Pro Se

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Governor Signs PRS Legislation

On June 30, 2008, Governor Paterson signed legislation amending the Correction and Penal Laws. The new law **clarifies** (makes clear) that the courts must impose Post-Release Supervision (PRS) whenever they impose a determinate (flat) sentence, explains the steps DOCS must take when it believes that a court has imposed an "erroneous" sentence, and provides a framework for resentencing defendants with respect to whom the courts had imposed determinate sentences but had failed to impose post-release supervision (PRS). The law was effective the date it was signed. Some of the amendments apply to people who will be sentenced after the effective date; others apply to people who were sentenced before the effective date.

PRS Provisions

Defendants Sentenced Between September 1, 1998 and June 30, 2008

With respect to defendants sentenced between September 1, 1998 and June 30, 2008, where a inmate's commitment shows that the court imposed a determinate sentence, but does not show that the court imposed post-release supervision, the law requires DOCS to notify the sentencing court. Once the court is notified, it must either transmit a **superseding** (takes the place of the original) commitment order reflecting that PRS was in fact imposed at sentencing, or convene a re-sentencing process. If the court convenes a re-sentencing process, the law requires it to be completed within 40 days of the court's receipt of the notice from DOCS. During the re-sentencing process, where the district attorney consents, the court may re-impose the original determinate sentence without any term of post- release supervision.

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A Message From the Executive Director

Karen L. Murtagh-Monks

According to Amnesty International, at least twenty-three state departments of correction, and the U.S. Bureau of Prisons, have policies that expressly allow the use of some form of restraints on female prisoners while they are in labor. Recently, in Nelson v. Correctional Medical Services, ___ F.3d ___ , 2008 WL 27774230 (8th Cir. July 18, 2008), a three-judge panel, sitting for the 8th Circuit Court of Appeals, held that such conduct *did not* violate the 8th amendment to our Constitution which prohibits cruel and usual punishment.

In Shawana Nelson's case, while she was in labor at the hospital, she was "(1) initially handcuffed and shackled, (2) later shackled by, at least, one ankle to the bed railing until shortly before she actually gave birth, and (3) placed in leg restraints after giving birth." Nelson, who weighed a little over 100 pounds, gave birth to a 9½ pound baby. In her complaint, she alleges that the experience of giving birth without anesthesia, and while largely immobilized, left her with permanent back pain and damage to her sciatic nerve. Circuit Judges William Riley, Raymond Gruender, and Bobby Shepherd held that where there was nothing in the record to demonstrate that the defendants "deliberately disregarded" Ms. Nelson's medical needs, this conduct was not cruel or inhuman.

Admittedly, our Constitution "does not mandate comfortable prisons," Rhodes v. Chapman, 452 U.S. 337, 346 (1981), "but neither does it permit inhumane ones." Farmer v. Brennan, 511 U.S. 825, 832 (1994). During our evolution as a country, our courts have given us ways to analyze whether certain conduct violates the 8th amendment. They have told us that the scope of the cruel and unusual punishment clause of the Constitution acquires meaning "as public opinion becomes enlightened by a humane justice," [Weems v. U.S., 217 U.S. 349, 378 (1910), citations omitted], that we must be "guided by the evolving standards of decency that mark the progress of a maturing society," [Trop v. Dulles, 356 U.S. 86, 101 (1958)], that the 8th Amendment embodies "broad and idealistic concepts of dignity, civilized standards, humanity, and decency," [Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968)], and that the "[l]egal prohibition of cruel and unusual punishment is an important aspect of humanity's search for civilization," Cunningham v. Jones, 567 F.2d 653, 655 (6th Cir. 1977).

According to Amnesty International, use of mechanical restraints on a pregnant inmate constitutes a cruel and inhumane form of punishment and poses a serious risk to both the mother and her unborn child. The United Nations standard for the Treatment of all Prisoners, Rule 33, states that shackles should not be used on inmates unless they are a danger to themselves, others or property or have a history of absconding. Like most incarcerated women, Ms. Nelson was in prison for a non-violent crime—identity fraud and writing bad checks. Thus, based on evolving standards of decency, one might ask, how it is possible that, in this day and age, a court could find that handcuffing and shackling Ms. Nelson to a hospital bed during her labor did not violate the 8th amendment?

Presently only three states have officially banned the practice of shackling pregnant women in labor: California, Illinois and Vermont. In the past, New York introduced legislation to ban the practice, but the legislation never moved forward. [See Assembly Bill A04105, Senate Bill S2115, sponsored by Assemblyman N. Nick Perry and Senator Velmanette Montgomery, respectively]. The proposed legislation allows the use of handcuffs if it is determined by prison personnel that the prisoner poses a substantial escape risk. Legislation such as this is humane, necessary, appropriate and overdue. I urge DOCS to join with PLS in supporting the passage of similar legislation during the upcoming 2009-2010 legislative session.

Note: Because the practice of shackling pregnant women during labor is draconian, PLS has joined with a number of other organizations as amicus in support of a request for a rehearing en banc. This means that we are asking the court to look at this case again where all the judges on the court, there are 11 of them, will re-hear the case.

