# Pro Se

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## *'EARLEY' CASE ROILS SENTENCING WATERS:*

## *Court of Appeals Holds DOCS May Not Impose Post Release Supervision Where Sentencing Court Silent; Appellate Court Holds DOCS May Not Run Predicate Sentence Consecutive to Parole Time Where Sentencing Court Silent*

The 2006 decision of the Federal Second Circuit Court of Appeals in Earley v. Murray, 451 F.3d 71, 75 (2d Cir. 2006), *cert. denied* --- U.S. ----, 127 S.Ct. 3014, in which the court held that DOCS was prohibited from imposing a period of Post Release Supervision (PRS) on a determinate sentence if the sentencing court failed to do so, continues to upset previously settled sentencing law in New York.

In the latest development, the New York Court of Appeals has agreed with the Federal court, holding that only a sentencing court may impose PRS and that DOCS has no independent authority to do so if the sentencing court was silent. But the court also held that a failure to sentence a defendant to a term of PRS is a mere "ministerial error" which may be corrected by vacating the sentence and producing the defendant in court for re-sentencing.

In another development, a State appeals court, applying Earley for the first time outside the PRS context, has held that DOCS lacks the authority to run the sentences of a predicate offender, *i.e.*, a second felony offender, a persistent felony offender, a second violent felony offender, or persistent violent felony offender, consecutively to the time owed on his prior sentences if the sentencing court did not explicitly state that the new sentence would

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## A Message From Karen Murtagh-Monks, Executive Director

Greetings.

Spring, a season of new beginnings and rebirth, has brought with it changes to PLS. Susan A. Johnson has left PLS after two years as Executive Director and I have been offered and accepted the position as the fifth Executive Director in PLS's 32-year history. I have been with PLS since the summer of 1983, during which I interned in the Albany PLS office as a law student. As I look back upon those years, I see that many changes have occurred both within PLS and within DOCS, changes that can move us toward a more humane criminal justice system.

When I first began at PLS, the prison population was approximately 31,000. PLS had five offices and over 40 employees. Throughout the 1980s, the prison population grew and so did PLS. By the early 1990s, New York State had a prison population over of 60,000 and PLS had a staff of 70. During the 1990s, however, even though the prison population continued to rise, PLS suffered major budget cuts, and in 1998 was forced to completely close down. In 1999, thanks to support from the New York State Legislature, we were funded once again. Although we have struggled from a fiscal standpoint, PLS continues to play an important role in providing high quality, effective legal representation and assistance to indigent prisoners, helping them to secure their civil and human rights, and advocating for more humane prisons.

Having dedicated my entire professional career to prisoners' rights, I am very optimistic about the changes in philosophy and attitude that are taking place in this country and specifically within New York State. Commissioner Fischer should be commended for his strong commitment to education and his demonstrated commitment to re-entry services by spearheading the Orleans Correctional Facility Re-entry program and by seeking funding to start up similar re-entry facilities in at least three other venues. By funding PLS, our state government has also demonstrated that it understands the importance of Prisoners' Legal Services as a necessary and integral criminal justice program if New York State is serious about its commitment to reducing recidivism and increasing public safety.

Although there is no question that there will be times when it will be necessary for PLS to engage in adversarial work to protect the rights of incarcerated individuals in New York State, I do believe that we are on the dawn of a new day. We all understand that, despite the adversarial nature of the job, there will be times when we are all on the same page, and that we all will share one common goal: decreasing our prison population and ensuring, for those that are serving prison time, that they are given the opportunity to receive the education, programming, and job training necessary to ensure successful integration into society.

I look forward to serving you all and to working with you to make significant strides in our criminal justice system in New York State.

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be consecutive. That decision, in People ex rel Gill v. Green, 852 N.Y.S.2d 457 (3d Dep't 2008), reverses many years of caselaw to the contrary and would--*if implemented*--reduce the sentences of thousands of inmates currently serving predicate offender terms.

This issue of ***Pro Se*** takes a closer look at these two Earley-related developments and what they might mean for you.

### *Background*

In Earley, the court considered the question of whether DOCS has the administrative authority to add a period of PRS to a sentence where the sentencing court failed to do so.

The question arose because Penal Law § 70.45 mandates that every determinate sentence include a period of PRS. In many cases, however, sentencing courts neglected to either pronounce the term at sentencing or indicate it in the defendant's commitment papers. In those cases, DOCS adopted the practice of simply adding the term to the sentence when the defendant arrived in state custody. DOCS argued that since the statute mandated that determinate sentences include PRS, it had no choice but to apply it, even in those cases in which the sentencing court did not.

Prior to 2006, state courts agreed with DOCS' argument. The courts held that since PRS was mandatory, it was automatically included in every determinate sentence, regardless of whether it was imposed by the court or added to the sentence later by DOCS.

In Earley, however, the court held that DOCS' practice was unconstitutional. "*The only cognizable sentence,*" wrote the court, "*is the one imposed by the judge [and] any alteration to that sentence, unless made by a judge in a subsequent proceeding, is of no effect.*"

### *Court of Appeals Weighs In*

In Garner v. New York State Department of Correctional Services, 10 N.Y.3d 358 (2008), the Court of Appeals held that under state law, too, DOCS is prohibited from imposing a period of PRS on a sentence if the sentencing court did not do so. Specifically, the Court wrote:

> DOCS's imposition of the PRS term contravenes the...express mandate [of Criminal Procedure Law §§ 380.20 and 380.40] that sentencing is a judicial function and, as such, lies beyond DOCS's limited jurisdiction over inmates and correctional institutions.

Under Garner, DOCS should remove PRS from any sentence to which it was previously added without explicit court authorization. Specifically, DOCS should remove PRS from your sentence if there is no indication in your commitment papers that PRS was imposed by your sentencing court.

In a footnote in Garner, however, the Court pointed out that its decision was "without prejudice to any ability that either the People or DOCS may have to seek the appropriate re-sentencing of a defendant in the proper forum." Plus, in a related case called People v. Sparber, __ N.Y.2d___(2008), the Court held that the failure of a sentencing court to pronounce PRS at the time of sentencing was a mere "ministerial error" which can be corrected by vacating the sentence and producing the defendant for re-sentencing.

Thus, although DOCS should remove PRS from your sentence if it was not specifically added by the sentencing court, it may notify your sentencing court that PRS was not properly imposed. The sentencing court may, in turn, vacate the sentence and impose a new sentence--one that includes PRS.

It is unclear, however, whether sentencing courts will be either willing or able to re-sentence all of the many defendants to whose sentences DOCS administratively added PRS. For one thing, it will be logistically difficult for courts around the state to vacate so many sentences and produce all of those defendants for re-sentencing. For another, the problem in many cases goes beyond the failure of the sentencing court to pronounce PRS *at sentencing*. In many cases, the problem extends to the failure of the sentencing court to notify defendants that PRS would be a part of their sentence *when they entered their pleas*. In those cases, the defendant will be entitled to withdraw his or her plea prior to being re-sentenced. See People v. Catu, 4 N.Y.3d 242 (2005). The consequences of withdrawing the plea are more complicated than those of merely vacating the sentence. If the plea is withdrawn, the defendant is returned to his or her pre-plea status and may either re-negotiate the sentence and/or demand a trial. This would impose additional logistical difficulties on the court.

Given these difficulties, we cannot say whether sentencing courts will be willing to re-sentence inmates who had PRS improperly added to their sentences by DOCS. We can only say that they do have the authority to do so, and one of the consequences of trying to have an administratively imposed period of PRS removed from your sentence may be that you are returned to your sentencing court for further proceedings.

Meanwhile, preliminary indications are that DOCS is resisting requests that it administratively remove PRS terms from sentences to which it was added without court authorization, notwithstanding Garner. DOCS appears to be taking the position that the *only* remedy for an administratively added PRS term is that the inmate be returned to the sentencing court for re-sentencing under Sparber.

The editors of ***Pro Se*** believe this position is contrary to the holding in Garner that DOCS lacks authority to impose PRS on a sentence if the sentencing court did not do so. If DOCS continues to hold this position in the months to come, the result will likely be further litigation.

### *Appellate Court Extends Earley Rule to Predicate Offender Sentences*

In the second significant development involving Earley, a state appellate court, relying on Earley, held that DOCS may not run the sentences of predicate offenders consecutively to the time owed to a prior undischarged sentence absent a specific order from the sentencing court.

The decision, People ex rel Gill v. Green, 852 N.Y.S.2d 457 (3d Dep't 2008), reverses 25 years of caselaw to the contrary and, if implemented, would have sweeping consequences: It would require the recalculation of the sentences of some eight thousand inmates currently serving predicate offender sentences. Some of those inmates would almost certainly be eligible for immediate release if their sentences were recalculated under Gill.

As of this writing, however, it is unclear whether Gill will be implemented. It is likely to be vigorously challenged by DOCS in the Court of Appeals. Whether it will survive such a challenge is unknown.

The issue in Gill concerns the proper interpretation of Penal Law §§ 70.25(1)(a) and 70.25(2-a).

