and one chosen by the offender. Each psychiatric examiner will provide a report to the court and provide testimony in the civil commitment proceeding. All psychiatric examiners shall be free to exercise independent, professional judgment.

Trial: An offender would be subject to civil commitment if found unanimously by a jury by clear and convincing evidence to suffer from a mental abnormality and to be likely to commit a sex offense if not confined or supervised. Following the jury verdict, the judge will determine whether the person should be confined in a secure facility or placed on a regimen of strict and intensive supervision and treatment.

Placement: Offenders would be confined in facilities operated by the State Office of Mental Health. The statute would require the strict separation of civilly-committed sexual offenders from persons with mental disabilities who are housed in mental hygiene facilities.

Court Review: Confined offenders could seek to have their status reviewed by the courts each year. In the event a court finds that confinement is no longer warranted, the person would be released to a regimen of strict and intensive supervision and treatment.

Mandatory In-Prison Sex Offender Treatment

Sex offender treatment will be made available to all inmates serving a sentence for a felony sex offense. Inmates will be assessed for the need for treatment upon admission to prison and treatment must continue for at least six months. Treatment programs will be operated in conjunction with the State Office of Mental Health. Such programs must meet treatment standards set by the new Office of Sex Offender Management created by the legislation.

Parole Supervision

Offenders who are not civilly committed may be ordered to a regimen of strict and intensive parole supervision, under the supervision of the Division of Parole and must comply with conditions set by the court. Conditions of supervision may include: electronic monitoring and global positioning satellite tracking; polygraph monitoring; and residence restrictions. Persons on supervision who violate the terms of supervision could be returned to confinement.

Tougher Prison Sentences and Extended Periods of Supervision

All future offenders convicted of a felony sex offense, including the new "sexually motivated felony," will receive a determinate (*i.e.*, non-parole eligible) sentence and will be subject to greatly increased periods of post-release supervision, some up to 25 years.

NEWS AND BRIEFS

Supreme Court Eases Limits on Prison Suits

Twelve years ago, Congress passed the "Prison Litigation Reform Act" (the "PLRA"), a law with one simple purpose: to make it harder for prisoners to file lawsuits challenging illegal or unconstitutional prison conditions.

Among its provisions, the PLRA requires inmates to exhaust available administrative remedies before filing a suit concerning prison conditions in federal court, putting their ability to file a federal lawsuit at the mercy of short deadlines and complicated procedures common to many prison grievance processes.

The PLRA has had its intended effect. It has dramatically limited the number of prison conditions suits that are successfully litigated in the federal courts.

Some federal courts, however, went beyond the plain text of the PLRA and imposed additional procedural rules to make it even harder for inmates to file a lawsuit.

The Sixth Circuit Court of Appeals, which covers the states of Ohio, Kentucky, Tennessee, and Michigan, was particularly notorious for imposing procedural rules on inmate lawsuits that went above and beyond the strict requirements of the PLRA.

In a series of decisions over the last decade, it held:

- ☆ that inmates filing lawsuits about prison conditions had to submit proof that they had exhausted their administrative remedies before the lawsuit could even be served (in contrast to the ordinary federal rule that places the burden on the defendant of showing, as a defense, that the plaintiff had failed to meet an exhaustion requirement); and
- ☆ that prisoners could not sue anyone they had not first named during the internal grievance process; and
- ☆ that a lawsuit that contained a mixture of exhausted and unexhausted claims should be dismissed in its entirety rather than be allowed to proceed on the exhausted claims.

This past January, in a case called Jones v. Bock, 127 S.Ct. 910, the Supreme Court reversed the Sixth Circuit rules, holding that they overstepped the requirements of the PLRA.

In its opinion, written by Chief Justice Roberts, the Court stated that it was sympathetic with the reasons for the Sixth Circuit's approach. It noted that prisoners' lawsuits accounted for nearly 10 percent of all civil cases filed in federal court. "Most of these cases," it wrote, "have no merit; many are frivolous."

Nevertheless, the Court wrote, "our legal system…remains committed to guaranteeing that prisoner claims of illegal conduct by their custodians are fairly handled according to law. The challenge lies in ensuring that the flood of non-meritorious claims does not submerge and effectively preclude consideration of the allegations with merit."

The barriers imposed on prisoner lawsuits by the Sixth Circuit, the Court found, "cannot fairly be viewed as a correct interpretation of the PLRA." Unless Congress explicitly provided otherwise, the Supreme Court explained, courts should apply to prisoners' lawsuits the same procedural rules they apply to any other lawsuit and "should generally not depart from the usual practice under the federal rules on the basis of perceived policy concerns."

The ruling was greeted with relief by advocates for prisoners' rights, who said the lower court's approach had threatened to make it all but impossible for an inmate not represented by a lawyer to navigate the procedural hurdles to get a case accepted for a hearing.

"A loss would have been devastating," said Elizabeth Alexander, Director of the National Prison Project of the American Civil Liberties Union, which filed a brief in support of three Michigan inmates whose separate cases were consolidated by the court for a single decision.

Dismissed by the United States Court of Appeals for the Sixth Circuit, their complaints about their treatment are now reinstated.

This decision marks the first time in a half-dozen rulings on the PLRA that the Supreme Court has not adopted the interpretation least favorable to inmates.

Practice pointer: *The rules adopted by the Sixth Circuit had been rejected by the Second Circuit, the federal appeals court that covers cases brought in New York. Thus, this decision, while a relief, does not affect the rules that had been applied to the federal lawsuits of New York inmates.*

Appellate Court Holds Challenge to Parole Denial Must Be Brought Either Where Inmate is Incarcerated or in Which Parole Has Central Office*; *Cannot Be Brought Where Sentence Was Imposed

Vigilante v. Dennison, 827 N.Y.S.2d 285 (2d Dep't 2007)

An inmate challenging a parole denial faces an uphill road, as New York State courts are notoriously deferential to the decisions of the Parole Board.

That road may have just become a little bit steeper as a result of the decision of the Appellate Division, Second Department, to reject an inmate's effort to file his parole appeal in Kings County, the county in which he was convicted. In doing so, the court appears to have ended the efforts of many inmates to file their parole appeals in the county in which they were convicted, rather than in the county in which they are incarcerated.

Those efforts had their roots in the perception of many that downstate judges, especially New York City judges, were more likely to be sympathetic to parole appeals than were upstate judges.

At issue were the rules for "venue," the place where a lawsuit can be brought. Challenges to a parole denial are brought in an Article 78 proceeding. The correct "venue" for an Article 78 proceeding is determined by Civil Procedure Law and Rules § 506(b), which states:

> [An article 78 proceeding] shall be commenced in any county within the judicial district where the respondent made the determination complained of or refused to perform the duty specifically enjoined upon him by law, or where the proceedings were brought or taken in the course of which the matter sought to be restrained originated, *or where the material events otherwise took place,* or where the principal office of the respondent is located.

Because the Parole Board often relies heavily on the instant offense in denying parole, many inmates argued that the underlying crime and sentence was a "material event" with respect to the parole decision. Therefore, the inmates argued, they should be allowed to file their parole challenges in the judicial district in which the crime was committed or where the sentence was imposed, *e.g.*, in many cases, New York City.

Lower courts had gone back and forth on the question. In one recent case, a court concluded that the Division of Parole could not "reasonably argue" that the crime and sentence were *not* "material events" with respect to its parole decisions. In another, a court asserted that Parole's motion to move a case from Brooklyn to Albany constituted a "naked attempt at forum-shopping"--an effort to shift the case away from "downstate justices" because they are seen as "more receptive" to arguments that parole was being improperly denied.

Other courts, however, have rejected inmates' venue arguments. One court wrote, for instance, that although the *nature* of the crime is always material to the parole determination, its *location* has "little connection to the determination at hand--whether parole is appropriate." "A contrary conclusion," wrote the court, "would give prisoners with lengthy criminal histories a wide choice of venue options simply because their convictions were material

factors that the [Parole Board] considered in assessing whether they should be returned to society."

In Vigilante, the Appellate Division sided with the no-venue courts. The court ruled, with little discussion, "We reject the Petitioner's contention…that…venue is proper [in the judicial district in which he was sentenced] because his…crime and sentence were 'material events' leading to the subject parole determination, within the meaning of CPLR 506(b)." To the contrary, the court continued, "the relevant material event was the decision-making process leading to the determination under review."