The review and resentencing provisions of the PRS law do not impact on an inmate's rights to bring an Article 78 or habeas action to remedy DOCS' imposition of post-release supervision.

The review and re-sentencing provisions of the law apply only to people sentenced to determinate sentences between September 1, 1998 and June 30, 2008. A summary of the most significant aspects of the legislation is set forth on pages 6-7.

Clarification of Existing Law

The law clarifies that when a court imposes a determinate sentence, it must also impose a period of post-release supervision and requires courts to transmit the certificate of conviction and a certified copy of the sentencing minutes to DOCS within 30 days of sentencing.

The legislation also requires DOCS to identify illegal sentences and, when DOCS discovers an illegal sentence, to notify the district attorney (DA) of the county where the sentence was imposed. If the DA agrees that the sentence is legally improper, the DA must so inform DOCS, whereupon DOCS is required to notify the sheriff of the county – or the commissioner of the city or county department of correction – from which such person was committed, who must take the person to court for re-sentencing.

DOCS Adopts Comprehensive Court Notification Plan

In response to the PRS Legislation, DOCS, Parole and the Office of Court Administration (OCA) have adopted a schedule for completing the review process required by the law. The plan takes the form of a Memorandum of Understanding (MOU). **The MOU applies to individuals who, between September 1, 1998 and June 30, 2008, were sentenced to determinate sentences, whose commitment orders do not reflect the imposition of PRS and whose sentencing minutes, assuming that they are in DOCS custody, do not show that the court imposed PRS.** The MOU refers to these individuals as Designated Persons (DP). To avoid confusion, we will use the same term. **Only if you are a DP does one of the following deadlines apply to you.**

The purpose of the MOU is to organize the sentence review process mandated by the legislation. The MOU is structured so that those individuals whose actually imposed sentences have expired and who are in DOCS or local custody based on violations of DOCS-imposed PRS will be returned to the sentencing courts this summer. The MOU is a voluntary arrangement. It represents goals that the signatories have set for themselves. It remains to be seen whether each signatory will be able to meet the goals set by the MOU.

The Goals Set Forth In The MOU

Designated Persons Whom DOCS Or Parole Plan to Refer to the Courts by July 31, 2008

- Individuals who are in DOCS custody due to violations of PRS that was not judicially imposed. The MOU estimates that there are about 400 people in this group.

- Individuals who are either in DOCS custody solely on the basis of PRS violation warrants (e.g., for violations occurring at Willard D.T.C.) or in the custody of local jails solely on the basis of either technical violations of PRS or PRS violation warrants.

Designated Persons Whom Parole Plans To Refer to the Courts by October 1, 2008

- Individuals who are currently under PRS supervision in the community and who were first released to PRS between July 15, 2004 and July 15, 2007. Of this group, no more than 500 people will be referred to the courts prior to September 1, 2008.

Designated Persons Whom Parole Plans to Refer to the Courts by November 1, 2008

- Individuals who are currently under PRS supervision in the community and who were first released to PRS between July 16, 2007 and July 15, 2008.

- Individuals who are first released to PRS between July 15, 2008 and September 1, 2008.

Designated Persons Whom Parole Plans To Refer to the Courts By December 1, 2008

- Individuals who were released to PRS before July 15, 2004.

- Individuals who are on PRS in the community and who have not reached the maximum expiration dates of their judicially imposed sentences.

Designated Persons Whom DOCS Plans To Refer to the Courts 45 Days Before They Are Released to PRS for the First Time

- Individuals who will be released to PRS after September 1, 2008 but before October 1, 2008.

Designated Persons Whom DOCS Plans To Refer to the Courts 60 Days Before They Are Released to PRS for the First Time

- Individuals who will be released to PRS after October 1, 2008. The MOU estimates that will be 70 to 80 such releases a month.

Individuals Whom Parole or DOCS Plans To Refer to the Courts Within 30 Days Of Their Re-incarceration

- Individuals whose commitment orders do not reflect the judicial imposition of PRS, and who were not referred to the sentencing courts prior to their subsequent incarceration in a local jail on a PRS violation warrant.

- Individuals whose commitment orders do not reflect the judicial imposition of PRS who were released from, and then returned to, DOCS custody due to a revocation of PRS and who have not previously been referred to the sentencing court.

The MOU provides that if the flow of cases into any particular Judicial District creates or is predicted to create workloads beyond the capacity of the District to provide fair and **expeditious** (speedy and efficient) review, and the flow of DPs into the District should therefore be modified, the deadlines may be modified in that District by agreement, subject to OCA approval, between the Administrative Judge, DOCS and Parole.