Penal Law § 70.25(1)(a) states that when a court sentences a defendant who owes time on a previously-imposed sentence (*i.e.*, "parole time"), the court may specify that the new sentence run either consecutively to or concurrently to the parole time--and if the court is silent, the new sentence "shall run concurrently."

Penal Law § 70.25(2-a), however, states that when the court finds that the defendant is a

predicate offender, it "must impose [the] sentence to run *consecutively*" to the parole time.

For more than 25 years, courts have held that where a defendant is a predicate offender, DOCS must run the sentences consecutively, even though the court did not so specify. For example, in a decision issued just three weeks prior to Gill, the Appellate Division, Third Department held:

> Although [petitioner's] sentencing court failed to indicate whether [the] sentences were to run concurrently or consecutively to [the] prior undischarged sentence, because petitioner was sentenced as a second felony offender, by operation of law they must be consecutive.
>
> People ex rel Batista v. Walsh, 851 N.Y.S.2d 671 (3d Dep't 2008)

In Gill, however, the court considered for the first time how the Earley case applied to this situation.

In Earley, remember, the court rejected DOCS' claim that it had the authority to add a term of PRS to a sentence where the governing statue mandated it but the sentencing court neglected to impose it. The court held: "*The only cognizable sentence is the one imposed by the judge. Any alteration to that sentence, unless made by a judge in a subsequent proceeding, is of no effect.*"

In Gill, the question was whether DOCS had the authority to run the sentences of predicate offenders consecutively to their parole time where the governing statute mandated it but the sentencing court neglected to do so.

The petitioner in Gill was sentenced as a second felony offender and his Commitment Papers indicated that he was a second felony offender, but the sentencing court failed to specify that his sentences had to run consecutively to his parole time. DOCS, citing Penal Law § 70.25(2-a), calculated the sentences as running consecutively.

The court, citing Earley, held that DOCS lacked the authority to do so. "While DOCS has a role in correcting an unlawful sentence, a court is the only body authorized to impose a correct sentence," the court wrote, continuing: "We therefore agree with petitioner that DOCS had no authority to calculate his sentences consecutively where the court did not do so."

The court therefore ordered DOCS to recalculate Gill's sentences concurrently.

### *Gill: Implications and a Caution*

As noted, Gill could have significant consequences. DOCS estimates that there are approximately eight thousand inmates currently serving predicate offender sentences, whose sentences would have to be recalculated if Gill were to be applied statewide. Some of them would be eligible for immediate release.

But some caution is required: As also noted, it is too early to say whether Gill will have lasting consequences. Gill is the first case to conclude that DOCS cannot run sentences consecutively under these circumstances, after many years in which the courts held that it could. Courts are generally reluctant to reverse settled practices so suddenly, particularly where, as here, doing so will have sweeping consequences. Right now, Gill applies only to courts in the Third Department and it is unclear whether it will be upheld by the Court of Appeals.

In addition, anyone contemplating litigating a claim under Gill should be aware that there is caselaw, pre-dating Gill, holding that sentencing courts have the authority to correct a sentence in this situation, either by re-sentencing you or by allowing you to withdraw your plea. See People v. DeValle, 94 N.Y.2d

870 (2000). Thus, one possible consequence of making a Gill claim--like that of pursuing a Garner claim--is that you would be returned to your sentencing court for re-sentencing.

Given the uncertainties associated with Gill, the editors of ***Pro Se*** believe it too soon to pursue a legal claim based on the case. If Gill is reversed by the Court of Appeals, any legal action that may have been commenced in the interim would be dismissed. If Gill is affirmed, it would presumably not be necessary bring a legal action to reap its benefits.

The one exception to that advice that we would make would be in those cases in which recalculation of the sentence so that it is running concurrently to parole time would make you *immediately eligible for release--i.e.*, would mean that you are past the conditional release or maximum expiration date of your current sentence. Under those circumstances, it may be advisable to file a habeas corpus proceeding. If you believe you are in that situation, write to the office of Prisoners' Legal Services serving your facility for further advice.

## *NEWS AND BRIEFS*

### *DOCS Proposes Repealing "Unauthorized Organizational Activities" Disciplinary Rule and Proposes Rules that Include Expansion of Authorized Publications*

DOCS' Disciplinary Rule 105.12, which prohibits inmates from possessing "unauthorized organizational...materials," has been criticized by both prisoners and the courts for its over inclusive language.

In Shakur v. Selsky, 391 F.3d 106 (2d Cir. 2004), for instance, the court noted that the rule bans the receipt of literature from any outside organization, unless the organization has been approved by the Deputy Commissioner for Program Services. The court questioned whether such a broad ban was consistent with the First Amendment. The court stated that "Rule 105.12…does not provide any standard against which DOCS officials will conduct an individualized review of the publication in question," and returned the case to the district court for further proceedings. (The Shakur case is still being litigated.)

More recently, in Mitchell v. Goord, 2007 WL 1288750, a district court appointed counsel to a prisoner seeking to enjoin further enforcement of the rule also as applied to publications from "unauthorized organizations."

DOCS has now proposed rescinding the rule entirely and replacing it with two new rules intended to "enhance clarity" regarding what kinds of organizational conduct is prohibited. Taken together, the proposed rules liberalize the range of publications a prisoner is allowed to possess.

The first of the proposed rules, Rule 105.13, is limited to "gang" activity. It provides:

> An inmate shall not engage in or encourage others to engage in gang activities or meetings or display, wear, possess, distribute or use gang insignia or materials including, but not limited to, printed or handwritten gang or gang related material.

The proposed rule defines a "gang" as follows:

> For purposes of this rule, a gang is a group of individuals, having a common identifying name, sign, symbol or colors, who have individually or collectively engaged in a pattern of lawlessness (*e.g.*, violence, property destruction, threats of harm, intimidation, extortion, or drug smuggling) in one or more correctional

> facilities or that are generally recognized as having engaged in a pattern of lawlessness in the community as a whole. For purposes of this rule, printed or handwritten gang or gang related material is written material that, if observed in the inmate's possession, could result in an inference being drawn about the inmate's gang affiliation, but excludes published material that the inmate has obtained through the facility library or that has been approved for the inmate to possess through the media review process.

The second proposed rule, Rule 105.14, continues the prior Rule 105.12's ban on "unauthorized" organizational materials, but with several new limits on its scope.

The new rule provides:

> An inmate shall not engage in or encourage others to engage in unauthorized organizational activities or meetings, or possess printed or handwritten material relating to an unauthorized organization where such material advocates either expressly or by clear implication, violence based upon race, religion, sex, sexual orientation, creed, law enforcement status or violence or acts of disobedience against department employees or that could facilitate organizational activity within the institution by an organization.
>
> **Note:** For purposes of this rule an unauthorized organization is any organization which has not been approved by the deputy commissioner for program services. Printed or handwritten material that could facilitate organizational activity includes, but is not limited to, a membership roster, organizational chart, constitution or by-laws. This rule excludes possession of published material that the inmate has obtained through the facility library or that has been approved for the inmate to possess through the media review process. During the pendency of an application to obtain authorization for a proposed inmate organization, the rule also excludes specific printed or handwritten material that the Deputy Superintendent of Programs or higher ranking employee has requested in writing the inmate submits as part of the application process.

Thus, the new rule permits the possession of written or printed materials relating to "unauthorized" organizations so long as it does not "advocate…violence based upon race, religion, sex, sexual orientation, creed, law enforcement status or violence or acts of disobedience against department employees" or "facilitate organizational activity." It also provides some examples of what written materials might be considered to "facilitate organizational activity" including "a membership roster, organizational chart, constitution or by-laws." Finally, it specifically exempts material "that the inmate has obtained through the facility library or that has been approved for the inmate to possess through the media review process." Rule 105.12 has allowed prisoners to be disciplined for possessing materials even if they were obtained through the library or the media review process if the materials are not from an "approved organization."

Prisoners' Legal Services of New York and The Legal Aid Society Prisoners' Rights Project has filed comments to the proposed rule changes with suggestions for further revisions. Suggested revisions include exempting materials obtained in approved prison

educational courses from the definition of "unauthorized organizational" materials, and adding a note to the regulation that directs that publications relating to an unauthorized organization, other than a gang, be forwarded to the Media Review Committee for review prior to the use of the disciplinary system.

### *Supplemental Merit Time to Be Considered in Calculating Temporary Release/CASAT Eligibility*

DOCS has conceded that it must consider Supplemental Merit Time in determining when an inmate becomes eligible to apply for Temporary Release and CASAT.

The issue arose because eligibility for these programs is based, in part, on an inmate's parole eligibility date: Correction Law § 851(2) provides that an inmate becomes eligible for temporary release two years prior to his or her parole eligibility date, while Correction Law § 2(18) states that certain inmates become eligible for CASAT 30 months prior to their parole eligibility date.

But the meaning of what exactly a "parole eligibility date" is has changed over the last decade.

Prior to 1997, your parole eligibility date was clear. It was the date on which the minimum term of an indeterminate sentence expired.