***Practice pointer**: Under Vigilante, a challenge to a parole denial can be brought in the judicial district in which you are incarcerated or in the district which includes Albany, where Parole has its central office.*

New York's 59 counties are divided into twelve judicial districts ("JDs") as follows:

- *1st JD - Manhattan;*
- *2d JD - Kings and Richmond (Brooklyn and Staten Island);*
- *3d JD - Albany, Columbia, Greene, Rensselaer, Schoharie, Sullivan, Ulster;*
- *4th JD - Clinton, Essex, Franklin, Fulton, Hamilton, Montgomery, St. Lawrence, Saratoga, Schenectady, Warren, Washington;*
- *5th JD – Herkimer, Jefferson, Lewis, Oneida, Onondaga, Oswego;*
- *6th JD - Broome, Chemung, Chenango, Cortland, Delaware, Madison, Ostego, Schuyler, Tioga, Tompkins;*
- *7th JD - Cayuga Livingston, Monroe, Ontario, Seneca, Steuben, Wayne, Yates;*
- *8th JD - Allegany, Cattaraugus, Chautauqua, Erie, Genesee, Niagara, Orleans, Wyoming;*
- *9th JD - Dutchess, Orange, Putnam, Rockland, Westchester;*
- *10th JD - Nassau and Suffolk;*
- *11th JD - Queens; and*
- *12th JD - the Bronx.*

Thus, if you are incarcerated in Clinton Correctional Facility, in Clinton County, you could bring a challenge to a parole denial in any of the Counties within the 4th Judicial District, as that district includes Clinton County, or in any of the Counties within the 3d Judicial District, as that district includes Albany (where Parole has its central office). Under Vigilante, however, you would not be able to bring your lawsuit in, for example, the 1st Judicial District, solely on the grounds that you were sentenced there.

*The Vigilante case was decided by the Second Department of the State's Appellate Division. It is therefore **controlling** authority for the courts within that department, including those of Richmond, Kings, Queens, Nassau, Suffolk, Westchester, Dutchess, Orange, Rockland, and Putnam Counties. Vigilante may not be the last word on this issue, as the other Appellate Departments, particularly the First Department, with jurisdiction over Manhattan and the Bronx, have yet to address the parole venue questions. Case law, however, suggests that lower courts, no matter where they are located, are required to follow Vigilante unless or until their Appellate Departments or the Court of Appeals rule to the contrary. See Mountain View Coach Lines, Inc. v. Storms, 476 N.Y.S.2d 918 (2d Dep't 1984).*

The Petitioner in Vigilante was represented by the Legal Aid Society of New York.

Second and Third Departments Adopt Holding in People v. Bautista in Determining What It Means To Be Eligible for A-II Drug Offender Re-Sentencing

In December 2004, New York's Legislature, responding to strong criticism of the Rockefeller Drug Laws, passed legislation alleviating some of the harshest sentences for non-violent drug offenses. This legislation is commonly referred to as the "Rockefeller Drug Law Reform Act" (the "DLRA") and it was passed in two incremental steps. The first step was enacted in January 2005, and among other reforms, it allowed for the re-sentencing of all incarcerated A-I drug offenders. The second step, enacted on October 29, 2005, allowed for the re-sentencing of A-II drug offenders. However, with A-II offenders, the Legislature placed various limits on eligibility for re-sentencing, including limiting eligibility to any person in state custody "who is more than twelve months from being an eligible inmate as that term is defined in Correction Law § 851(2)." Correction Law § 851(2), which defines eligibility for temporary release programs, states that an "eligible inmate" is one who is "eligible for release on parole" *or* who "will become eligible for release on parole or conditional release" within two years.

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

Several trial courts were divided over this question, some holding that inmates were eligible for re-sentencing as long as they were more than *one year* from parole eligibility, while others held that inmates were not eligible for re-sentencing unless they were more than *three years* from parole eligibility. The issue finally reached an appellate court in 2006, when the Appellate Division, First Department decided People v. Bautista, 26 A.D.3d 230, 809 N.Y.S.2d 62 (1st Dep't 2006). In Bautista, the First Department held that when read together, the first 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 defendant in People v. Bautista appealed this decision to the Court of Appeals, hoping that New York's highest court would reverse and declare that an A-II offender need be only one year from parole eligibility to be eligible for re-sentencing. Initially, the Court of Appeals agreed to hear the appeal. But instead of resolving the issue, the Court of Appeals side-stepped it, dismissed the appeal, and declared that it lacked the statutory authority to review the re-sentencing decisions of the lower courts. *See* People v. Bautista, 7 N.Y.3d 838, 823 N.Y.S.2d 754 (2006). This means that the First Department's decision in Bautista stands--and A-II offenders must be more than three years from their parole eligibility dates to be eligible for re-sentencing.

Since the First Department's Bautista decision, two other Appellate Divisions have issued decisions agreeing that A-II offenders must be at least three years from parole to be eligible for DLRA re-sentencing. In People v. Thomas, 826 N.Y.S.2d 456 (3d Dep't 2006), the Appellate Division, Third Department held that "in order to qualify for re-sentencing under the 2005 DLRA, a class A-II felony drug offender must not be eligible for parole within three years." Similarly, in People v. Parris, 828 N.Y.S.2d 429 (2d Dep't 2006), the Appellate Division, Second Department held that an inmate who is less than three years from parole eligibility is not eligible to be re-sentenced under the DLRA. Thus, A-II offenders in the First, Second, and Third Departments must be at least three years from parole eligibility to qualify for re-sentencing under the DLRA.

The Appellate Division, Fourth Department has not yet issued a decision on the issue. Nonetheless,

trial courts in the Fourth Department will likely follow the rulings in Bautista, Thomas, and Parris. For example, in People v. Mills, 14 Misc.3d 1220(A), 2007 WL 173840 (Onondaga Co. Ct., 2007), the Onondaga County Court set aside the defendant's re-sentencing under the DLRA. The defendant had served almost twelve years of a three-to-life sentence. The court had initially re-sentenced the Defendant under the DLRA, but upon the prosecution's motion, set aside the re-sentencing in accordance with Bautista, Thomas, and Parris because the defendant had been less than three years from parole eligibility at the time of re-sentencing. The court did so begrudgingly, however, stating the following:

> This Court is of the opinion that while it is the responsibility of the judge to interpret the law as written and not rewrite the law, *it is clear that the State Legislature, by this confusing legislation, has not only failed their sworn duties in that respect but has more fundamentally failed to implement the Legislature's express intent of ameliorating long A-II drug sentences by providing more humane and realistic sentences or A-II drug felons....* Certainly if the Legislature's intent was to ameliorate long A-II drug sentences it would seem that Mr. Mills and defendants similarly situated should have been included within the re-sentencing provision of the Drug Law Reform Act.

Id. at 5 (emphasis added).

Thus, absent legislative action, it appears that courts throughout New York will adhere to the First Department's decision in Bautista, despite the fact that this decision fails to fully implement the Legislature's intent (as the Mills court showed). For that reason, on February 14, 2007, PLS submitted written testimony to a joint Senate and Assembly Committee on the Public Protection Budget, asking, among other things, that the Legislature heed the call of the Mills court--and others--to amend the DLRA to allow for re-sentencing of inmates less than three years from parole eligibility. PLS will continue to update inmates on any changes in the law in future editions of *Pro Se*.

Federal Cases

Medical Care; Deliberate Indifference: Sergeant Not Liable For Ignoring Plaintiff's Injuries

Bell v. Arnone, 455 F.Supp.2d 232 (W.D.N.Y. 2006)

Plaintiff Bell sued Sergeant Arnone for "deliberate indifference" to his serious medical needs, in violation of the Eighth Amendment. He alleged that he was in a strip cell and cut his wrist with a razor. He stated that when Sergeant Arnone, who was supervising the Special Housing Unit (the "SHU") at the time, was informed of what had happened, she came and spoke to him, and then told an officer, "I don't care if he cut himself; we are going to move him [to a different cell] behind a shield," and that she provided him with no medical attention. On being moved to the new cell, he alleged, he cut himself again, requiring sutures in his arms, neck, and right leg.

The Plaintiff's medical records showed that he received treatment on October 31, 2004 for self-inflicted lacerations, which were sutured; that he was moved to SHU later that day; that he received a medical visit on November 1st; that he again cut himself on November 3rd; that he was again treated and the mental health unit was contacted. On November 5, 2004, the medical records stated that the Plaintiff "began to open [his] previous wounds in his arms [and] refused medical treatment." The Plaintiff was given a form to acknowledge his refusal of treatment but he refused to sign it. There was no indication in the medical records that Sergeant Arnone was present during any of these events.

The court dismissed the Plaintiff's complaint, finding that his allegations could not support a claim that Sergeant Arnone had violated his constitutional rights.

***Practice pointer**: In order to prevail in federal court in a medical care case, an inmate must show that the defendant was "deliberately indifferent" to his "serious" medical needs. A medical need is considered "serious" if it presents "'a condition of urgency' that may result in 'degeneration' or 'extreme pain.'" A defendant is "deliberately indifferent" to an inmate's serious medical condition if he or she knew or should have known about the need for care and either recklessly or intentionally failed to provide it.*

Here, the court found that the Plaintiff's medical records showed that he had received medical treatment for his self-inflicted injuries, and that on one occasion he refused to accept it. The medical record also contained no evidence that Sergeant Arnone had ignored his injuries.