Court Finds PRS Revocation To Be Null and Void

In People ex rel. Benton v. Warden, 2008 WL 2132803 (Sup. Ct. Bronx Co., May 21, 2008), the court addressed the issue of whether a parolee could be given a time assessment for a violation of PRS, where the violation occurred before a court had imposed PRS. The facts presented to the court were that Mr. Benton was sentenced to a five year determinate sentence, but the court, although having told him at his plea that PRS would be imposed, at sentencing did not mention it. DOCS however, administratively imposed 5 years PRS. After Mr. Benton was released to parole supervision, a parole violation warrant was issued, his parole was revoked and a time assessment of 24 months was imposed. A year later, Mr. Benton brought a motion before the sentencing court, which, citing the plea minutes, imposed 5 years PRS, ***nunc pro tunc*** (as though it had been imposed at the same time as the original sentence). Mr. Benton

then filed a petition for a writ of habeas corpus arguing that he could not have violated the terms of PRS, as at the time of the alleged violation, he had not been sentenced to PRS.

The court ruled in Mr. Benton's favor. It reasoned that in Matter of Garner v. New York State Correctional Services, 859 N.Y.S.2d 590 (2008), the Court of Appeals stated **unequivocally** (without any ifs, ands, or buts) that the combined command of CPL §§ 380.20 and 380.40 is that the sentencing judge, and only the sentencing judge, is authorized to pronounce the PRS **component** (part) of a defendant's sentence, and that prison officials are bound by the content of an inmate's commitment papers. Thus, the Benton court found, DOCS' imposition of PRS, where a judge failed to impose PRS at sentencing is "a nullity."

Further, the court held, the court's imposition of PRS after the date that Mr. Benton allegedly had violated PRS did not change the fact that Mr. Benton could not violate a term of his sentence that was not imposed until after the date of the violation. Because the Mr. Benton was not subject to any conditions of release when he was violated, the court granted the writ of habeas corpus and ordered Mr. Benton's release.

Based on the court's order, Mr. Benton was released to serve the period of PRS imposed by the judge at the re-sentencing procedure.

Court of Appeals To Review People ex rel. Gill v. Greene

Overruling 25 years of precedent, in People ex rel. Gill v. Greene, 852 N.Y.S.2d 457 (3d Dep't 2008), the Third Department ruled that where a sentencing court is silent as to whether a newly imposed sentence runs concurrently with or consecutively to, a previously imposed and undischarged sentence, DOCS must compute an inmate's legal dates as though the court had ordered the new sentence to run concurrently with the old. See, ***Pro Se***, Volume 18, No. 2, Spring 2008. Following this decision, DOCS made a motion to re-argue the case, or in the alternative, for leave to appeal to the Court of Appeals. On June 26, 2008, the Third Department denied the motion to reargue and granted the motion for leave to appeal to the Court of Appeals.

While the case is pending before the Court of Appeals, Gill v. Greene remains good law in the courts located in counties that fall within the Third Department. The Court of Appeals could affirm the Third Department's decision in Gill, in which case its holding will apply state-wide. Or the Court could reverse the Third Department, in which case the law statewide will be that when the court imposes a sentence on a defendant whom it has found to be a predicate felony offender, the sentence must run consecutively to previously imposed and undischarged sentences.

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Post-Release Supervision

On June 30, 2008, new laws pertaining to determinate sentences and post-release supervision (PRS) became effective. Among the new provisions are the following:

Determinate Sentences Imposed Between September 1, 1998 and June 30, 2008: Correction Law § 601-D*

- When an inmate's commitment order does not show that PRS was imposed, and DOCS either does not have the inmate's sentencing minutes, or the sentencing minutes show that PRS was not imposed, DOCS must notify the sentencing court.

- After receiving notice, where the court reviews the sentencing minutes and determines that PRS was imposed at sentencing, the court must issue a superceding commitment order.

  Where a superceding commitment order is not issued:

  Within 10 days of receiving notice from DOCS, the court must appoint counsel and calendar a court appearance to be held no more than 20 days after receipt of the notice;

  At the appearance, the court must set a date for a re-sentencing procedure. The procedure must be scheduled no more than 30 days after the date upon which the court received the notice;

  No later than 40 days after receiving notice, the court must issue a written order resolving the sentencing issue and provide to DOCS and to the inmate a copy of the current order of commitment.

- The inmate may consent to extend the time periods that the law imposes on the court.

- Within 30 days, and based on extraordinary circumstances that prevent final resolution of the question of whether the inmate will be re-sentenced, the District Attorney may ask the court for a 10 day extension.

- **Where the District Attorney consents, the sentencing court may re-impose the originally imposed determinate sentence of imprisonment without any term of post-release supervision, which then shall be deemed a lawful sentence. Penal Law § 70.85**

*** These provisions only apply to determinate sentences that were imposed between September 1, 1998 and June 30, 2008.**

RELATED PROVISIONS

Determinate Sentences and Post-Release Supervision: Penal Law § 70.45(1)

When a court imposes a determinate sentence, it must state not only the term of imprisonment, but also a period of post-release supervision as determined by Article 70 of the Penal Law.

Documents Relating to Sentences: Criminal Procedure Law § 380.70

Within 30 days of sentencing, the court must deliver to DOCS a certified copy of the sentencing minutes and a certificate of conviction and a copy of any order of protection issued against the defendant.