In that year, however, the State Legislature created the Merit Time Program, which made some inmates eligible for parole release prior to the expiration of their minimum terms.

So the question arose: Should eligibility for Temporary Release still be calculated based on the old "parole eligibility date"--*i.e.*, the expiration of the minimum term? Or should it be based on the "merit eligibility date"–*i.e.*, the date on which an inmate would be eligible for parole if granted merit time?

It was not until 2003 that DOCS conceded that the "parole eligibility date" should be considered the merit eligibility date for purposes of calculating temporary release eligibility.

The very next year, however, in 2004, as part of the Rockefeller Drug Law Reform Act, the Legislature authorized *additional* merit time, called "Supplemental" Merit Time, for certain drug offenders. The effect of Supplemental Merit Time was to advance the parole eligibility date of eligible inmates even further.

So again the question arose: Should eligibility for temporary release be calculated based upon the "supplemental merit eligibility date"? Or on the merit eligibility date?

Since 2004, DOCS had refused to concede that eligibility for Temporary Release and CASAT should be calculated based on the supplemental merit date. It argued that the "merit" date was the earliest possible release date upon which Temporary Release could be argued.

This made a significant difference to some inmates. For an inmate serving a 6-year minimum term, for example, calculating Temporary Release eligibility based on the supplemental merit eligibility date would mean that he or she would be eligible for Temporary Release after serving two years (and eligible for CASAT after serving only 1½ years). If, on the other hand, eligibility for Temporary Release were calculated solely on the merit eligibility date, that same inmate would be eligible for Temporary Release only after serving 3 years (and for CASAT after 2½ years).

In 2007, three inmates at Eastern Correctional Facility, Phillip St. Louis, Robert Gunney, and John Wright, sued DOCS over its refusal to use the supplemental merit date when calculating Temporary Release eligibility.

In a decision dated March 3, 2008, the Supreme Court, Albany County, granted their

petition. The court held that DOCS had "failed to…demonstrate a distinction between merit time and supplemental merit time" in determining eligibility for participation in the Temporary Release and CASAT programs. St. Louis v. Commissioner, Index # 7845-07, Sup. Ct. Albany County, March 3, 2008 (Ceresia, J.)

Shortly after St. Louis was decided, DOCS conceded the point and agreed to use the supplemental merit eligibility date in calculating Temporary Release and CASAT eligibility. It has informed Prisoners' Legal Services that it is re-programming its computers accordingly.

Thus, if you are eligible for supplemental merit time, you should now be eligible for Temporary Release two years prior to your supplemental merit eligibility date, rather than your merit eligibility date, and you should be eligible for CASAT 30 months prior to your supplemental merit eligibility date.

*Petitioners in Gunney & Wright were represented by Prisoners' Legal Services of New York. Deborah Schneer, Esq. represented petitioner St. Louis.*

### *New York City, in Policy Change, to Permit Suspension of Child Support Payments While in Prison*

The New York City Department of Social Services, in a change of policy, will now consent to the suspension of child support orders issued in New York City when the paying parent is incarcerated.

The Court of Appeals, New York's highest court, held in Knights v. Knights, 71 N.Y.2d 865 (1988), that financial hardship as a result of conviction and incarceration did not necessarily warrant suspension of support payments during incarceration.

The NYC Department of Social Services' new policy means that prisoners who petition the family court for suspension of child support orders due to incarceration may be granted such suspensions based on financial circumstances. This policy applies only to child support orders payable to the NYC Department of Social Services.

Any modification of a child support order in this manner will only affect support payments that come after the date of the modification order. The NYC Department of Social Services will not consent to waive child support already owed by an incarcerated parent. When the prisoner is released from prison, the Court will make a decision on resuming child support payments. The suspension of child support payments will likely last only for the length of the prisoner's sentence.

In order to have child support payments suspended, prisoners must file a petition with the Court. The petition which must be filed is called, "Petition for Modification of an Order of Support" (Form 4-11). Prisoners may write to the following address to request the necessary petition:

New York City Family Court
Child Support Enforcement Team
60 Lafayette Street
New York, NY 10013
Attn: Petitions Division

The petition may be filled in by hand with the docket number of the prisoner's current child support order. If a prisoner does not know the docket number, the prisoner should send the Court his/her Social Security number, date of birth, the name of the custodial parent or guardian, and the names and birth dates of his/her children to identify the correct docket number.

After the petition has been filed and given a docket number, the Court will mail the prisoner an Electronic Testimony Application so that the prisoner may waive a personal appearance due to incarceration. In place of a personal

appearance, the Court can order an appearance by telephone, audio-visual means, or another electronic method.

An order modifying child support will not erase past due child support payments. If a prisoner is behind in their support payments and owes some past due amount, the prisoner will still have to pay that amount. If the Court grants a suspension of a prisoner's payments, however, the payments due will not continue to accrue. Prisoners should file petitions as soon as possible to stop the accrual of child support payments.

## *Federal Cases*

### *Plaintiff's Claims of Denial of Access to the Courts and Retaliation Claims Dismissed*

Smith v, Napoli, 2008 WL 355573 (W.D.N.Y.)

The plaintiff alleged that defendant correctional officials denied him access to the courts by denying him the funds necessary to add exhibits to his complaint and by destroying his law library request forms. The court dismissed the claim, noting that an inmate cannot state a claim for denial of access to the courts unless he shows that a "nonfrivolous legal claim had been frustrated or was being impeded" due to the actions of prison officials. See Lewis v. Casey, 518 U.S. 343, 351-52 (1996). Although the court had directed the plaintiff to state what effect the defendants' actions had on his non-frivolous legal actions, the plaintiff merely alleged that he "can be harmed…by the fact that he has not presented a prima facie case." The court concluded that this conclusory assertion was not sufficient to show that the plaintiff was prejudiced in his ability to seek redress from the judicial system. Because the plaintiff has not alleged the existence of an actual injury traceable to the defendants' conduct, held the court, he failed to state a claim upon which relief may be granted.

The plaintiff also alleged that the destruction of his law library requests was retaliatory due to their learning that the plaintiff had filed grievances against other guards. However, the court noted, a prisoner alleging retaliation must show that his protected conduct was "a substantial or motivating factor" behind the alleged retaliatory conduct. Because retaliation claims are easily fabricated, the court, continued, courts must "examine prisoners' claims of retaliation with skepticism and particular care," and "wholly conclusory claims of retaliation can be dismissed on the pleadings alone." Here, the plaintiff was given an opportunity to provide specific facts in support of his retaliation claim but did nothing more than assert that the defendants had retaliated against him as a result of his grievances. The court held that this conclusory allegation, without more, failed to provide sufficient facts to allege that the plaintiff's protected conduct was "a substantial or motivating factor" behind the alleged retaliatory conduct.

## *State Cases*

### *Disciplinary Cases*

### *Inmate's Depiction of Gang Symbol Results in Discipline*

Matter of Parks v. Smith, 853 N.Y.S.2d 710 (3d Dep't 2008)

The petitioner was found guilty of possessing unauthorized organizational materials, namely, a photograph of himself depicting a gang symbol. After his

administrative appeal was denied, he filed an Article 78 proceeding.

The court affirmed the result, concluding that the Misbehavior Report, together with the photograph of the petitioner and the testimony of a senior counselor trained in identifying gang-related materials, constituted sufficient evidence of his guilt. The petitioner's testimony that the hand gesture at issue constituted a form of meditation used in the practice of his religion presented a credibility issue which, the court held, was for the Hearing Officer--not it--to resolve.

### *Court Finds Insufficient Evidence That Inmate Disobeyed Direct Order*

Matter of Jackson v. Brown, 853 N.Y.S.2d 730 (3d Dep't 2008)

The petitioner in this case challenged a Tier II disciplinary determination finding him guilty of disobeying a direct order. The charge was based on the petitioner's alleged failure to respond to the Industry Superintendent when he twice asked the petitioner why he was standing by the vocational gate. The court held that since the Superintendent merely asked the petitioner a question and never actually gave him any directive, "we cannot conclude that substantial evidence supports the finding that petitioner disobeyed a direct order."

### *X-Ray Contradicted Charge That Inmate Possessed Weapon*

Matter of Warren v. Goord, 853 N.Y.S.2d 735 (3d Dep't 2008)

The petitioner in this case allegedly caused a metal detector to sound prior to a visit. As a result, he was strip frisked. When the strip frisk revealed nothing, DOCS obtained authorization for an X-ray, which showed a foreign object in the petitioner's abdomen. According to the escorting correctional officer, the petitioner admitted that the object was a razor. As a result, a Misbehavior Report was issued, charging the petitioner with smuggling and possession of a weapon.

At the disciplinary hearing, the Hearing Officer agreed to disregard the X-ray evidence, as well as any testimony by the doctors who interpreted the X-rays, because one doctor was unavailable to testify as he was no longer employed by the Department of Correctional Services. Nevertheless, he found the petitioner guilty, basing his determination solely on the Misbehavior Report and the testimony of the correctional officer who authored it.