Disciplinary Due Process: Inmate Has No Due Process Right To Avoid Illegal SHU Confinement, Where Confinement Was Not "Atypical and Significant"

Anderson v. Beaver, 455 F.Supp.2d 228 (W.D.N.Y. 2006)

The Plaintiff alleged that he had served two concurrent, 60-day SHU sentences at Riverview and been released back to the general population before being transferred to Orleans. When he arrived at Orleans, however, the Defendants mistakenly determined that he had 60 outstanding SHU days left to serve and returned him to SHU. When he brought the error to their attention, the Defendants refused to correct it. He sued DOCS' officials, claiming that his second 60-day SHU confinement constituted a violation of his constitutional right to due process of law.

The court dismissed his claim, holding that an inmate has no due process right to avoid being placed in SHU unless the conditions in SHU are "atypical and significant" with respect to the ordinary conditions of prison life. Since the Plaintiff in this case made no allegation that his 60-day SHU sentence was "atypical and significant," his claim would have to be dismissed, even if the sentence had been imposed in error.

***Practice pointer**: The federal constitution gives all persons the right to "due process of law" before the state may take their "liberty." This means that the state cannot deprive anyone of their liberty arbitrarily: it must have a good reason for doing so and it must provide the person whose liberty it seeks to restrain with an opportunity to contest its reasoning.*

For persons who are already incarcerated, however--and who have therefore already lost a good deal of their liberty--the Supreme Court has held that a transfer from a general prison population to a SHU does not constitute a loss of "liberty" unless the conditions in SHU are "atypical and significant" with respect to the "ordinary conditions of prison life." Sandin v. Conner, 515 U.S. 472 (1995).

In New York, the Second Circuit Court of Appeals has held that a SHU sentence of 101 days or more will generally be considered "atypical and significant," but that a SHU sentence less than that will only be considered atypical and significant "if the conditions [in SHU] were more severe than the normal SHU conditions." Palmer v. Richards, 364 F.3d 60, 66 (2d Cir. 2004).

In this case, the Plaintiff served only 60 days in SHU and he never argued that his time in SHU was more severe than normal SHU conditions were. Thus, the court found, he had no "liberty interest" against being placed in SHU for that period and, hence, no constitutional right to due process of law.

State Cases

Disciplinary Cases

Substantial Evidence: Evidence Supported Drug Charge; Court Declines to Weigh Competing Evidence

Excell v. Goord, 824 N.Y.S.2d 575 (3d Dep't. 2006)

The Petitioner was found guilty of possession of a controlled substance after a Correction Officer who was pat frisking him saw him throw two marijuana cigarettes to the grounds (NIK drug-testing confirmed that the cigarettes were marijuana). The Petitioner argued that the information in the Misbehavior Report, the supporting memorandum, and the Correction Officer's hearing testimony demonstrated that the Officer's testimony was falsified. The court rejected this claim. Any inconsistency between the Officer's testimony and other documents he had prepared merely created a credibility issue for the Hearing Officer to resolve.

Practice pointer*: New York courts provide only minimal review of the evidence presented in a prison disciplinary hearing. They ask only whether there was "substantial evidence" of guilt. "Substantial evidence" has been defined as: "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." 300 Gramatan Avenue Associates v. State Division of Human Rights, 408 N.Y.S.2d 54 (1978). If the evidence at the hearing meets that test, the court will uphold the Hearing Officer's decision (barring some significant procedural error). The court will not weigh competing evidence. It views that as the job of the Hearing Officer. The court's job is merely to ensure that there was sufficient evidence in the record to support the Hearing Officer's conclusion. Thus, the mere fact that there may have been inconsistencies in the evidence will not be sufficient to defeat a finding of guilt if the evidence that the Hearing Officer relied upon met the "substantial evidence" test.*

Substantial Evidence: Evidence Did Not Support Contraband Charge

Ganz v. Selsky, 823 N.Y.S.2d 582 (3d Dep't, 2006)

As part of a block cleaning in the Petitioner's facility, all the inmates' furniture was removed from their cubes and placed in a common area. After the floors were stripped and waxed, the inmates moved the furniture back into the cubes. The Petitioner resided alone in a double-bunk cube. The Petitioner's locked locker was returned to his cube along with an empty locker. The empty lockers were not numbered or labeled so as to ensure that they were returned to the same cubes from which they were removed. The day after the cleanup, Correction Officers searching the Petitioner's cube found a razor blade taped underneath the empty locker. As a result, the Petitioner was charged and found guilty of possessing a weapon.

The court found the charge was not supported by substantial evidence. "While a strong inference of possession arises as to items found in an inmate's cell or an area over which an inmate has control, even if the inmate did not have exclusive control over the area, that inference is not absolute." Here, the Petitioner denied knowledge of the weapon, all 60 inmates in the Petitioner's block had access to the empty locker while it was out of his cube, the locker was only moved into his cube the night before the weapon was found, there is no proof in the record that the lockers were searched prior to their return to the cubes, and there is no proof that the unmarked empty locker returned to the Petitioner was the same locker removed from his cube. "Under the circumstances," the court noted, "the weapon could have been attached to the locker prior to or when it was moved into the Petitioner's cube."

***Practice pointer**: DOCS is permitted to draw reasonable inferences from evidence that it finds of inmate misconduct. Where the evidence consists of contraband found in an inmate's cell, the inference that the contraband belongs to the resident of the cell has been described as "virtually irresistible." Matter of Hernandez v. Le Fevre, 541 N.Y.S.2d 868, lv. denied 549 N.Y.S.2d 960. It arises out of the inmate's control over the cell and the things in it. A similar inference extends to such things as an inmate's locker. Matter of Trudo v. Le Fevre, 504 N.Y.S.2d 68, or an inmate's coat at a work station that was within his control. Matter of Mabery v. Coughlin, 564 N.Y.S.2d 553, lv. denied 570 N.Y.S.2d 488.*

However, as this case illustrates, the inference that contraband found in an area usually controlled by a particular inmate belongs to that inmate, while strong, is not absolute. It can be rebutted by evidence that the place where the contraband was found was not under the inmate's control. For example, courts have dismissed charges of misconduct against an inmate arising from contraband found in an unlocked storage area which was separate and apart from the inmate's locker. Trudo, supra. Courts have also rejected DOCS' claims that a gun, found in a package which was addressed to an inmate, brought into the facility by a visitor, constituted sufficient evidence that the inmate tried to bring it in (Matter of Sanchez v. Coughlin, 518 N.Y.S.2d 456), and that a knife found in the leg of a bed in a cell, into which an inmate had just been transferred several day before, was the responsibility of the inmate. Matter of Varela v. Coughlin, 610 N.Y.S.2d 103).

In this case, the fact that there was no way of saying if the empty locker belonged to the Petitioner prior to the floor cleaning, and the fact that all inmates has access to the locker immediately before it was placed in the Petitioner's cube, were sufficient to rebut the inference that the razor belonged to him. (Compare this case with Warren v. Goord, 824 N.Y.S.2d 496 [3d Dep't 2006], another case decided last Fall. In that case, three weapons, made from state pens and sharpened pieces of flat metal, were found in an inmate's cell. There, the court held that the fact that items were retrieved from the inmate's cell constituted sufficient evidence that they belonged to him, notwithstanding his denials.)

Substantial Evidence: Inmate Exonerated of Stolen Property Charge

Garafolo v. Cunningham, 825 N.Y.S.2d 562 (3d Dep't 2006)

The Petitioner worked as a facilitator for a transitional services program. As part of his duties, he designed charts to illustrate concepts taught in the program. He took the charts back and forth with him every day that he taught the program. In a memo sent to the program supervisor, he announced that he would be resigning from the program at the end of the program cycle and he stated that he would be taking his charts with him. In a reply memo, the supervisor acknowledged the Petitioner's resignation but made no mention of the charts. The next day, the Petitioner went to teach one of the remaining classes in the program cycle. As he was returning to his cell with his charts, he was stopped by Correction Officers and eventually charged in a Tier II proceeding with possessing stolen property. A Hearing Officer upheld the charges.

The court reversed the charges. "Based on petitioner's unrefuted testimony," the court held, "the record lacks substantial evidence that petitioner intended to possess stolen property…or that the property was even stolen."

Hearing Officer Bias: Fact that Hearing Officer Was Defendant in the Petitioner's Federal Case Does Not Establish Bias

Matter of Burgess v. Goord, 832 N.Y.S.2d 312 (3d Dep't 2006)

The Petitioner was charged with unauthorized possession of a controlled substance and smuggling after he allegedly mailed a quantity of heroin to the Governor and the United States Department of Justice Drug Enforcement Administration in an alleged effort to expose a drug-selling operation within the correctional facility involving Correction Officers. Following a Tier III disciplinary hearing, he was found guilty and, after his administrative appeal was affirmed, filed an Article 78 proceeding.