Correction of Illegal Sentences: Correction Law § 601-a

Whenever it appears to DOCS that a person in its custody has been erroneously sentenced, DOCS must notify the district attorney (DA) of the county in which the person was convicted. If after investigation, the DA agrees that the person has been erroneously sentenced, the DA must notify DOCS, and DOCS will then notify the sheriff of the county, or the commissioner of the city or county department of correction, from which such person was committed, who must take the person to court for re-sentencing.

Impact of Correction Law § 601-D on a Defendant's Right to Other Forms of Relief

The provisions of C.L. § 601-D do not impair an inmate's right to bring a 440 motion, an Article 78 or a state habeas petition, or any other authorized proceeding.

Right to Counsel: County Law § 722(4)

When, pursuant to C.L. § 601-D, a case is calendared for consideration of re-sentencing, or when a court is otherwise asked to consider whether a proper term of PRS was imposed as part of a determinate sentence, the court must assign counsel for the defendant.

State Cases

Former Inmate Is Entitled to Damages for Wrongful Confinement

In 1993, Isaac Hudson pled guilty to felony charges, and, although he owed approximately 5 years on a prior felony sentence, when the court imposed the sentence of 10 to 20 years, it neither found that Mr. Hudson was a predicate felony offender, nor sentenced him as predicate felon. Nonetheless, when Mr. Hudson went into DOCS custody, DOCS ran the new sentence consecutive to the undischarged sentence. Mr. Hudson gave notice to DOCS that it had made an error, but only when PLS got involved did DOCS realize its mistake and release Mr. Hudson from prison.

Mr. Hudson then filed a claim in the Court of Claims, seeking damages for 19 months of unlawful confinement. The State moved to dismiss the claim, citing a number of reasons. In Hudson v. State, Claim No. 114628, Decision No. 2008-04-020, April 17, 2008, the court denied the motion. The claimant alleged that the State negligently calculated his release date and that as a result, he was held beyond his statutorily mandated conditional release date. The court found that claims of unlawful confinement based on incarceration beyond conditional release date are recognized in New York.

Practice Pointer: Had DOCS not released the claimant after correcting its error in computing his sentence, it is unlikely that, unless he had been held past his maximum expiration date, he would have had a claim for damages. An inmate must prove actual harm resulted from the erroneous sentence computation, i.e., that he or she was held beyond a release date upon which he would have been released.

Court Dismisses Claim For Negligent Infliction of Emotional Distress

In Tatta v. State, 857 N.Y.S.2d 815 (3d Dep't 2008), the court considered the issue of whether the revelation of medical information could be the basis of a claim for damages where the information is revealed in the course of deciding a grievance **pertaining to** (about) medical treatment. Claimant Tatta filed a grievance protesting the medical department's failure to give him his medication. The investigation resulted in a report that indirectly referred to the plaintiff's underlying medical condition. Plaintiff filed suit, alleging that confidential medical information had been wrongfully disclosed in retaliation for his prior grievances about medical care. He alleged negligent infliction of emotional distress, and claimed that his injury was **ostracism** (exclusion and rejection) by other inmates. The court rejected the claim, holding: "Under the particular facts of this case, claimant placed his medical condition in issue when he filed the initial grievance, and in so doing waived his right to confidentiality within the limited context of the grievance process." Further, the court found, the claimant failed to establish that anyone outside the grievance program learned about his medical condition. Inmate grievance representatives are bound by a code of ethics, and claimant failed to establish that his confidential medical information was given to anyone other than those involved in the grievance process.

Disciplinary Hearings

Issue Raised for First Time In Article 78 Was Not Preserved

Inmate Pulliam was charged with obstructing visibility into cell and refusing a direct order when he refused to take down a sheet that he had draped in front of his cell, after being ordered to do so. In his Article 78, Mr. Pulliam advanced the claim that the obstructing rule is in conflict with Penal Law § 245.11, which prohibits the public display of offensive sexual material. (The defense may have referred to paintings, drawings or photographs that Mr. Pulliam had hung in his cell). The court, in Matter of Pulliam v. Waite, 778 N.Y.S.2d 323 (3d Dep't 2008), refused to rule on this issue because he had not raised it in the administrative proceeding. In addition, the court noted, such a challenge to the rule would have to be raised through the grievance process.

Insufficient Factual Basis for Handwriting Comparison

After investigating an **anonymous** (the author did not give his name) letter detailing a planned prison escape, the inspector general charged petitioner with conduct detrimental to the order of the facility and making false statements. At the hearing, the hearing officer concluded that the petitioner's handwriting and the handwriting in the letter were the same. The petitioner challenged the determination of guilt. In Matter of DeVivo v. Selsky, 52 A.D.3d 1009 (3d Dep't 2008), the Third Department held that because the hearing officer's conclusion was based on a comparison of a letter written in **cursive** (script) and the sample of petitioner's handwriting was printed, the hearing officer's determination that the same person wrote both letters was not supported by substantial evidence.