However, the record of the hearing revealed that after the initial X-ray, the petitioner was isolated in a one-on-one contraband watch cell. Eventually, a piece of plastic was discovered in his feces and a subsequent X-ray confirmed that no other foreign objects remained in the petitioner's body. Since no razor was ever recovered and there was no proof that the piece of plastic was an "item that may be classified as a weapon or dangerous instrument by description, use or appearance" (see Disciplinary Rule 113.10; 7 NYCRR 270.2[B][14][i]), the court concluded that the determinations finding him guilty of possessing a weapon and smuggling were not supported by substantial evidence. Nor was there substantial evidence to support the smuggling charge.

### *Evidence Failed to Support Charge That Petitioner Tampered With Electrical Device*

Matter of Fratello v. Farrell, 853 N.Y.S.2d 748 (3d Dep't 2008)

A search of the petitioner's prison cell recovered an altered electrical wire, an AM/FM radio, and an "off duty permit" card, signed by a facility deacon, allowing the petitioner to

possess the radio. As a result, the petitioner was charged in a Misbehavior Report with possession of contraband, unauthorized exchange, and tampering with an electrical device. A Tier II disciplinary hearing ensued, during which the deacon testified that he signed the permit card authorizing the petitioner to use the radio. Although the Hearing Officer noted that the deacon did not have the authority to issue permission for use of the radio, he nevertheless found the petitioner not guilty of possession of contraband and unauthorized exchange. The petitioner was, however, found guilty of tampering with an electrical device.

The court reversed the decision. The prison disciplinary rule of which the petitioner was found guilty of violating, Rule 118.31, states that "[a]n inmate shall not alter, rewire, tamper or attempt to repair electrical outlets or any electrical device" (7 NYCRR 270.2[B][19][ix]). Here, however, the hearing transcript failed to definitively indicate that the source or purpose of the electrical wire was ever established. Absent such proof, the court held, it could not be concluded that the petitioner actually tampered with an electrical outlet or device in violation of the rule.

### *Court Finds That Time Limits on Disciplinary Hearings Are Not Mandatory and a Failure to Provide Inmate With CO's Medical Records Was a 'Harmless' Error*

Matter of Mack v. Goord, 853 N.Y.S.2d 704 (3d Dep't 2008)

The petitioner in this case was charged with assaulting staff, engaging in violent conduct, disobeying a direct order, and being out of place. The charges stemmed from an incident in which the petitioner, who was out of place, allegedly refused a correctional officer's order to stop and then struck the correctional officer in the face with a closed fist. Following a Tier III disciplinary hearing, he was found guilty as charged and a penalty of 180 days in the Special Housing Unit and a corresponding loss of privileges and Good Time were imposed. He then brought an Article 78 proceeding.

His principal argument on appeal was that the underlying disciplinary hearing was both commenced and completed in an untimely manner. But the court ruled: "Simply put, the time limits imposed by the relevant regulations are directory, not mandatory." Moreover, it continued, "our review of the record reveals valid reasons for each of the extensions granted."

The petitioner also argued that he was improperly denied the right to present relevant documentary evidence in the form of the correctional officer's medical records. Here, the court agreed with the petitioner: "[I]n the absence of some indication that disclosing the injured correction officer's medical records would jeopardize institutional safety, the Hearing Officer's failure to provide petitioner with such documents was error." But the court still refused to reverse the hearing: "[The] error…is harmless in view of the overwhelming evidence of petitioner's guilt and the fact that these records were not relied upon by the Hearing Officer in rendering his determination."

### *Removal of Inmate From Disciplinary Hearing Held Appropriate*

Matter of Applewhite v. Goord, 853 N.Y.S.2d 444 (3d Dep't 2008)

The petitioner was charged in a Misbehavior Report with engaging in violent conduct and assaulting staff. A Tier III disciplinary hearing ensued and, during the course thereof, the petitioner was expelled for disruptive behavior. The hearing proceeded in the petitioner's absence and, ultimately, the petitioner was found guilty of engaging in violent conduct, but

not guilty of assaulting staff. Following an unsuccessful administrative appeal, the petitioner commenced an Article 78 proceeding, contending that he was improperly removed from the disciplinary hearing.

The court disagreed. It found that shortly after the disciplinary hearing commenced, the petitioner accused the Hearing Officer of "conspir[ing] to deprive [him] of [his] rights" and threatened to sue the Hearing Officer if the charges against him were sustained. The Hearing Officer responded that he would entertain appropriate objections, but would not tolerate such threats. But, the court wrote, "Petitioner continued to lodge objections, accused the Hearing Officer of being biased and claimed that he received inadequate employee assistance, which the Hearing Officer duly noted and attempted to address. During this colloquy, petitioner repeatedly called the Hearing Officer a liar, and the Hearing Officer, in turn, repeatedly warned petitioner that if he continued to make such comments, he would be removed." When the petitioner persisted, the Hearing Officer expelled him from the hearing. The court held: "Given petitioner's disruptive, argumentative and antagonistic behavior we cannot say that the Hearing Officer erred in removing him from the remainder of the hearing."

### *DOCS Lacked Evidence That Inmate Possessed Weapon*

Matter of Avery v. Goord, 854 N.Y.S.2d 558 (3d Dep't 2008)

The petitioner was involved in a fight with his cellmate, during the course of which he allegedly stabbed his cellmate in the cheek with a pen. As a result, he was charged with disciplinary rules that prohibit fighting and assaulting another inmate. He was also charged with possession of contraband that may be classified as a weapon. Following separate Tier III hearings, he was found guilty of all charges. After his administrative appeal was denied, he filed an Article 78 proceeding.

The court held that the determination finding the petitioner guilty of possession of contraband that may be classified as a weapon was not supported by the evidence.

DOCS' Disciplinary Rule Series 114 prohibits contraband. Subsection 10 states that an inmate "shall not make, possess, sell or exchange any item that may be classified as a weapon or dangerous instrument by description, use or appearance. A dangerous instrument is any instrument, article or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing bodily harm."

Here, notwithstanding how the pen was used, the court found there was no evidence that it constituted contraband, *i.e.*, an article not "specifically authorized by the superintendent or designee." DOCS acknowledged that it "was officially issued by the prison" and no evidence was presented at the disciplinary hearing to show that the pen was an unauthorized article. Accordingly, the court reversed that charge. The remaining charges were affirmed.

### *Inmate Disciplined for Possession of Twenty-Nine "Identification Size" Photos*

Matter of Garcia v. Selsky, 852 N.Y.S.2d 420 (3d Dep't 2008)

After a search of the petitioner's prison cell resulted in the discovery of 29 card-size identification photographs of the petitioner, as well as his prison identification photograph, he was charged with violating several prison disciplinary rules. Following a Tier III hearing, he was found guilty of possession of contraband, but not guilty of the other charges. The determination was affirmed upon

administrative review, and the petitioner commenced an Article 78 proceeding.

The rule that the petitioner was charged with violating, Disciplinary Rule 113.12, provides that all items possessed by inmates, unless they have been "specifically authorized" by the superintendent or the local rules of the facility, constitute contraband. In this case, the petitioner contended that he was provided with his prison identification photograph by a DOCS counselor and, therefore, he was authorized to possess it. That claim, however, was refuted by the counselor at the hearing. In any event, the court noted, regardless of the petitioner's arguments concerning his prison identification photograph, the 29 other photographs in his possession were determined by the Hearing Officer to be contraband. Inasmuch as the Misbehavior Report, hearing testimony, the petitioner's admission to possessing the photographs, and the confiscated material provided substantial evidence to support the finding of guilt, the court found "no basis to disturb the Hearing Officer's determination."

### *Inmate Not Guilty of "Harassing" Female Employee*

Matter of Washington v. Selsky, 850 N.Y.S.2d 720 (3d Dep't 2008)

The petitioner was charged with solicitation, stalking, and harassment after asking a female correctional officer to accompany him to an office where he gave her a religious book. Following a Tier III disciplinary hearing, he was found guilty of the harassment charge. He contested the finding in an Article 78 proceeding. The court reversed.

DOCS Disciplinary Rule 107.11 provides that "an inmate shall not harass an employee or any other person verbally or in writing." It goes on to state: "Prohibited conduct includes, but is not limited to, using insolent, abusive, or obscene language or gestures, or writing or otherwise communicating messages of a personal nature to an employee or any other person including a person subject of an order of protection with the inmate or who is on the inmate's negative correspondence list."

In this case, the officer admitted that she had had conversations with the petitioner in the past concerning religion, and the petitioner testified that, based upon these conversations, he decided to give her the book as a gift. Although the officer testified that the petitioner exhibited an "eerie" smile which she found "very unnerving," she did not indicate that he engaged in any inappropriate or disrespectful behavior and she confirmed that he had always addressed her professionally in the past.

The court found that the petitioner's conduct "appear[ed] to have been a continuation of a cordial relationship between the officer and petitioner." Under those circumstances, it continued, "we cannot conclude that it rose to the level of harassment as contemplated by [Rule 107.11]."