The court found that the Petitioner's acknowledgment that he wrote the letters and enclosed the heroin, together with the testimony of the Correction Officer who investigated the incident and authored the Misbehavior Report, provided substantial evidence to support the determination of guilt, regardless of his motivation in sending the letters. The court rejected the Petitioner's contention that the Hearing Officer was precluded from presiding at the disciplinary hearing because he was named by the Petitioner as a Defendant in a pending federal lawsuit. "The record establishes that petitioner was afforded a fair and impartial hearing and that the outcome of the hearing flowed from the evidence presented, not from any alleged bias on the part of the Hearing Officer."

Practice pointer: *Many corrections officials serving as hearing officers at disciplinary hearings have a strong institutional bias against inmates, as virtually any inmate who has been the subject of a disciplinary hearing can testify. Proving bias as a legal matter, however, is difficult. New York courts have held that it is not enough to show that the Hearing Officer was rude or asked leading questions or interrupted or intimidated the inmate or his witnesses. Instead, you must show that the outcome of the hearing was the result of the Hearing Officer's bias. Put another way, you must prove that the sole reason you were convicted was the Hearing Officer's bias--because the evidence otherwise did not support the charges.*

For this reason, courts generally treat Hearing Officer bias claims as if they were substantial evidence claims in disguise. They will only reverse the hearing if the evidence was insufficient to support the charge. They will not reverse a hearing merely because a Hearing Officer was rude, or even unprofessional, if the evidence otherwise supports the charge, and the Hearing Officer committed no significant procedural errors.

Drug Testing; False Positives; Adequacy of Record: Failure to Preserve Testimony of Drug Test Manufacturer Found Insufficient Basis for Invalidating Hearing

Ruiz v. Goord, 825 N.Y.S.2d 811 (3d Dep't 2006)

An inmate's assertion that the medications that he was taking could have caused a false positive in a urinalysis test were rebutted by testimony from a test manufacturer's representative. On review, the court noted that the test representative's answers could not be heard on the tape of the disciplinary hearing. The court, found, however, that this did not prevent a meaningful review of the hearing. The substance of the test representative's answers could be gleaned from the Hearing Officer's replies. The Petitioner's contention that the test representative's answers did not exclude the possibility that a mix of his medications could result in false positive, the court found, was purely speculative. The Misbehavior Report, the test results, and the testimony of the test representative that none of the Petitioner's medications would cause false positive for cocaine provided "substantial evidence" of the Petitioner's guilt.

Notice*: *Misbehavior Report Not Required to Specify Incident Date if It Otherwise Adequately Apprises Inmate of Charged Conduct

Blake v. Goord, 825 N.Y.S.2d 326 (3d Dep't 2006)
Profitt v. Goord, 824 N.Y.S.2d 493 (3d Dep't 2006)

The right to adequate notice of the charges is an important part of the due process protections afforded inmates in a prison disciplinary hearing. It allows the charged inmate to "[know] what he is accused of doing so that he can prepare a defense to those charges and not be made to explain away vague or conclusory charges set out in a misbehavior report." Taylor v. Rodriguez, 238 F.3d at 192-93 (2d Cir. 2002).

To that end, a Misbehavior Report must set out "at least some 'specific facts' underlying the accusation." Id.

A Misbehavior Report need not, however, set out all the facts. The Constitution does not require Misbehavior Reports "that painstakingly detail all facts relevant to the date, place, and manner of charged inmate misconduct." They need only contain "sufficient factual specificity to permit a reasonable person to understand what conduct is at issue so that he may identify relevant evidence and present a defense."

Discrepancies in a Misbehavior Report will generally be excused where it contains sufficient details to provide sufficient adequate notice of the conduct at issue. For example, in Quinones v. Ricks, 732 N.Y.S.2d 275, 276 (2d Dep't 2001), the court held that the Report's failure to include the specific date on which the misbehavior allegedly occurred was excused, where the report otherwise provided sufficient details to permit the inmate to fashion a defense. Other cases have held that where a Misbehavior Report is the result of a lengthy investigation of continuing conduct, it is sufficient for the report to note the date on which the investigation was completed, rather than the date of the charged acts, so long as it otherwise provides reasonable notice of what was at issue. *See, for example*, Jackson v. Smith, 785 N.Y.S.2d 603 (3d Dep't 2004); Carini v. Mann, 654 N.Y.S.2d 484 (3d Dep't 1997).

Two cases decided this past fall follow the lead of Jackson and Carini.

In Blake v. Goord, an inmate was charged with extortion, solicitation, and conspiracy to introduce narcotics into the facility. In the space on the Misbehavior Report reserved for a statement of the incident date, the charging officer had written the date on which he finished his investigation, rather than the date on which any misbehavior allegedly occurred. The court, citing Jackson and Carini, rejected the Petitioner's claim that this was improper, "given that petitioner's misconduct was a continuing violation."

In Profitt v. Goord, the Petitioner was charged with possessing a cell phone and charging other inmates for permission to use it. The court again found that it was appropriate for the Misbehavior Report to use the date the investigation was completed as the incident date, because the Report "otherwise adequately described the nature of the charged misconduct to provide petitioner with an opportunity to prepare a defense."

Res Judicata*: *DOCS Not Prohibited From Filing "Penal Law Offense" Charge Against Inmate After Criminal Conviction, Notwithstanding Previous Discipline for Same Incident

Matter of Josey v. Goord, 826 N.Y.S.2d 479 (3d Dep't 2006)

Res judicata is a Latin term which means "the matter has already been decided." It is also a legal doctrine which prohibits the re-litigation of the same case twice. It is intended to protect principles of basic fairness: Once a matter has been decided the first time, a party should not expect to have to re-litigate the same matter again.

Res judicata is not absolute, however. Exceptions exist in cases in which one party claims to have new evidence that was not available at the

time the initial determination was made and which would change the outcome of the result, or in which the law changes in such a way that, if the matter were re-litigated under the new law, the results would be different.

In this case, the Petitioner was charged with various disciplinary charges, including assault and violent conduct, after stabbing another inmate, ultimately causing his death. The Hearing Officer sentenced him to 24 months in SHU. DOCS then charged the Petitioner again, this time making it clear in the Misbehavior Report that the inmate had caused the victim's death. He was found guilty a second time and this time sentenced to 120 months in SHU, modified to 60 months. This hearing was administratively reversed, however, on the grounds of *res judicata*: The same incident had been considered during the previous hearing and no newly-acquired evidence had been introduced.

The Petitioner was subsequently convicted of criminal charges related to the incident. DOCS then charged him with violating the disciplinary rule prohibiting penal law violations. That rule, 7 N.Y.C.R.R. § 270[A], states:

> Any Penal Law offense may be referred to law enforcement agencies for prosecution through the courts. In addition, departmental sanctions may be imposed based upon a criminal conviction.

The Petitioner was again found guilty. This time, he was sentenced to 72 months in SHU.

He appealed, arguing that the third administrative proceeding, like the second, was barred by *res judicata*.

The court disagreed. It noted that a Penal Law offense charge could not have been lodged against the Petitioner in the earlier proceedings because the charge could not be sustained without the criminal conviction. Thus, in this case, the court held, the criminal conviction constituted "new evidence," putting the case within the exception to the *res judicata* doctrine. "[T]he determination of guilt arising out of the third disciplinary hearing cannot be said to have been barred by *res judicata* as it was premised upon new evidence, namely, petitioner's criminal conviction." As a result, the Petitioner's disciplinary hearing was affirmed.

The inmate in this case was represented by Prisoners' Legal Services of New York. PLS has asked the Court of Appeals for leave to appeal.

Timeliness: Fourteen Day Rule Not Mandatory

Matter of Bilbrew v. Goord, 822 N.Y.S.2d 339 (3d Dep't 2006)

The Petitioner was charged with disciplinary violations after allegedly shouting obscenities and swinging a food transport cart at the facility's head cook because he was angry at the cook for removing his chess set and workout gloves from the kitchen area. After being found guilty of some of the charges, he appealed, arguing that the hearing was not completed in a timely fashion because it had not been completed within 14 days of the writing of the Misbehavior Report and an extension request was not filed until the 15th day. The court, however, rejected his claim, noting: "[T]he time limits set forth in 7 N.Y.C.R.R. 251-5.1 are directory, not mandatory, and where the record fails to disclose any prejudice as a result of the delay it is not necessary to reverse the hearing."