Hearing Officer Qualified to Compare Writing Samples

After a letter allegedly authored by petitioner was found in another inmate's cell, petitioner was found guilty of distributing unauthorized organizational materials. In an Article 78 challenge, the petitioner claimed that the determination was not supported by substantial evidence. In Matter of Sweat v. Fischer, 2008 WL 2521357 (3d Dep't June 26, 2008), the court found that the hearing officer was qualified to compare the petitioner's handwriting with handwriting on the gang related letter, and that his conclusion that the two were written by the same person, in combination with the letter and the testimony of officer trained in identification of gang related materials, constituted substantial evidence of the charge.

Proof Insufficient to Defeat Presumption

In Matter of Liakis v. Selsky, 857 N.Y.S.2d 751 (3d Dep't 2008), the Third Department again looked at the issue of the proof necessary to show that a failure to urinate within three hours is the result of a medical condition. In Liakis, where the petitioner was unable to provide a urine sample within the allotted period of time, he defended a charge of refusing to do so by producing evidence that one of the side effects of the medication that he takes is difficulty urinating. In upholding the hearing officer's determination of guilt, the court found that there was substantial evidence because there were no entries in petitioner's medical records showing that he experienced that side effect.

Court Rejects Challenge to the Review Officer's Rank

In Magin v. LeClaire, Jr., 853 N.Y.S.2d 742 (3d Dep't 2008), the petitioner argued that his Tier III hearing should be reversed because the review officer was a lower ranking officer than is permitted by 7 N.Y.C.R.R. § 251-2.1. Section 251-2.1 states that review officers shall be staff members of the rank of lieutenant or above, but that if sufficient reason exists, the superintendent may designate "some other employee to serve as the review officer." The court found that the issue was not preserved as the petitioner did not, at the hearing, make an objection to the review officer's rank. The court went on to say that, in any event, there was no impropriety, because the regulation permits the superintendent, "if sufficient reason exists," to appoint "some other employee" as a review officer.

Court Dismisses Civil Service Challenge to Change in Job Duties

In Matter of Criscolo v. Vagianelis, 856 N.Y.S.2d 265 (3d Dep't 2008), DOCS education supervisors, plant superintendents, and assistant industrial superintendents brought an Article 78 challenging the decision to reclassify their civil service job titles to include the duty to conduct tier III disciplinary hearings. Finding that the reclassification was not wholly arbitrary and capricious, the court dismissed the petition.

Raising a related issue, in Matter of Kirshstein v. Fischer, 2007 N.Y. Slip Op. 33808(U) [unpublished] (Supreme Court, Clinton County Oct. 23, 2007), the petitioner argued that his right to due process of law was violated by having a senior correction counselor serve as the hearing officer, because 1) Seven N.Y.C.R.R. §254.1 states that hearing officers will be either the superintendent, a deputy superintendent, captain, or commissioner's hearing officer, and 2) Civil Service Law §61(2) provides that except upon assignment by proper authority during the continuance of a temporary emergency situation, no person shall be assigned to perform the duties of any position unless he has been duly appointed to such position. As it did in Matter of Magin v. Leclaire, see discussion above, the court found that because the issue was not raised at the hearing, the petitioner had waived it. Nonetheless, the court went on to say that if the issue had been preserved, it would not be a basis for reversing the hearing for two reasons. First, the regulation permits the superintendent, at his discretion, to designate some other employee to conduct the hearing. Second, even if the civil service regulations did provide a basis for a senior correction officer to claim that s/he was wrongfully required to perform work outside his/her job description, such an assignment would not violate the petitioner's right to due process of law at his hearing.

Court Rules Substantial Evidence Supports Ad Seg Hearing

In Matter of Dumpson v. Fischer, 856 N.Y.S.2d 733 (3d Dep't 2008), the petitioner was placed in administrative segregation based on the determination that he posed a threat to the safety and security of the staff and inmates. The petitioner challenged this result, arguing that his recent improved behavior while in disciplinary special housing, and his receipt of a time cut relating to his disciplinary penalty, should, in making the determination of whether he is presently a threat to staff and inmates, outweigh his past misconduct. The court ruled that the more recent conduct, occurring as it did in a setting designed to reduce the opportunity to engage in misconduct – Disciplinary SHU – cannot be taken as probative evidence of rehabilitation, and confirmed the hearing determination.

The petitioner was represented by Prisoners' Legal Services of New York.

Ad Seg Placement Partially Based On Pre-Prison Conduct Is Upheld

Prison officials convened an administrative segregation hearing based on confidential information that Inmate Sutton had put a contract hit on staff at Erie County Sheriff Department and evidence that while Mr. Sutton was in a county jail, hack saw blades were mailed to him. In Matter of Sutton v. Selsky, 860 N.Y.S.2d 311 (3d Dep't 2008), the Third Department held that the determination made at petitioner's hearing was supported by substantial evidence that petitioner's presence in general population would pose a threat to safety and security of prison.