## ***Parole Cases***

### *Parole Denial Provokes Dissent*

In re Siao Pao v. Dennison, 854 N.Y.S.2d 348 (1st Dep't 2008)

The petitioner pleaded guilty in 1982 to murder in the second degree and robbery in the first degree, and was sentenced to concurrent prison terms of 18 years to life and 8⅓ to 25 years for his participation in the robbery of two people, one of whom the petitioner fatally stabbed in the course of the robbery.

The petitioner sought parole in 1999, 2001, and 2003, but was denied each time. In 2005, he appeared before the Parole Board for the fourth time. He expressed remorse for what he had done, but nevertheless told the Board that he

never thought anyone would get hurt during the robbery and that he had unintentionally stabbed the victim while trying to prevent his co-defendant from beating the man. Since his last appearance before the Board, the petitioner had maintained a clean disciplinary record and worked as a paralegal in the prison law library. He stated that he hoped to pursue a career as a tractor trailer driver and obtain housing through a community program, if placed on parole.

After conferring, the Board rendered its decision:

> After a review of the record and this interview parole is denied. The instant offense…occurred during the commission of a robbery…[and constituted] an escalation of your anti-social behavior. Your institutional achievements and positive disciplinary record are noted and considered. The Board finds your propensity for violence and indifference for the law as an indicator of your unsuitability for release at this time.

The majority of the court, over a vigorous dissent, found that this was sufficient grounds for denying parole.

The majority noted that the law grants the Board substantial discretion in making parole determinations, provided that it follow the standards set forth in the Executive Law. Pursuant to Executive Law § 259-i(2)(c)(A), the Board must consider the inmate's institutional record ("including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy and interpersonal relationships with staff and inmates"), release plans, performance in work release programs, victim impact statements, and any deportation orders. However, the court noted, the statute also states: "Discretionary release on parole shall not be granted merely as a reward for good conduct or efficient performance of duties while confined but after considering if there is a reasonable probability that, if such inmate is released, he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society and will not so deprecate the seriousness of his crime as to undermine respect for law." In most cases, the statute also requires the Board to take into account the seriousness of the offense and the inmate's prior criminal record. Further, courts have held that the Board need not expressly discuss in its determination each of the guidelines, or give equal weight to each factor: "[T]he weight to be accorded to each of the factors," noted the court, "lies solely within the discretion of the Parole Board."

The dissent argued that the Board's decision appeared to rely almost exclusively on the seriousness of the offense, to the exclusion of the additional considerations required by Executive Law § 259-i(2)(c)(A) and that there was virtually no discussion of the additional statutory factors that must be taken into consideration. The dissent pointed out that:

- ✓ the petitioner was 19 years old when he participated in the robbery;
- ✓ he had explained at the time that the victim was accidentally stabbed when he tried to intervene;
- ✓ this account was corroborated by the grand jury testimony of a second victim, and was not disputed by the prosecutor;
- ✓ at the time of his Board appearance, he had been incarcerated for 23 years and denied parole on three prior occasions;
- ✓ his institutional record during his incarceration had been favorable and

included his assignment as a paralegal in the facility's law library;

✓ the petitioner had expressed remorse for his conduct and its consequences; and

✓ his involvement with the criminal justice system prior to his 1981 criminal activities was minor and not characterized by acts of violence.

The dissent agreed that the Board enjoys "considerable discretion" in determining whether to grant parole and "need not itemize each factor it considered, nor give equal weight to all factors, but it must take the statutory factors into consideration." However, the dissent continued, "some factual basis for the Board's conclusions needs to be stated in the decision." Here, the Board made no reference to any of the petitioner's efforts in prison since his last hearing, thus ignoring any progress he may have made. "Notwithstanding the Parole Board's passing pro forma reference to petitioner's institutional achievements and favorable disciplinary record, the Board did not set forth any factual basis to support its conclusion that petitioner has a continuing propensity for violence and a manifest indifference to the law." Because of the lack of factual specificity in the decision, the dissent concluded, "we cannot adequately determine if the Parole Board properly considered and discussed the statutory factors in arriving at its determination. Its decision, therefore, cannot be upheld, and the matter must be remanded for further proceedings."

The majority responded by criticizing the dissent for faulting the Board for failing to provide explanatory detail and for according too much weight to the severity of the petitioner's offenses for which he is currently incarcerated, despite acknowledging "the well-settled precedent" permitting it to do just that.

The majority also criticized the dissent for "appear[ing] to credit petitioner's assertion that he only accidently injured the victim… Such credibility determinations are generally to be made by the Board" and, considering all the various factors of the crime, the Board could have determined that the petitioner was not being truthful or taking full responsibility for his actions.

The majority noted that previous courts, with ten different Justices participating, had found the petitioner's two prior denials of parole--both of which were worded similarly to the instant denial--to have been proper, and it criticized the dissent for failing to explain "how the Board's interpretation of identical facts has suddenly become erroneous or its weighings disproportionate, or why a more detailed discussion in the determination is now mandated by the Executive Law."

In sum, the court supported the Board.

### *Court Reverses Parole Denial Where Board Relied on Non-Statutory Factors*

Matter of Vaello v. Parole Board, 851 N.Y.S.2d 745 (3d Dep't 2008)

The petitioner in this parole appeal was convicted of murder in the second degree as well as several additional charges, and was sentenced to concurrent prison terms, the longest of which was 20 years to life. In 2006, the Board denied the petitioner's request for parole and directed that he be held for an additional 24 months. After the determination was affirmed on administrative appeal, the petitioner commenced an Article 78 proceeding. The court reversed the Board.

The court noted that although parole release determinations are discretionary and entitled to deference, they must satisfy statutory requirements of Executive Law § 259-i, and a

decision based on factors not found in that statute is improper and requires a new hearing.

The first sentence of Executive Law § 259-i(2)(c)(A) states that "[d]iscretionary release on parole shall not be granted merely as a reward for good conduct…but after considering if there is a reasonable probability that, if such inmate is released, he [or she] will live and remain at liberty without violating the law, and that his [or her] release is not incompatible with the welfare of society and will not so deprecate the seriousness of his [or her] crime as to undermine respect for [the] law." The statute goes on to list criteria for the Board to consider in making this determination. (See the discussion in the case above.)

Here, the Board failed to identify any of the standards set forth in the statute. It simply listed the crimes for which the petitioner was convicted, noted one prior conviction, and then summarily stated that it was denying release because "[a]ll factors considered…you are a poor candidate for release to the community."

The court held that although the Board is not required to give all statutory factors equal weight or to articulate each factor considered in making its decision, it must present some statutory rationale for its decision. "The use of 'nonstatutory, conclusory language,'" such as that here, "impermissibly leaves the reviewing court to guess at the basis for the Board's denial." Here, the court concluded, "the dearth of any analysis of the statutory or regulatory criteria" made it "impossible…to give meaning to the language used by the Board."

### *Board Concedes That Parole Hearing Was "Fatally Flawed"*

Matter of South v. N.Y.S. Division of Parole, NY County, April 8, 2008 (Goodman, J.)

The petitioner in this case was a 58-year-old, honorably discharged veteran of the United States military, who has been imprisoned for almost 19 years on an 8-years-to-life sentence. During his imprisonment, he has been a near "model prisoner," and has accomplished, according to the court, "the very things a 'correctional service' might encourage if the goal was rehabilitation and reform."

Nevertheless, he had been denied parole six times.

After his sixth parole denial, he filed an Article 78 proceeding.

At the hearing, the Board denied parole based on the summary conclusion that there was a "reasonable probability that [petitioner] would not live and remain at liberty without again violating the law." According to the court: "The transcript of the abbreviated hearing suggest[ed] that the decision was a foregone conclusion before it even took place. The record demonstrated no probing beyond the conclusory statements that petitioner could not be and should not be allowed to live in the community after 19 years of confinement, notwithstanding his certificate of earned eligibility for parole, which creates a presumption in favor of release [see Correction Law § 805], and his good institutional record.

The Board failed to set forth any additional reasoning in denying parole--which, the court noted, cannot be based on offenses alone. Thus, "one is left with the impression," stated the court, "that the State's position is that because of this man's past crimes, there would, in essence, never be a time that he would be suitable for release, no matter what he has accomplished in 19 years of imprisonment, even though the lengthy confinement and punishment are not in accord with cases of similar seriousness."

In reply to the petition, the Board conceded that the hearing was "fatally flawed" and scheduled a new hearing.

The petitioner opposed this result, arguing that he should simply be granted parole, a

remedy which, the court noted, it was "powerless to impose."

The petitioner also suggested that, by transferring him to another prison for the new hearing, DOCS and/or the Division of Parole was/were attempting to hold the hearing in a jurisdiction which has historically been more lenient with parole decisions than has New York County, where the original hearing was held. The court tried to preclude this, stating that it "would expect that in good faith, unless petitioner's claims of forum shopping are, in fact true," that the Board should be able to meet in New York County and have the petitioner participate in the hearing electronically. "If the prison at which petitioner is currently lodged lacks such capability, whether or not that is what motivated [his transfer], the Court is confident that the Department of Correctional Services or the Division of Parole can make the necessary arrangements for a video hook-up, or removal or return of petitioner to a facility so equipped, such as the one he just left."