Practice pointer*: Seven N.Y.C.R.R. 251 - 5.1(b) states that "a disciplinary hearing or*

superintendent's hearing must be completed within 14 days following the writing of the misbehavior report unless otherwise authorized by the commissioner or his designee." The fourteen days do not count the day on which the misbehavior report was written. Harris v. Goord, *702 N.Y.S.2d 676 (3d Dep't 2000).*

In the late 1980s and early 1990s, case law held that the "fourteen day rule" was mandatory, not discretionary, and any violation of it would result in an automatic reversal of a disciplinary hearing. See, for example, Hicks v. Scully, *552 N.Y.S.2d 684 (2d Dep't 1990), (where a second extension was obtained after the first had expired, the court required reversal of the hearing);* Matter of Wysinger v. Scully, *540 N.Y.S.2d 744 (2d Dep't 1989);* Matter of Brito v. Sullivan, *530 N.Y.S.2d 28 (2d Dep't 1980); and* Matter of Anderson v. Coughlin, *600 N.Y.S.2d 539 (4th Dep't 1993).*

In recent years, courts have backed away from that rule. As this case suggests, they now routinely hold that the fourteen day rule is merely "directory," not mandatory. A violation of the rule will not result in automatic reversal of the disciplinary hearing unless the petitioner can show that he was "prejudiced" by the violation. "Prejudice" might occur if, for instance, the delay results in the inability to call a crucial witness because the witness was paroled, died, or etc.

Witnesses: Hearing Officer Improperly Prevented Inmate From Presenting Witnesses and Evidence

Caldwell v. Goord, 827 N.Y.S.2d 709 (3d Dep't 2006)

The Petitioner was alleged to have used other inmates' telephone PIN numbers to make phone calls during which he solicited drugs. At his disciplinary hearing, he requested as witnesses the inmates whose PIN numbers he was alleged to have used to show that he did not make the phone calls in question. He also requested documentary evidence showing the location of the phone from which each call was made, in order to show that he did not have access to those areas of the prison at the times the calls were placed, the existence of which was established by the testimony of an investigator for the Inspector General's office. The Hearing Officer denied these requests.

The Hearing Officer also summarily denied the Petitioner's request to call as a witness the woman who was caught smuggling drugs into the facility and who gave a written statement to investigators implicating the Petitioner in the conspiracy. The Petitioner, the court noted, could have used her testimony to "attack her credibility and question her about her written statement which was part of the hearing evidence."

The various violations of the Petitioner's right to call witnesses and present evidence, the court found, required reversal of the hearing. With respect to the Hearing Officer's denial of the Petitioner's visitor as a witness, the court held: "In addition to violating regulations by failing to give a written statement of the reasons for denial of this witness (*See* 7 N.Y.C.R.R. 253.5[a]), the hearing officer's outright denial of petitioner's request for this material witness without a stated good-faith basis constitutes a constitutional violation."

Parole

Hearing Reversed Where Board Failed to Consider Sentencing Minutes

Standley v. New York State Div. of Parole, 825 N.Y.S.2d 568 (3d Dep't 2006)

One of the several factors that the Parole Board is required to consider when deciding whether to grant or deny parole are any recommendations by the sentencing court. *See* Executive Law § 259-i(1)(a). Such recommendations, if they exist, are

typically contained in the "sentencing minutes," *i.e.*, the stenographic transcript of everything that was said at the sentencing hearing.

Criminal Procedure Law § 380.70 requires sentencing courts to deliver "a certified copy of the…minutes of the sentencing proceeding…to the person in charge of the institution to which the defendant has been delivered." As one court recently noted, the purpose of this rule is "presumably [that the minutes] be placed in the inmate's permanent file so as to be available for [among other things] parole hearings." McLaurin v. New York State Bd. of Parole, 812 N.Y.S.2d 122 (2d Dep't 2006).

Despite this rule, DOCS frequently does not have a copy of inmates' sentencing minutes in their files and, as a result, the Parole Board often does not consider them.

In the past several years, courts have begun to reverse Parole Board decisions denying parole where the record revealed that the Board had failed to consider the sentencing minutes.

In Edwards v. Travis, 758 N.Y.S.2d 121 (2d Dep't 2003), for example, the court reversed a Parole Board decision denying parole where the sentencing minutes revealed that the sentencing court did not intend that the Petitioner serve more than the minimum term, and the Board conceded that it had not considered the minutes.

In McLaurin, id., the court found that where the sentencing court had made statements at sentencing that amounted to a recommendation, "the Board was required to obtain and consider those minutes prior to making its determination." Its failure to do so required reversal of the hearing.

In Standley, the court considered a case in which the Petitioner's request for parole had been denied three times. Each time, the Board failed to consider the Petitioner's sentencing minutes. The court held that the "the Board's [repeated] failure to comply with the provisions of Executive Law § 259-i which mandate consideration of the sentencing minutes and recommendations of the sentencing court in reviewing applications for parole release" required that the third hearing be reversed as well. It ordered the Board to obtain the Petitioner's sentencing minutes within 30 days and conduct a new parole hearing within 45 days.

***Practice pointer**: The Parole Board has complained that it is the sentencing court's responsibility to forward the sentencing minutes to DOCS. If the sentencing court fails to do so, they argue, there is nothing it can do to remedy the situation.*

In both Edwards and McLaurin, Id., it appears that the sentencing minutes were readily available and the Board simply neglected to review them. In addition, in both those cases, the minutes revealed that the sentencing courts had made recommendations which were relevant to the Board's decision-making.

Will courts be equally willing to reverse parole decisions if Parole argues that the sentencing minutes are simply unobtainable, or where there is nothing in the record to suggest that the minutes contain recommendations from the sentencing court?

The decision in Standley suggests that they might. Nothing in that decision suggests that either the sentencing minutes were easily available to the Board or that they contained relevant recommendations. The court simply ordered the Board to obtain them.

Sentence Computation

Inmate Not Entitled to "Parole" Jail Time for Time Spent in Custody on New Charge

Blake v. Travis, 824 N.Y.S.2d 573 (3d Dep't 2006)

The Petitioner, serving a term of six to 18 years in prison, was paroled in 2000, but declared delinquent as of October 24, 2001, the date he was arrested for a new crime. On his delinquency date, he owed seven years, two months and 10 days to his prior sentence. On January 29, 2004, he was sentenced to a new term of 2¼ to 4½ years,

consecutive to his prior sentence. He was returned to DOCS on February 6, 2004.

DOCS credited his new sentence with 836 days of jail time, covering the period between October 24, 2001--the date of his arrest on the new charges--and February 6, 2004--the date he was received by DOCS.

The Petitioner argued that the 836 days should also have been credited to his prior sentence, as parole jail time. The court disagreed. It held: "Petitioner was not entitled to parole jail time credit for the time period after his prior sentences were interrupted, for to do so would, in effect, be to grant him double credit for such time. As petitioner's release dates were correctly calculated, the petition was properly dismissed."

Practice pointer: *Inmates are often confused about the difference between "jail time" and "parole jail time."*

The former is time served in a local facility on a new criminal charge. It is credited to any sentence which arises from the new charge. See Penal Law § 70.30(3).

The latter is time served in a local facility based on a parole detainer or warrant. It is credited to time owed on the sentence which was interrupted by the parole violation. See Penal Law § 70.40(3).

The confusion arises where, as here, a parolee is arrested on a new charge, which results in a new sentence, while at the same time, his parole is revoked, interrupting the prior sentence. Is the time served in the local facility "jail time," to be credited to the new sentence? or "parole jail time," to be credited to the old sentence? or both?

According to Penal Law § 70.40(3), priority goes to the new sentence. It does this by stating that if an arrest which has resulted in a parole detainer also results in a new sentence, only that portion of the jail time which exceeds the length of the new sentence can be considered "parole jail time" (credited to the prior sentence). Otherwise, it is, by default, "jail time" (credited to the new sentence).

This is to the inmates' advantage. A new sentence will almost always be consecutive to time owed on a prior sentence. Thus, the time owed will be added to the maximum term of the new sentence, creating an "aggregate" maximum term. If the time served in the local facility were considered "parole jail time," it would only be applied to the old sentence. It would therefore only reduce the maximum term of the aggregate sentence. By crediting the time to the new sentence, both the maximum and minimum terms of the new sentence are reduced.

Courts have repeatedly held, however, as does this court, that the time served in a local facility under these circumstances cannot be credited to ***both*** *sentences.*

Inmate, Accidentally Held 3½ Years Beyond Parole Eligibility Date, Has No Remedy After Being Returned to DOCS as a Parole Violator

Fletcher v. Goord, 826 N.Y.S.2d 807 (3d Dep't 2006)

The Petitioner was sentenced to 15 years to life as a persistent violent felon in 1990. He was paroled at his first Board appearance in March 2002, but returned to prison on a parole violation in 2003. Upon returning, he learned that DOCS had miscalculated his parole eligibility date by 3½ years: It had given him a March 2002, P.E. date, rather than the October 1998 parole eligibility (PE) date, which, had his sentence been properly computed, he should have received. He sued DOCS. The court agreed that DOCS had miscalculated his earliest parole eligibility date and that the miscalculation had resulted in the Petitioner not being considered for parole until 3½ years later than he should have been. However, the court held, since DOCS had since corrected the error, and since the Petitioner had already served his minimum term, been released, and returned to prison on a parole revocation, there was no relief it could grant him: the case was "moot."