Court Finds Evidence of Harassment to Be Speculative at Best

In Matter of Perkins v. Kirkpatrick, Index No. I-2007-12402 (Sup. Ct. Erie County 4/2/2008), the petitioner challenged a hearing at which he was found guilty of harassment (but not of threats), based on 1) a misbehavior report alleging that he threatened to stab an officer when he, the petitioner, was released from SHU and 2) a videotape with no audio. The videotape showed the officer turning his head in the direction of petitioner's cell after he had picked up the petitioner's feed up tray. The petitioner's defense was that the misbehavior report was written in retaliation for the grievances that petitioner filed alleging that the officer had engaged in misconduct and his letters about the same to the district attorney.

The petitioner complained to the hearing officer that his employee assistant had not produced documents he had requested. The hearing officer said that he would get them if they were relevant. The petitioner objected that it was his assistant's job to have done so, and refused to cooperate with the hearing officer's questions regarding the employee assistant. Based on this refusal, the hearing officer excluded the petitioner from the hearing.

Petitioner requested copies of the complaints that he had filed with the district attorney (DA) and requested four inmate witnesses, two of whom agreed to testify, and two of whom the hearing officer said refused to testify, however nothing in the record documented the refusals. The hearing officer stated that the testimony of four other witnesses, who would have testified about the complaints that petitioner had submitted against the author of the misbehavior report, were irrelevant. The hearing officer refused to produce the complaints filed with the DA because they were irrelevant.

Based on the videotape, which the hearing officer concluded showed that the petitioner had distracted the officer from his duties by saying something, the hearing officer found petitioner guilty of harassment.

The court found that the petitioner's right to assistance was violated because his employee assistant failed to produce documents related to his retaliation defense. As to the hearing officer's efforts, the court stated that it was evident that the petitioner's demand for evidence that was relevant to the accuser's credibility was summarily dismissed as pertaining only to an attack on character.

The court also found that the petitioner's refusal to engage with the hearing officer on the issue of the evidence relating to his employee assistant did not support the hearing officer's determination that petitioner was disruptive. Further, the court held that under the circumstances of this case, i.e., the petitioner had not been disruptive to the hearing process and since the hearing took place over an extended period of time, "it would not have been inappropriate" to allow the petitioner to attend subsequent sessions of the hearing to view the videotape and pose questions for his witnesses.

Finally, finding that the evidence supporting the determination that petitioner had harassed the officer consisted of an inconclusive videotape, the misbehavior report and two witnesses who contradicted the substance of the report, and commenting that there may have been other evidence, rejected by the hearing officer that would have been relevant to the officer's credibility, the court held that the evidence presented at the hearing was, "at best speculative" and ordered the hearing reversed and the charges expunged.

Court Finds Absence of Authorization for Mail Watch to Be Harmless Error

In Matter of Davis v. Fischer, 858 N.Y.S.2d 468 (3d Dep't 2008), based on testimony from the author of the misbehavior report, taped telephone conversations and in-coming mail, the court found that substantial evidence supported the determination that petitioner was guilty of conspiring to introduce drugs into prison and of soliciting others to smuggle drugs into the prison. The court found that in the absence of evidence that the superintendent had given authorization for a mail watch, the hearing officer had erroneously entered into evidence – and relied upon – an out-going letter from petitioner. Nonetheless, the court confirmed the determination of guilt, because, although the hearing officer should not have considered the outgoing letter, the remaining evidence was sufficient to support the determination. Thus, the court concluded, the hearing officer's error was harmless. Presumably, had the out-going letter been the only, or the primary evidence against the petitioner, the court would have reached a different result.

Prisoner Defeats Charges of Unauthorized Legal Assistance

Based on his possession of another inmate's legal papers, the petitioner in Matter of McCallister v. Fischer, 858 N.Y.S.2d 803 (3d Dep't 2008) was found guilty of violating the rule against providing unauthorized legal assistance. The court found that merely possessing another inmate's legal work is not sufficient evidence to support a determination that an inmate gave unauthorized legal assistance. The court ordered the hearing reversed.

Can Top Used for Food Prep May Also Be Considered A Weapon

When an officer saw an inmate using a bent over can top to cut onions, the officer ticketed him for possession of an altered item and an item that may be classified as a weapon by description, use or appearance. At his hearing, the inmate argued that the item was not intended for use as a weapon and that he had only used it for **benign** (harmless or innocent) purposes. Nonetheless, the inmate was found guilty of the charges. On appeal, in Matter of Tinnirello v. Selsky, 858 N.Y.S.2d 806 (3d Dep't 2008), the court held that the inmate's intent did not control the outcome; because the item could be classified as a weapon by description, use or appearance, the hearing officer's determination was supported by substantial evidence.