## ***Other Cases***

### ***Petitioner Denied "Area of Preference" Transfer***

Matter of Lugo v. Goord, 853 N.Y.S.2d 747 (3d Dep't 2008)

In May 2006, the petitioner, an inmate at Wyoming Correctional Facility, requested an "area of preference" transfer to a correctional facility closer to his home. After the petitioner was informed that he was not eligible for such a transfer because his status code of "REU" for academic programming indicated that he was negatively removed from the program due to unacceptable attendance, participation, or progress, he filed a grievance. The grievance was ultimately denied by the Central Office Review Committee. The petitioner thereafter commenced a CPLR Article 78 proceeding.

The court dismissed the case. At Wyoming Correctional Facility, only inmates who successfully participate in major programming and obtain certain status codes during quarterly reviews are eligible to request "area of preference" transfers. Since the petitioner did not obtain one of the acceptable status codes for his academic programming, the denial of the petitioner's grievance was not irrational or arbitrary and capricious. In any event, the court continued, even if the petitioner were eligible to request an "area of preference" transfer, "it is well settled that an inmate has no right to select the correctional facility in which he or she is housed" and the Commissioner of Correctional Services retains broad discretion to coordinate inmate transfers.

### ***Inmate In Civil Commitment Proceeding Not Entitled to Less Restrictive Conditions***

State v. Cuevas, 853 N.Y.S.2d 798 (4th Dep't 2008)

New York's new civil confinement law, Article 10 of the Mental Hygiene Law, allows the State to hold sex offenders past their maximum expiration date while civil commitment proceedings are pending. DOCS has typically placed such persons in involuntary protective custody.

The respondent in this case was a sex offender who had been held past his maximum expiration date while his civil commitment proceedings were ongoing. He sought an order "requiring Mid-State Correctional Facility to create the least restrictive setting on [its] campus to house individuals in similar circumstances…during the pendency" of civil commitment proceedings. Specifically, the petitioner sought the same conditions of

confinement as inmates in long-term protective custody.

The court agreed that the petitioner was entitled to the conditions of confinement provided for inmates in protective custody as spelled out in DOCS' regulations. See 7 NYCRR 330.4. The court disagreed, however, that the respondent was entitled to anything more. "Because prison administrators have broad discretion to determine, based upon security concerns, whether persons such as respondent should be afforded the less restrictive conditions [of inmates in long term protective custody] we agree with [the State] that prison administrators have discretion to place a person eligible for protective custody in administrative segregation, a more restrictive placement, where such placement is 'required for the security of the facility and the safety of the [detained person].'"

### *Placement of Inmate in Administrative Segregation, Despite Positive Behavior in SHU, Okay With Court*

Matter of Ryan v. Selsky, 852 N.Y.S.2d 490 (3d Dep't 2008)

The petitioner has been imprisoned since 1978. During his imprisonment, he was convicted of murder and arson after setting his codefendant's cell on fire, two counts of escape involving separate facilities, and assault on staff. The petitioner has been confined to a Special Housing Unit and segregated from the general prison population for more than a decade. In April 2006, George Seyfert, Deputy Inspector General of the Department of Correctional Services, recommended administrative segregation of the petitioner. Following a hearing, administrative segregation was determined to be warranted on the ground that the petitioner poses a danger to the staff, inmates, and the correctional facility in which he is housed. After the determination was upheld by the respondent on administrative appeal, the petitioner commenced an Article 78 proceeding. The court upheld the determination, noting: "A determination confining an inmate to administrative segregation will be upheld if supported by substantial evidence 'that the inmate's presence in [the] general population would pose a threat to the safety and security of the facility.'" In this case, the court found, the petitioner's criminal convictions during his imprisonment, history of escape, and testimony minimizing the events surrounding his convictions, as well as the written recommendation and testimony of the Deputy Inspector General, provided substantial evidence to support the respondent's determination. Although the petitioner had behaved well in special housing, the court found this factor was not determinative: "[a] denial of the opportunity to commit a crime," wrote the court, "cannot be…taken as probative evidence of rehabilitation."

### *Plaintiff States Claim Against County Jail in Slip and Fall Case*

Havens v. County of Saratoga, 854 N.Y.S.2d 810 (3d Dep't 2008)

The plaintiff, a 17-year-old inmate at the Saratoga County Correctional Facility, slipped and fell as she was cleaning a shower stall. She had been assigned to wash down the tile stall using soapy water, a sponge, and a Brillo-type pad. After soaping the walls and floor of the stall, she went to the far wall of the stall where the nozzle was located and turned on the water so the spray would wash out the soap. She then immediately turned to run out of the stall to avoid getting wet. Her feet went out from under her on the soapy floor and she fell, injuring her hand. State Supreme Court dismissed her negligence claim against the County Jail,

concluding that her conduct was the sole cause of the accident.

The Appellate Division reversed. The court noted that, in general, "an inmate is required to exercise ordinary care" and that, if he or she fails to do so "and pursues a dangerous course of conduct, he or she is required to take some responsibility for his or her own negligence." On the other hand, the court continued, "[G]overnmental entities 'owe a duty to provide inmates engaged in work programs with reasonably safe equipment' and training."

In this case, the court continued, deposition testimony of the jail administrator established that all minor inmates were required to perform certain chores and were subject to disciplinary action if they refused. This included taking turns cleaning the shower, for which they were issued only a bucket of soapy water, a sponge, and a scrubbing pad, but no special clothing. The plaintiff testified that at the time of her fall, she was wearing her facility-issued clothing, including a pair of slightly large, slip-on men's canvas shoes with smooth rubber soles. The court also noted that the layout of the shower stall at issue all but guaranteed that an inmate cleaning it would be exposed to a slippery surface. "In other words," the court continued, "defendants have not demonstrated that, unlike a person cleaning a residential or hotel shower, an inmate cleaning the subject shower had an option to avoid the slippery surface. Nor have they shown that appropriate equipment to minimize slippage, such as mats or water shoes, was available." Finally, while the testimony indicated that facility personnel never instructed inmates to run out of the shower, the plaintiff testified that everyone who washed the shower ran out after turning on the water to avoid getting wet; furthermore, the correctional officers were aware of this practice and did not stop it.

On this record, the court found, the defendants were not entitled to have the action dismissed prior to trial.

### *Father, Incarcerated for Domestic Violence, Prohibited Contact With Child*

Morelli v. Tucker, 851 N.Y.S.2d 696 (3d Dep't 2008)

The petitioner, an incarcerated father, sought visitation with his children. He and the children's mother had separated following several incidents of domestic violence perpetrated by the petitioner and the mother had been awarded sole custody of the child, with the petitioner allowed parenting time on Fridays and alternate weekends. Thereafter, the domestic violence continued to escalate, culminating in two serious incidents--including one in which the petitioner allegedly beat the mother with a crowbar--for which the petitioner was eventually incarcerated.

While incarcerated, he filed a petition for visitation with the child, asserting that the mother's "bitterness is poisoning [his] relationship" with the child without "just cause." Family Court dismissed the petition and prohibited all contact between the petitioner and the child.

On appeal, the Appellate Division held: "Although the incarceration of a noncustodial parent [does] not, by itself, preclude visitation with his or her child, a denial of an application for visitation is proper where evidence demonstrates that visitation would not be in the child's best interest." Here, although the petitioner denied that he committed any domestic violence against the child's mother and contended that she was poisoning his relationship with the child, the court noted that he nevertheless stands convicted by guilty plea of brutally assaulting her. Moreover, the court noted, Family Court had credited the

respondent's testimony that the assault occurred in the presence of the child, who was then 16 months old, and that the child developed a fear of men as a result. Under these circumstances, wrote the court, "and in light of both the child's young age and [petitioner's] lengthy prison sentence," the Family Court's determination that visitation or other contact with the petitioner would not be in the child's best interest "has a sound and substantial basis in the record."

### *Inmate Denied Permission to Send Excess Stamps Home*

Matter of Vidal v. Goord, 850 N.Y.S.2d 720 (3d Dep't 2008)

The petitioner commenced an Article 78 proceeding to challenge the denial of his grievance requesting that he be allowed to send to his family 668 postage stamps that were confiscated from him by DOCS.

The court affirmed DOCS' position. It noted that although Directive No. 4910 § VI(D) sets forth options for the disposal of contraband, including allowing inmates to mail certain items home when appropriate, the options also include storage or destruction. DOCS had decided that the petitioner was not allowed to choose between those options and the court found that that determination "was not an arbitrary and capricious interpretation of the directive," especially considering that the stamps at issue, which exceeded $20.00 in value in violation of prison disciplinary rules, were confiscated from the petitioner as part of a penalty imposed in a Tier III disciplinary hearing in which he was found to have obtained them by means of an unauthorized exchange.