Practice pointer*: A matter is considered "moot" if further legal proceedings with regard to*

it can have no effect, or events have "placed it beyond the reach of the law"--meaning, the matter has been deprived of any practical significance and has been rendered purely academic. Here, the matter was moot because the Petitioner had already served the miscalculated minimum term and been returned to DOCS on a parole violation. The error thus no longer affected him.

Pro Se Practice

LITIGATING IN THE COURT OF CLAIMS

Bad things often happen in prison. Sometimes, there is nothing you can do about them. Sometimes, however, you have a remedy, either through administrative channels or through the courts. This article takes a look at a one legal remedy: seeking redress in the Court of Claims. It addresses the kinds of cases you can bring in the Court of Claims and the differences between the Court of Claims and other courts, especially the federal courts. It then takes a detailed look at several recent Court of Claims cases to illustrate some of the kinds of cases you may bring there, what you must prove in order to prevail, and some of the substantive issues that may arise.

This article does not explain *procedure* in the Court of Claims. For more information on <u>how</u> to bring an action in the Court of Claims, request Prisoners Legal Services' "Court of Claims" form memo. One procedural note should be mentioned up front, however. That is, that actions in the Court of Claims must be initiated within a <u>short</u> period of time--typically, *within 90 days of the incident about which you want to sue*. So if you have been injured by some wrongful action of the State and think you might want to sue in the Court of Claims, remember that you must act promptly.

What is the Court of Claims?

The Court of Claims is a New York State court, the sole purpose of which is to hear claims brought against the State of New York. It is the <u>only</u> *state* court available if you are seeking <u>money</u> <u>damages</u> against the State of New York or certain state agencies (such as DOCS). You cannot sue the State of New York for money damages in any other state court, nor can you sue any officer or employee of DOCS for money damages in any other state court.

The Court of Claims does not have jurisdiction over claims brought against individuals. Claims based on alleged improper conduct of the Department of Correctional Services or its employees are considered claims against the State, and the named defendant should be "The State of New York."

What Kinds of Claims Can Be Heard in the Court of Claims?

The Court of Claims has jurisdiction over claims in which you allege that you were injured as a result of the negligent or intentional wrongdoing of state employees. Such claims are commonly called "torts." They include, but are not limited to, claims of personal injury as a result of unsafe conditions in prisons, assault by corrections staff, a failure to protect you from assault by other inmates, and medical negligence and malpractice. The Court also has jurisdiction over claims that your property was negligently or intentionally lost or damaged by state employees.

What Kinds of Claims <u>Cannot</u> Be Heard in the Court of Claims?

The Court of Claims is a court of *limited jurisdiction*. It can only hear claims that your rights under *state law* were violated by *state action*. It

cannot generally hear claims that your rights under federal law, such as the federal constitution, were violated. Nor can it hear claims that you were injured by the actions of county, town, city, or village governments, agencies, or employees. (For example, the Court of Claims has no jurisdiction over claims that arise at city or county correctional facilities, such as Rikers Island or any county jail.)

What Relief Is Available In the Court of Claims?

The only relief available from the Court of Claims is money damages to compensate you for a loss or injury that you suffered as a result of wrongful conduct. For example, if you have a case in which a DOCS' employee has lost your property, the Court will award you the value of the property. If you have a case where you have suffered permanent injury, the Court will attempt to compensate you based on a determination of how the injury will affect your ability to earn a living in the future and enjoy life. The Court can also award damages for temporary or permanent pain and suffering.

What Relief <u>Is</u> <u>Not</u> Available in the Court of Claims?

The Court of Claims cannot award punitive damages, attorneys' fees, or injunctive relief. (Punitive damages are awarded to punish wrongdoers for their conduct and discourage them from engaging in similar conduct in the future. An injunction is an order requiring the defendant to take or stop taking a particular action. Attorneys' fees are the fees an attorney might charge to represent you.) So, for example, if you have a case in which you want to sue to force DOCS to take a specific action (*e.g.*, provide certain medical treatment, admit you into CASAT, recompute your sentence, or reverse your disciplinary hearing), you cannot obtain relief in the Court of Claims. You will have to seek redress in either the State Supreme Court (typically, via an Article 78 proceeding) or in federal court.

What Are Some Differences Between the Court of Claims and Federal Court?

Federal courts can only hear claims arising under federal law, such as the U.S. Constitution. There is often some overlap between "tort" claims, which could be litigated in the Court of Claims, and constitutional claims, which could be litigated in federal court. For example, a claim that you were assaulted by correction officers could be brought in the Court of Claims (as the "tort" of "assault and battery"). It could also be brought in federal court (as a claim that the officers' conduct violated your constitutional right to be free of "cruel and unusual punishment.")

Meeting the standards of a federal constitutional claim, however, is frequently more difficult than meeting the standards of a similar claim in the Court of Claims.

For example, in order to prevail in a medical claim in the Court of Claims, you would need to prove that the care you received was either negligent or constituted medical malpractice (*i.e.*, that it constituted a significant departure from accepted practice). To prevail on the same facts in federal court, you would have to show that the defendants were "deliberately indifferent to a serious medical need" and their care thus constituted "cruel and unusual punishment." Moreover, in many other situations, there is no overlap between state and federal claims. Federal courts, for example, have no jurisdiction over a claim that is based on pure negligence (such as, for instance, a claim that you were injured because DOCS' officials negligently failed to maintain the basketball court, or negligently lost your property). This is because there is no constitutional protection against pure negligence.

There are also significant procedural differences between the Court of Claims and federal court. Each has their pluses and minuses.

Some procedural advantages of federal court over the Court of Claims include: a longer Statute of Limitations (three years in most cases, as opposed to 90 days in the Court of Claims); jury trials (in the Court of Claims, all claims are decided by judges); and the availability of punitive damages, injunctive relief, and attorneys' fees.

Some disadvantages of federal court over the Court of Claims include: procedural rules, such as the PLRA, designed to make inmate litigation more difficult [among other things, the PLRA requires inmates to exhaust available administrative remedies prior to filing in federal court; with the exception of personal property claims, the Court of Claims has no exhaustion requirement]; and a higher standard of proof for most kinds of claims.

Some Recent Cases

Below we present a detailed discussion of six recent cases decided in the Court of Claims. The cases cover three of the most common types of cases litigated in the Court of Claims: negligence, medical malpractice, and inmate-on-inmate assaults. They should give you an idea of the kinds of cases that succeed in the Court of Claims, the kinds of cases that fail, and what the difference between them is.

Negligence: Unsuccessful Case
Levin v. State of New York, 820 N.Y.S.2d 626 (2d Dep't 2006)

The Claimant fell out of his upper bunk at Arthur Kill Correctional Facility and fractured his finger. Medical staff ordered that he be moved to a lower bunk. The order was not implemented. The Claimant fell out of his upper bunk again. This time he suffered serious injuries. He sued, alleging that the State was negligent in failing to transfer him to a lower bunk immediately after he had fallen off a top bunk.

At trial, the Claimant claimed that he fell from his bunk because he was suffering from a seizure. There is a written policy at Arthur Kill that inmates who suffer from seizures be assigned to bottom bunks. The physician who treated the Claimant's finger, however, testified that he did not believe that the Claimant suffered from seizures. He stated that he only ordered the transfer to the bottom bunk because he believed the Claimant would have difficulty reaching the top bunk with a fractured finger. He testified that, in his opinion, it was not necessary that the Claimant be "immediately" transferred to a bottom bunk.

Based on this testimony, the majority of the court found the Claimant's case unpersuasive. It held that the lower court had "properly determined that it was not reasonably foreseeable that the Claimant would again fall out of an upper bunk so soon after his first accident, or that he would fall as a consequence of a seizure." Therefore, the court held, the failure of the State to immediately transfer the Claimant to a lower bunk did not breach any duty that the state owed to the Claimant.

A dissenting judge noted that the Claimant's medical records specifically indicated that, at the time he fell out of the top bunk, he was taking an anti-seizure medication and had reported to medical staff that he had had a seizure. Further, the dissent noted, although the treating physician had testified at trial that the bottom bunk order was based solely on his concern about the Claimant being able to reach the top bunk with a fractured finger, the Claimant's medical records specifically indicated that he had claimed to have injured his finger "after having a seizure." Moreover, it was another doctor who had issued the lower bunk order. Consequently, the dissent argued, the court should not have credited the treating physician's contention that the Claimant's finger was the sole basis for the lower bunk order or that it was not urgent.