Parole

Board's Denial of Parole Was Not So Irrational As to Border on Impropriety

In Matter of Nunez v. Dennison, 857 N.Y.S.2d 810 (3d Dep't 2008), the court reviewed the issue of whether the Parole Board could consider facts related to crimes for which an inmate was not convicted. Here, petitioner Nunez had been convicted of robbery. At his parole eligibility hearing, the Board noted that during one of the robberies, a victim was shot and died. Petitioner complained that because he had not been convicted of murder, the Board had wrongfully concluded that he was responsible for the death. The court disagreed, noting that the Board had accurately stated that during one robbery, a victim was killed by petitioner's co-defendant. The court stated that the Board is permitted to consider all of the circumstances of the instant offenses, which may include conduct for which the petitioner was not convicted, so long as some evidence of such conduct exists in the record and it is not the sole basis for the Board's determination. Here the Board also considered the relevant statutory factors, including the seriousness of the instant offenses and petitioner's lengthy criminal history and history of drug addiction as well as his positive institutional programming, lack of any recent disciplinary infractions and his plans for release. The court held that the Board's determination was therefore not so **irrational** (unreasonable and illogical) as to border on **impropriety** (legally improper).

Board's Denial of Parole Irrational to the Point of Impropriety

In Matter of South v. N.Y.S. Division of Parole, Index No. 113811/07, Supreme Court, New York County, April 8, 2008, the court granted a petition alleging that the Parole Board's denial of the petitioner's application for parole was irrational, bordering on impropriety. Petitioner had been imprisoned for close to 19 years on a sentence of 8 to Life. He was 58 years old, and an honorably discharged military veteran. He was a model prisoner, and suffers from a serious illness. The Parole Board denied him release based on what the court stated was an "unexplored conclusion" that there was a reasonable probability that if released, he would not live and remain at liberty without again violating the law. The court found that there was "no probing" beyond the conclusory statement that the defendant, whose crimes were admittedly serious, could not be and should not be allowed to live in the community after 19 years of incarceration.

In reversing the hearing, the court noted that the sentencing judge had not sentenced the petitioner to the maximum sentence that he could have lawfully imposed, and had run sentences for other crimes concurrent to the most serious crime. This, the court stated, was an indication that the sentencing judge did not intend that the maximum term of life be used as a basis for confining the petitioner for 2½ times the eight years imposed.

As a final basis for finding that the proceeding was fatally flawed, the court found that because the Board failed to set forth its reasoning in denying parole (which can not be based on offenses alone), the Board failed to meet the minimum standards for a parole hearing.

Finally, the petitioner argued that the Parole Board's admission in the Article 78 that the hearing should be reversed was rooted in its intention to hold a hearing at a location that would **preclude** (stop) petitioner from challenging in New York County the results of the re-hearing. The court found that the Article 78 was appropriately filed in New York County because the hearing was done via teleconferencing, with the Board in New York City and the petitioner in Elmira. With respect to this issue, the court stated that it would expect that "in good faith," and unless petitioner's claims of forum shopping were true, the Board would again meet in New York and that petitioner would participate electronically, thereby allowing him, should he again be denied release, to file his Article 78 challenge in New York County.

Parole Board's Failure to Consider Statutory Factors Leads to Reversal and Rehearing

In Matter of Borcsok v. New York State Board of Parole, Index No. 1119-08, (Sup. Ct. Albany County, April 25, 2008), the petitioner challenged a parole denial, arguing that the Board failed to consider and apply the **requisite** (required) statutory factors and based its decision on the severity of petitioner's offense. The court found that in denying the petitioner parole, the Board did not adequately demonstrate that there was a reasonable probability that the petitioner, if released, would not live and remain at liberty without violating the law, that his release was not incompatible with the welfare of society, or that his release would so **deprecate** (belittle or detract from) the seriousness of his crime as to undermine respect for the law. In reaching this result, the court noted that the Board's decision to deny parole focused primarily on the petitioner's crime, which he had committed over 25 years before. The court stated that §259-I (2)(c)(A) of the Executive Law requires that the Board consider:

> 1. The applicant's prison record, including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy, and interpersonal relationships with staff and inmates;
>
> 2. Performance on temporary release;
>
> 3. Release plans, including community resources, employment, education and training and support services available to the inmate;
>
> 4. The existence of a deportation order; and
>
> 5. Statements made by the crime victim or crime victim's representative.

In the absence of any analysis of the statutory criteria, it was impossible for the court to determine whether the Board, in reaching its conclusion, had considered the pertinent factors.

As an alternative ground for reversal, the court cited the Board's failure to review the sentencing minutes which were not included in the record.

Presumptive Release Not The Equivalent of Parole

In 2004, Mr. Jenkins, who was serving a sentence of 4½ to 9 years for criminal sale of a controlled substance, was released

on presumptive release. More than two years after his release, Mr. Jenkins was charged with violating the conditions of release by operating a motor vehicle without written permission. Incarcerated on a violation warrant, Mr. Jenkins filed a petition for a writ of habeas corpus, alleging that pursuant to Executive Law 259-j(3-a), because he had completed two years of supervision without a violation, the Division of Parole was required to discharge him from supervision. Section 259-j(3-a) requires termination of certain sentences after 2 years of unrevoked **parole**. The issue before the court was whether this section of the law applied to individuals on presumptive release. After winning release in the supreme court, Wayne County, in People ex rel. Jenkins v. Piscotti, 860 N.Y.S.2d 358 (4th Dep't 2008), the Appellate Division reversed the decision, holding that Section 259-j(3-a) only applies to people on parole, and did not apply to people on presumptive release.