### *Court Rejects Denial of State Job to Ex-Felon*

Hollingshed v. New York, Index No. 0006848/2007 (Supreme Court, Bronx Co., January 31, 2008) (Williams, J.)

A job applicant who had been convicted of a felony 24 years ago was illegally denied employment working for New York State as a direct care worker for mentally impaired adults, a Bronx court ruled.

The employer, the New York State Office of Mental Retardation and Developmental Disabilities (OMRDD), failed to consider that the candidate previously had an "unblemished work record" with vulnerable populations and had not been convicted since 1983, wrote the court in Hollingshed.

The dispute arose after Mr. Hollingshed applied for a job in August 2006 as a direct care worker with Episcopal Social Services, an agency funded by OMRDD. The position paid $10 an hour and involved aiding mentally impaired adults with bathing, feeding, and other activities.

Mr. Hollingshed, then 56, had more than 14 years of experience working with special needs populations, including homeless adults, disabled foster children, and individuals with cerebral palsy and HIV/AIDS.

After a background check confirmed Mr. Hollingshed's criminal history, he was given 30 days to explain why he should not be denied employment. He wrote a letter to OMRDD, detailing his criminal history, indicating that he had worked continuously since his last conviction in 1983. He also noted that he had received a Certificate of Good Conduct in 1992 from the New York State

Board of Parole which, the court noted in its decision, "served to remove all legal bars and disabilities to employment, license and privilege except those pertaining to firearms and except the right to be eligible for public office."

Mr. Hollingshed wrote: "[M]y life has made a 360 degree turn around. Don't let my past criminal history be the determining factor whether or not my application will be approved. I try to leave the past in the past but that don't [sic] always seem to work it always seem to find away [sic] to resurface."

After Mr. Hollingshed was denied employment, he filed an Article 78 petition challenging the determination.

The court held that the denial of employment was arbitrary, capricious, and an abuse of discretionary power. The court rejected the state's argument that Mr. Hollingshed's prior convictions "established a pattern of behavior" and "presented an unreasonable danger" to the social service agency's consumers.

Under Correction Law § 752, an employer may deny an individual employment based on criminal history only if a "direct relationship" exists between the prior offenses and the specific job, or if hiring the person would present an "unreasonable risk" to property or the public. In deciding whether to hire a person with a criminal background, an employer must consider several factors, including the duties of the job, when the offense occurred, the "seriousness" of the crime, information concerning "rehabilitation and good conduct," and the "legitimate interest in protecting property, and the safety and welfare of specific individuals or the general public."

The court noted that since Mr. Hollingshed's release in 1988, he had no further arrests and had been continuously and successfully employed working with emotionally, mentally, and physically handicapped children. "It does not appear," wrote the court, "that the agency fully considered Mr. Hollingshed's prior work experience, letters of reference, and Certificate of Good Conduct" and it could not "reasonably state that Mr. Hollingshed provided no proof of his rehabilitation or the fact that he had been drug free for almost 18 years."

Judith Whiting, an attorney for the Legal Action Center, which represented Mr. Hollinshed, said, "The state should encourage organizations to hire people who moved on from past mistakes, not stand in the way," and added that the court's decision confirms the work that her organization, and others, are doing in the re-entry area.

## *Pro Se Practice*

### *Bringing a Habeas Corpus Proceeding in State Court*

This memoranda explains when and how to bring a habeas corpus proceeding in State Court.

"Habeas corpus" is a Latin term meaning "produce the body." A habeas corpus proceeding refers to the process by which a person in custody can obtain a court order directing that he or she be produced in court in order to conduct an inquiry into the legality of the custody. More broadly, it is a legal action claiming that a person is being held in custody illegally.

Historically, habeas corpus has been used to obtain further review of a criminal conviction after all direct appeals have been exhausted. Federal habeas corpus proceedings are still frequently used for that purpose. If you have exhausted your state court remedies and believe your conviction was tainted by some form of federal constitutional error, a federal habeas corpus proceeding is the proper way to proceed.

In New York, however, the use of habeas corpus proceedings to obtain further review of a criminal conviction has been largely supplanted by Criminal Procedure Law § 440. That statute specifies both the circumstances under which and the procedure by which a New York court will entertain further review of a criminal conviction once direct appeals have been exhausted. Thus, most post-appeal challenges to the legality of a criminal conviction brought in state court should be raised in a "440" motion. (To learn more about federal habeas corpus proceedings and 440 motions, request a copy of PLS' memo, "Collateral Attacks on a Criminal Conviction.")

So, when would you use a state habeas corpus proceeding?

Habeas corpus in New York is used primarily to challenge the legality of your custody for some reason other than your conviction. In other words, you would use a New York habeas corpus proceeding when you believe the State has no right to keep you in custody, even though you concede that your conviction was legal.

A typical example would be a claim that DOCS has miscalculated your sentence computation and, as a result, has held you in prison longer than it has a legal right to. Such a claim does not challenge the legality of your underlying conviction. It simply asserts that the legal authority to hold you under that conviction has expired.

Another example might be one of the situations discussed in the lead article of this issue of ***Pro Se***: a challenge to a period of Post Release Supervision on the ground that the period of Post Release Supervision had not been ordered by the sentencing court; or a challenge to DOCS' authority to run your sentence consecutively to your parole time, if the sentencing court did not order consecutive sentences. In both of those examples, you are not challenging your underlying conviction but, instead, DOCS' (or Parole's) legal authority to continue to hold you after the sentence imposed by the court has expired.

State habeas corpus proceedings are, thus, like Article 78 proceedings, in that they are used primarily to challenge the legality or correctness
of an administrative decision, such as the calculation of a sentence or the revocation of parole.

The critical difference is this: You can use a habeas corpus proceeding, rather than an Article 78 proceeding, only if winning the proceeding would establish your entitlement to immediate release.

So, for example, if you disagree with the way DOCS has calculated your sentence, you could challenge the sentence calculation in an Article 78 proceeding (after exhausting your administrative remedies). Or you could challenge it in a habeas corpus proceeding. But you could only challenge it in a habeas corpus proceeding if winning would entitle you to be released--that is, if recalculating the sentence as you believe that it should be calculated would show that you are being held beyond your conditional release or maximum expiration date.

Likewise, you could bring an Article 78 proceeding to challenge DOCS' decision to impose a period of Post Release Supervision on your sentence. Or you could challenge the decision in a habeas corpus proceeding. But you could only challenge the decision in a habeas corpus proceeding if winning would entitle you to immediate release. In this case, that would mean that you could bring a habeas corpus proceeding only if you are being held as a result of an alleged violation of the period of Post Release Supervision. If you are still serving the underlying sentence of imprisonment, winning would not entitle you to immediate release. You would have to bring an Article 78 proceeding.

If you can bring a habeas corpus proceeding, rather than an Article 78

proceeding, you should. Habeas corpus has several advantages over an Article 78. First, in a habeas corpus proceeding, unlike an Article 78 proceeding, you do not need to exhaust your administrative remedies before filing. You can file the claim as soon as you feel you have valid grounds. Second, if you win your habeas corpus proceeding, you will be entitled to immediate release. Third, if you win, the respondent is not entitled to a stay of the lower court's decision while he appeals. (In an Article 78 proceeding, by contrast, the respondent is entitled to a stay of a lower court's decision while the decision is being appealed.)

If you are unsure as to whether you would be entitled to immediate release should you win your claim, you may still bring it as a habeas corpus proceeding instead of an Article 78 proceeding. If the court concludes that you would not be entitled to immediate release if you won, it should convert the proceeding to an Article 78. (It would, however, then be subject to all the requirements of Article 78 proceedings, including those requiring exhaustion of administrative remedies.)

### *How to File a Habeas Corpus Proceeding*

#### Law Governing

Habeas corpus proceedings in New York are governed by Article 70 of the Civil Practice Law and Rules (CPLR), §§ 7001 through 7012. In addition, habeas corpus proceedings, like Article 78 proceedings, are considered "special proceedings" under New York law and are thus also governed by CPLR §§ 401 - 411, which concern "special proceedings," generally. It would be worth your time to obtain and read these statutes before bringing your claim; you should be able to find them in your law library.

#### Where to File

A habeas corpus proceeding may be brought in any State Supreme Court in the judicial district in which you are detained, or even in the Appellate Division governing the place you are being held. However, they are always *returnable*--that is, answered and heard--in the County in which you are detained. So, absent exceptional circumstances, they should generally be filed in the County in which you are being detained. Thus, if you are incarcerated in Clinton Correctional Facility, your habeas proceeding should be filed in the Supreme Court of Clinton County.

#### What to File

A habeas corpus proceeding consists of an **Order to Show Cause** and a **Verified Petition** or **Affidavit in Support**.

The **title**, or caption, of the proceeding is, generally, "People ex rel [the Petitioner] versus [warden/superintendent]." This means that the writ is being issued by "the People" (*i.e.*, the State) in a matter relating to "the Petitioner" (usually, you) and that it is addressed to the person who is holding you in custody and who will be required to produce you in court (*i.e.*, the warden or superintendent of your correctional facility).