In the dissent's view, the duty of the employees at Arthur Kill to implement the lower bunk order was a *ministerial* duty. That is, it involved no

discretion. An order concerning the Claimant's care had been issued by medical staff and corrections staff lacked the discretion to either refuse or delay its implementation. "There is no evidence that Arthur Kill employees charged with the ministerial duty of implementing the order were given any information as to why the order was issued and/or any discretion to delay its implementation," wrote the dissent. Further, "[t]he existence of the policy to assign lower bunks to inmates suffering from seizures is proof that the defendant actually foresaw the risk that an accident would occur in the manner in which it occurred." Yet, the record showed, they failed to implement the order. It was thus reasonably foreseeable, according to the dissent, that the Claimant would suffer another seizure and fall off his bunk.

Practice pointer: *The scope of the State's duty to its inmates is to take adequate measures to protect them from injuries that are "reasonably foreseeable." Whether or not the injury that you suffered was "reasonably foreseeable" to DOCS' officials is often the focal point of a negligence case. Here, the majority found that it was not reasonably foreseeable that the Claimant would fall out of his bunk a second time, but its reasoning was severely criticized by the dissent.*

Negligence: Successful Case

Mance v. State, Claim # 106998 (Court of Claims, October 2, 2006)

The Claimant alleged that he suffered injuries to his left hand when a Correction Officer negligently closed the door to his cell on his hand. He testified that on February 18, 2001, a Sunday, he was about to leave his cell for the facility media center, where he was to assist the Chaplin in setting up the church for services. He heard his cell door "click," which indicated to him that it had been unlocked from the "lock box," which was located at the end of the row of cells on his company. As he started to leave, he turned around to gather some personal effects, including his bible. He then heard a noise identical to that which occurred when all 43 cells along the entire row of his company were being closed mechanically. He attempted to exit his cell, but as he did so he caught his fingers in the door as it was being closed. He screamed for assistance, and was taken to the prison infirmary for medical treatment shortly thereafter by a Correction Officer. He argued that by closing his cell from a remote location, shortly after releasing his cell door and without regard to his whereabouts, the State was negligent and therefore responsible for his injuries.

The Correction Officer on duty at the time testified that he had unlocked the Claimant's cell from the "lock box"on the morning in question because the Claimant had been approved for a call-out to attend religious services. He waited for several minutes but the Claimant did not exit his cell. He then proceeded down the corridor to the cell and told the Claimant that he was going to secure the company, meaning that all cells on the entire company were to be locked. He then manually closed and locked the Claimant's cell. When he closed the door, the Claimant was several feet away, and at no time did his hand become caught in the door. Furthermore, when he closed the door, he claimed that the Claimant made threats against him, and as a result, he issued a Misbehavior Report.

Thus, the testimony of the Claimant and the Correction Officer were diametrically opposed.

Another inmate was called as a witness on behalf of the Claimant. The inmate testified that on the date of this incident, he was assigned to the cell immediately adjacent to the Claimant's cell. He testified that he did not observe the Claimant's cell door being closed, but he was alerted by the Claimant's screams. He testified that he then utilized his mirror and saw that the Claimant's hand was caught in the cell door. He further testified that there were no Correction Officers in the hallway at this time. Finally, he testified that after a short time, the Claimant was able to remove his hand from the

gate, and that Correction Officers came to the Claimant's assistance and escorted him to the infirmary.

The Claimant's medical record was also offered into evidence. It contained an entry confirming that the Claimant was treated in the infirmary at 8:50 a.m. on the date of the incident, as well as a statement from the Claimant that his fingers had been caught in his cell door. The nurse's note on that record contained an observation that the Claimant's fingers were red, but there was no indication of bleeding, broken skin, or swelling. A "Report of Inmate Injury," containing a similar statement from the Claimant, was also received into evidence (*See* Exhibit 1).

After weighing the conflicting evidence, the court found in favor of the Claimant. His testimony was supported by the testimony of the other inmate and by the Claimant's medical record. Although the Correction Officer on duty denied that the incident occurred, he did not successfully discredit the Claimant's testimony, nor did he provide any explanation as to why the Claimant might attempt to fabricate the claim. Thus, the court found, the preponderance of the evidence supported the Claimant's claim.

***Practice pointer**: In the operation of its prisons, the State is held to the same standard of care as a private landowner. It must act as a reasonable person in maintaining its property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk. Miller v. State of New York, 62 NY2d 506. In this case, after resolving the factual conflict between the two principal witnesses, the Court found that the State's action in closing the door without notifying the inmate was negligent.*

Medical Malpractice*: *Unsuccessful Case
Bennett v. State, 820 N.Y.S.2d 653 (3d Dep't 2006)

The Claimant entered DOCS with advanced periodontal disease. A DOCS dentist extracted three teeth, performed scaling and toot planing of the Claimant's mouth, prescribed antibiotics, and followed up with regular deep cleaning. The DOCS dentist never referred the Claimant to a periodontist. Six years after his entry into DOCS, the Claimant hired his own specialist. The specialist recommended the extraction of 11 more teeth. The Claimant sued, claiming that the delay in treatment resulted in the loss of 11 teeth and thus constituted medical malpractice.

To succeed in a malpractice claim, the Claimant is required to prove that DOCS's medical care deviated from the accepted standard of care and that the deviation was the proximate cause of the Claimant's injuries. In order to meet this standard, the Court of Claims requires that the Claimants alleging medical malpractice provide an expert to testify to the correct standard of care.

The Claimant had an expert, a dentist. The dentist testified that DOCS' failure to chart the Claimant's teeth made it difficult to track his progress and determine the appropriate course of treatment. He also faulted DOCS for not outlining a treatment plan or referring the Claimant to a periodontist. In addition, he stated that the delay in the Claimant's treatment caused him to lose more teeth than if he had been promptly treated.

DOCS' dentist testified that she did not refer the Claimant to a periodontist because she was capable of treating him herself. She testified that she did not chart the teeth because it was useless to chart hopeless teeth. She also testified that she treated the Claimant conservatively because he wanted to keep his teeth and would not accept that many of his teeth needed to be extracted.

An expert periodontist also testified on behalf of DOCS. DOCS' expert testified that according to the Claimant's x-rays and records, he had extreme bone loss in his jaw and several questionable teeth that needed extraction at the time he entered DOCS. The expert further testified that: charting helps measure progress in diseased teeth but does not treat periodontal disease; teeth with a poor or hopeless prognosis should be extracted; DOCS' treatment

was appropriate and met the standard of care; and that the proximate cause of the Claimant's tooth loss was his advanced periodontal disease, not the treatment he had received from DOCS.

The Court of Claims agreed. It concluded that any alleged deviation from the accepted standard of care was not the cause the Claimant's injuries. The advanced state of his disease had already rendered the Claimant's teeth hopelessly lost at the time he entered DOCS.

***Practice Pointer**: The State has a duty to provide reasonable and adequate medical and dental care to the inmates of its correctional facilities. A claim in the Court of Claims that the state has failed to meet that obligation may be based on a theory of medical **negligence**, medical **malpractice**, or both.*

*In a medical **negligence** case, the negligent acts should be readily determinable based on common knowledge, so no expert is needed. Some examples of medical negligence include: scalding a patient with a hot water bottle (Phillips v. Buffalo Gen. Hosp., 239 N.Y. 188); leaving an electric light bulb under the sheets (Dillon v. Rockaway Beach Hosp., 284 N.Y. 176); and leaving a postoperative patient unattended in a bathroom (Coursen v. New York Hospital-Cornell Med. Center, 114 A.D.2d 254, 256). Other typical examples include instances in which the State fails to provide a prescribed medication, or provides the wrong medication.*

*In a medical **malpractice** case, the negligence involved cannot be determined by common knowledge. An expert is needed to show that your treatment constituted a departure from the accepted standard of practice--and that the departure was the proximate cause of your injury. In some cases, your expert may be countered by the State's expert--and the Court could still decide against you (as happened in the case Bennett above). Without any expert, however, you have no malpractice case at all.*

The following case is a good example of the successful use of an expert in a medical malpractice case.

Medical Malpractice: Successful Case

Long v. State of New York, Claim # 107435 (Court of Claims, November 14, 2006)

In May 2002, while the Claimant was incarcerated at Sing Sing, he was hit on the left side of his face by a softball and sustained "comminuted depressed fractures of his left zygomatic arch" (*i.e.*, the cheek bone). He alleged that the State's delay in surgically addressing his fractures until more than six months post-injury necessitated a more complicated surgery, caused him increased pain and suffering, and resulted in permanent harm. The Claimant was seen by a specialist at St. Agnes hospital the day after the incident. The specialist recommended follow up with a particular oral surgeon for possible surgery. Sing Sing apparently ignored that recommendation because the named oral surgeon was not on contract with Sing Sing. The Claimant was instead scheduled to see Sing Sing's oral surgeon on June 19th. The oral surgeon recommended further follow up by a specialist at the Westchester Medical Center. That did not occur until August. The specialist requested a CAT scan, which was done in September. He then recommended surgery, however, which did not occur until December.

The Claimant estimated that it took a year from the time of the surgery for his jaw to feel comfortable and that, even today, his jaw locks when he opens his mouth too wide. He avoids apples and tries to chew on his right side when he eats meat, toast, or hard fruit. He sometimes has slurred speech and spits when he speaks. Also, he still experiences sensitivity under his eye and pressure on his cheeks from sunglasses.

An oral surgeon offered expert testimony on behalf of the Claimant. He explained that the treatment indicated for the Claimant's fracture was open reduction, as soon as possible, which meant no later than ten to 14 days post-injury. He further explained that, ideally, surgery should be done within 24 to 48 hours because fibrous tissue, which could form bone, develops, thereby impairing the function of the lower jaw. He testified that, within two weeks post-injury, the Claimant could have had an extra-oral (outside-the-mouth) operation known as a Gillies approach. This 20- to 30-minute procedure consists of a small incision on the scalp and a second incision in the "temporal fascia." An instrument is then inserted through the incisions to pull the cheek bone up by popping it back into place. Within a few days of this type of surgery, the patient is fully functioning and eating a normal diet.

The expert explained that due to the delay in treating the Claimant, a Gillies approach was not available and, therefore, the Claimant had to endure two more extensive procedures. While he conceded that the surgery performed on the Claimant in December was proper, he noted that the operation took two hours, which is three to four times longer than a simple Gillies approach. This caused more trauma to the patient. He maintained that when the simple Gillies approach is performed, the patient achieves a 100 percent result with no sequella from surgery. He opined that if the Claimant had been examined by an oral surgeon within 24 hours of the fracture, surgery could have and should have been performed at that time.

The expert explained that with non-inmate patients who appear in an emergency room with such an injury, an oral surgeon or other specialist would be called in to evaluate the patient and the patient would be admitted immediately. Surgery would be scheduled within a day or two. He was of the opinion that a deviation from reasonable medical care had occurred after the Claimant was returned to Sing Sing. In his view, the facility was aware of the Claimant's fracture and malfunction and somebody should have addressed the Claimant's need for medical treatment. He noted that on June 19, 2002, when the Claimant was examined by an oral surgeon at the Sing Sing dental clinic, it was already beyond the time when the simple surgery could have been performed on the Claimant. The expert testified that there were "multiple people to blame."

> I mean, he was referred back to the prison, the correctional institute, where they were obviously aware that he had fractures, and he was obviously in pain. He obviously had a dysfunction. He also had medical issues prior to all this, and it would be my assumption that somebody in the Department of Corrections Medical Department or Dental Department should have seen to it that this patient got definitive treatment within a reasonable period of time.

Based on the expert's testimony, the court found DOCS 100 percent liable for the suffering and permanent injuries caused to the Claimant by the delay in his treatment. It awarded the Claimant $75,000.00 for past pain and suffering and $15,000 for future pain and suffering.

Failure to Protect: Unsuccessful Case

Tislon v. State of New York, Claim # 108638 (Court of Claims, November 30, 2006)

The Claimant testified that he and his cell mate "had words" regarding the space they shared in the cell. Thereafter, while he was sleeping in his bunk, the cell mate attacked him without warning and "cracked his head open." He was taken to an outside

hospital, where four staples were used to close the wound on the top rear portion of his head. He alleges that, prior to the attack, he had told a Correction Officer that he and his cell mate were not getting along. On cross-examination, he conceded that he did not ask for protective custody because not "in a million years" did he think his cell mate would assault him.

The court rejected this claim. In claims arising from inmate assaults, the central issue is whether the State had notice of the risk of harm and an opportunity to intervene in a way that would have prevented the assault, but failed to do so. Here, the court found, that State did not have sufficient notice of any particular threat to the Claimant such that it could have or should have intervened. The Claimant's allegation that the assault was foreseeable because he told a Correction Officer that he and his cell mate "could not relate," was, without more information, insufficient to rise to liability. "[L]iability," the court noted, "may be based either on defendant's failure to protect the claimant from a known dangerous prisoner or to use adequate supervision to stop that which was foreseeable in an immediate or proximate sense, rather than in some generalized way." The Claimant's comment that he and his cell mate "could not relate" was far too generalized, the court held; it lacked the specificity necessary to permit the state to take reasonable steps to prevent the assault.

Failure to Protect: Successful Case

Rosario v. State of New York, Claim # 97663 (Court of Claims, December 12, 2006)

While housed in A Block at Attica, the Claimant counseled another inmate who had been marked by the Latin Kings as someone who needed to be disciplined. He advised the inmate to seek protective custody. This information got back to the Latin Kings and, according to the Claimant, in April 1996, he overheard two inmates, known to him as "Panama" and "Negro," discussing what he interpreted as a threat toward him. He immediately concluded that he was the target of a "hit" and wrote to the A Block sergeant about his concern for his personal safety. The next day he was taken to see Sergeant Reiner, to whom he related his concerns. Sergeant Reiner found the threats to be credible and had the Claimant moved out of A Block that day and assigned to protective custody in B block. He was later released to the general population and functioned without problems there until, without notice, he was transferred to D block. While at chow in D block, he was seen by some inmates whom he believed were gang members.

The Claimant told various DOCS officials of his concerns for his safety if he remained in D block, and he provided the officials with the nicknames of the people he feared might assault him. His concerns were investigated but they were found insufficiently specific to warrant involuntary protective custody and the Claimant declined to request protective custody.

Two days later, the Claimant was standing in the "go back" line waiting to return to his cell when a fellow inmate slashed him on his right cheek, inflicting an eight-inch gaping wound which needed 39 sutures to close. Another inmate was observed stooping down, picking up an object, and throwing it into the grass in the recreation yard. A subsequent search of the yard failed to recover any weapon.

Under these facts, the court held, the State was liable. The State had either actual or constructive notice of an unreasonable risk of an attack and it failed to exercise reasonable care in assessing, and responding to, the threat to the Claimant's safety. The Claimant had been placed first in protective custody and then into a more secure block. He was then moved out of the more secure block with no consideration of the threats of which the State had been placed on notice. He then notified the authorities of the threats he perceived and provided the nicknames of the purported plotters, but the authorities conducted an insufficient investigation of these specific threats. Under the circumstances, the court held, "the risk of harm to the Claimant was

reasonably foreseeable… [DOCS] had the ability and duty to prevent the assault, which…they could have accomplished by placing the Claimant in protective custody. Given the specificity of the threats, and the provision of the nicknames of the putative protagonists…, the State breached its duty to this Claimant under these circumstances, and the harm and injury he sustained was reasonably foreseeable."

Practice Pointer: *In Gangler v. State of New York, (Ct Cl, UID #2006-009-159, Claim No. 96352, March 29, 2006), the court summarized the law applicable to failure-to-protect cases. It stated: "[T]he State is required to use reasonable care to protect inmates of its correctional facilities from the foreseeable risk of harm. Foreseeable risk of harm includes the risk of attack by other prisoners. The duty to protect inmates from the risk of attack by other prisoners, however, does not render the State an insurer of inmate safety. The scope of the [State's] duty of care is to exercise reasonable care to prevent attacks which are reasonably foreseeable. The test for liability encompasses not only what the State knew, but also 'what the State reasonably should have known--for example, from its knowledge of risks to a class of inmates based on the institution's expertise or prior experience, or from its own policies and practices designed to address such risks.'" However, "[t]he mere occurrence of an inmate assault, without credible evidence that the assault was reasonably foreseeable, cannot establish the negligence of the State."*

Additional Materials

For more information on the kinds of cases that can be heard in the Court of Claims and the Court's rules and procedures, write to the PLS office that serves the prison in which you are incarcerated for the following:

PLS Form Memo: "Lawsuits Against the State of New York"

A Jailhouse Lawyer's Manual (2005)

Chapter 17, "The State's Duty to Protect You and Your Property: Tort Actions"

PLS Form Memo: "Late Claims Against the State of New York"

A Clarification

In the last issue of ***Pro Se***, we published an article titled, "Efforts of Shi'a Muslim Inmates to Obtain Separate Services Falter." In it, we reported that decisions in two recent cases, Orafan v. Goord, 411 F.Supp.2d 153 (N.D.N.Y., 2006) and Matter of Holman v. Goord, 12 Misc.3d 1174(A) (Sup. Ct., Sullivan Co., June 29, 2006), in which courts denied Shi'a inmates' claims that they are entitled to separate Jumah services. In discussing those cases, we also mentioned a case called, Pugh v. Goord, 184 F.Supp.2d 326 (S.D.N.Y., 2002), in which the court reached a similar conclusion. We should have noted: a) that the Pugh case was subsequently reversed for technical reasons (*See* Pugh v. Goord, 345 F.3d 121 [2d cir. 2003]) and will shortly be going to trial; and b) Orafan is being appealed.

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