Technically, anybody can petition for a writ of habeas corpus on behalf of any another person. Thus, sometimes the petitioner won't be you but your attorney or a family member or friend "on behalf of" ("o/b/o") you. In that case, the caption would be "People ex rel [attorney/family member, etc.] o/b/o [you] vs. [warden/superintendent]."

**(a) The Order to Show Cause**

The **Order to Show Cause,** or OSC, is the document that commences the proceeding. It is an order, signed by a judge, requiring the respondent--generally, the superintendent of the correctional facility in which you are being held--to "show cause" at a particular place and time why your detention is legal. The OSC will also typically state the way in which notice of the proceeding should be served on the respondent and state the date by which the respondent must submit answering papers, if any.

The OSC is generally prepared *by you* (or your attorney) for the judge's signature. The judge may sign it as you wrote it or may change it in any number of particulars or may substitute his or her own. In any event, after it is signed, the judge will send you a copy of the signed Order. It will then be your obligation to serve it in the manner in which the Order prescribes on the persons named therein. Often, for simplicity's sake, the Order will simply require that the papers be served on the Attorney General, as the representative of your facility superintendent, by certified mail.

Choose the dates you put in the proposed OSC carefully. Remember that a number of things must happen between the date you put your papers in the mail to the court and the date you choose for the hearing.

- First, the court has to receive and process the papers.

- Second, a judge has to review them, sign the OSC, and return it to you.

- Third, you will have to serve a copy of the papers, plus the OSC, on the respondent or the Attorney General within the time specified in the OSC.

- Fourth, the Attorney General must have a reasonable amount of time to investigate the situation and prepare a reply.

Given all that, a month is often a good framework within which to work. In that framework, you would set the hearing date for a
month from the date on which you are sending the papers to the court. You would then set the date by which you must serve the papers on the Attorney General for a week to ten days from the date on which you send the papers to the court, and you would set the date by which the Attorney General must answer the petition for ten or so days after service has been completed. That gives everyone involved--you, the court and the Attorney General--enough time to get everything done correctly.

**(b) The Verified Petition**

The **Verified Petition** is a petition or affidavit stating the grounds upon which the Order to Show Cause should be issued. Basically, it is your statement about why your custody is illegal and why you are entitled to be released on habeas corpus. It should lay out the facts that give rise to your Petition as clearly as possible, usually in numbered paragraphs. If you have any exhibits that prove your facts, they should be attached to the Petition, each one clearly marked and numbered.

In addition to the basic facts giving rise to your petition, Section 7002 of the Civil Procedure Law and Rules lists several items that every Petition for a writ of habeas corpus must state. They are:

- That the person on whose behalf the petition is made is detained;

- The name of the person detaining him and the name of the place of detention (if known);

- The cause or pretense of the detention;

- That a court or judge of the United States does not have exclusive jurisdiction to order the petitioner released;

- Whether any appeal has been taken from any order by virtue of which the person is detained, and, if so, the result; and

- The date, and the court or judge to whom made, of every previous application for the writ, the disposition of each such application and of any appeal taken, and the new facts, if any, presented in the petition that were not presented in any previous application.

The **Verification** is a statement affirming that what you have said in the petition is true to the best of your knowledge. You sign it in front of a notary and attach it to the back of the Petition.

In addition to the Order to Show Cause and the Verified Petition, you will need an Index Number Application, and 3 "RJIs" (Request for Judicial Intervention). If you cannot afford the court filing fee, you may also need a Poor Person's Request. These forms--which, for the most part, are self-explanatory--should be available through your law library.

Sample Orders to Show Cause and Verified Petitions, as well as Index Number Applications, RJIs, and Poor Person's Requests, are also available upon request to your local office of Prisoners' Legal Services.

**How to File**

Once you have drafted your Index Number Application, RJIs, Poor Person's Application, proposed Order to Show Cause, and Petition, and have signed the Verification in front of a notary, you should staple the Order to Show Cause, Petition, Verification, and whatever exhibits you have together in one document. You should then put all the papers in one envelope with a letter addressed to your County Court Clerk, itemizing all the documents that you are enclosing:

- Order to Show Cause;

- Verified Petition for a Writ of Habeas Corpus;

- Poor Person's Application and Authorization;

- Index Number Application; and

- Three RJIs.

Your letter should ask the court to:

1. Grant the Petition an index number;
2. Assign the matter to a judge; and
3. Ask the judge to sign the Order to Show Cause and return both it and the Petition to you.

Send the entire package to your local County Court Clerk.

When you get the signed Order to Show Cause and the Petition back, make two copies. Follow the instructions in the Order to Show

Cause and serve one copy on your adversary (typically, the Attorney General). Then draft an "Affidavit of Service" stating that you served the papers. Send the Affidavit and one copy of the OSC and Petition back to the court clerk. Keep the other for your records.

You should get something back from the Attorney General by the date on the Order to Show Cause by which the AG is supposed to respond. It may be an Answer--*i.e.*, the AG's reply to your legal arguments--or it may be simply a request for an adjournment. In either case, you can respond, if you like. If the judge hearing the case feels it necessary to produce you for a hearing, he or she will issue an Order for your production. If not, your case will be decided on the papers.

Good luck!

## Human Rights Watch Seeks Information from Inmates

In the next few months, Human Rights Watch, the largest international human rights organization based in the United States, will be looking at the drug treatment and the HIV and Hepatitis C prevention programs in DOCS. Founded in 1978, Human Rights Watch is an independent, non-governmental organization dedicated to documenting human rights abuses around the world and working to change these conditions. Human Rights Watch reports are not just dry, academic documents. Instead, the reports try to bring out the human stories involved. Confidentiality is highly respected at all times. Real names are not used in the reports without permission.

Megan McLemore, a lawyer and researcher with the HIV/AIDS Program at Human Rights Watch, is seeking information about the New York State prison system's drug/substance abuse treatment and HIV and Hepatitis C prevention services. Questions include:

1. **What types of drug/substance abuse treatment programs are offered in your facility? Are these treatment programs accessible to you? Are you on a waiting list? If you are in a program, is it helpful? What makes it helpful?**
2. **Are you worried that you will use drugs when you return to the community? Will you need help finding a treatment program in the community once you are released?**
3. **If you were a user of heroin, oxycontin, or other opiates, did you have a difficult withdrawal experience in jail or in DOCS? Were you on methadone or buprenorphine (Suboxyn) before you entered prison? Do you feel that methadone or buprenorphine would be helpful to you in prison? Would it be helpful to be linked to a medication-therapy clinic on the outside once you are released? Have you received education about the risk of overdose upon release?**
4. **Are you receiving HIV and Hepatitis C prevention education? Please describe these programs and tell us if they are helpful to you and why.**

**If you would be willing to share your experiences and opinions, please write to Human Rights Watch at the address below.**

**Megan McLemore, Esq.**
**HIV/AIDS & Human Rights Program**
**Human Rights Watch**
**350 5th Avenue, 34th Floor**
**New York, NY 10118**

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### *Pro Se On-Line*

Inmates who have been released, and/or families of inmates, can read ***Pro Se*** on the PLS website at:

www.plsny.org.

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## PLS OFFICES AND THE FACILITIES SERVED

**Requests for legal representation and all other problems should be sent to the local office that covers the prison in which you are incarcerated. Below is a list identifying the prisons each PLS office serves:**

**ALBANY**
**41 State Street, Suite M112, Albany, NY 12207**

**Prisons served: Arthurkill, Bayview, Beacon, Bedford Hills, Mt. McGregor, Summit Shock, CNYPC, Coxsackie, Downstate, Eastern, Edgecombe, Fishkill, Fulton, Great Meadow, Greene, Greenhaven, Hale Creek, Hudson, Lincoln, Marcy, Midstate, Mid-Orange, Mohawk, Oneida, Otisville, Queensboro, Shawangunk, Sing Sing, Sullivan, Taconic, Ulster, Wallkill, Walsh, Washington, Woodbourne.**

**BUFFALO**
**Statler Towers, Suite 1360, 107 Delaware, Avenue, Buffalo, NY 14202**

**Prisons served: Albion, Attica, Buffalo, Collins, Gowanda, Groveland, Lakeview, Livingston, Orleans, Rochester, Wende, Wyoming.**

**ITHACA**
**102 Prospect Street, Ithaca, NY 14850**

**Prisons served: Auburn, Butler, Camp Georgetown, Monterey Shock, Camp Pharsalia, Cape Vincent, Cayuga, Elmira, Five Points, Southport, Watertown, Willard.**

**PLATTSBURGH**
**121 Bridge Street, Suite 202, Plattsburgh, NY 12901**

**Prisons served: Adirondack, Altona, Bare Hill, Camp Gabriels, Chateaugay, Clinton, Franklin, Gouverneur, Lyon Mountain, Moriah Shock, Ogdensburg, Riverview, Upstate.**

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