The Fourth Department agreed with the petitioner that to distinguish between those individuals released via parole rather than by presumptive release "is a technical distinction without a substantive basis." Nonetheless, the court held that because Section 259-j(3-a) only refers to "unrevoked parole" as opposed to unrevoked parole **and** presumptive release, the rules of statutory construction require the court to construe clear and unambiguous statutes as enacted and prohibit the court from using "interpretative contrivances" to broaden the scope and application of the statutes. Further, the court noted, Executive Law § 259-j had been amended several times in the last decade, thus leading to the conclusion that if the legislature had wanted to include presumptive releasees in the coverage of §259-j(a-3), it would have done so.

Applying the same reasoning, the Third Department in Matter of Sweeney v. Dennison, 858 N.Y.S.2d 845 (3d Dep't 2008), reached the same result.

Practice Pointer: In June 2008, the legislature amended Executive Law 259-j(3-a) to include in the law's coverage people on presumptive release as well as people on parole.

Miscellaneous State Court Decisions

Challenge to Recommendation That Petitioner Enter ASAT Fails

Petitioner, who had abstained from drinking alcohol for over ten years, filed a grievance when DOCS recommended that he participate in the ASAT program. His grievance was denied, and he filed an Article 78 to challenge the decision. In Matter of Rodriguez v. Goord, 855 N.Y.S.2d 309 (3d Dep't 2008), the court rejected the petitioner's argument, holding that the current DOCS policy is to recommend ASAT for all inmates with a history of drug or alcohol abuse, and the policy is based on evidence that individuals with such a history can readily relapse even after many years of **abstinence** (not drinking or using drugs). Thus, the court found, the recommendation was not **arbitrary and capricious** (not rational and not based on the application of standards).

Challenge to Security Classification Fails

In Matter of Mohsin v. Fischer, 858 N.Y.S.2d 452 (3d Dep't 2008), the petitioner challenged the decision to classify him as a security risk for arson. He argued that he had neither been charged nor convicted of arson, and that therefore the classification was not warranted. The petitioner admitted that his crime involved dousing his girlfriend with gasoline and setting her on fire, but argued that the definition of arson does not include burning a human being. Noting that DOCS has broad discretion in matters of institutional security, the court found that there was a rational basis for the determination that petitioner's criminal conduct involved "arson-like" behavior.

Poor Performance in Sex Offender Program Leads to Loss of Good Time

In Matter of Given v. Goord, 859 N.Y.S.2d 263 (3d Dep't 2008), the petitioner alleged that he had been wrongfully deprived of good time. The court held that the petitioner's repeated failure to participate in and finish a sex offender program was a rational basis for depriving the petitioner of good time credits. The court noted that the decision to take away good time is a **discretionary decision** (a decision that involves the use of judgment) and is based on a review of the inmate's entire institutional record.

Court Denies Re-sentencing to Inmate Convicted of A-II Drug Felony

Defendant Flores was convicted of an A-II drug felony, and sentenced to a life sentence. He moved to be re-sentenced pursuant to the Drug Law Reform Act of 2005. The trial court denied his motion, and on appeal, the Third Department, in People v. Flores, 856 N.Y.S.2d 668 (2d Dep't 2008), affirmed the decision. The Third Department noted that the defendant is a second felony offender whose criminal history dates back to 1994 and included a violent felony conviction.

Further, despite his positive achievements while in prison, he had what the court **characterized** (labeled) as a poor disciplinary history – a small number of relatively minor rule violations. The court found that these facts supported the trial court's decision to deny the motion to re-sentence.

Court Orders Production of Pre-Sentence Report

According to Criminal Procedure Law §390.50(1), a pre-sentence report is confidential and is not to be made available to any person " . . . except where specifically required or permitted by statute or upon specific authorization of the court." Where no statutory authority is cited, a petitioner may be entitled to disclosure of the report upon a proper factual showing for the need thereof. In Matter of Davis v. People of the State of New York, 860 N.Y.S.2d 644 (3d Dep't 2008), the court held that where petitioner had notice of an impending hearing before the Board of Parole, and his pre-sentence report was one of the factors to be considered by the Board in determining his application for release (*see* Executive Law § 259-i[1][a]; [2][c]), petitioner had made a proper factual showing entitling him to a copy of the report.

Inmate Liaison Committee Lacks Capacity to Sue

The Inmate Liaison Committee (ILC) at Elmira C.F. filed an Article 78 proceeding challenging DOCS decisions regarding what the ILC said was inadequate television reception and the lack of Spanish language programing. In Matter of The Inmate Liaison Committee of Elmira C.F. v. Fischer, 2008 W.L. 2497021 (3d Dep't June 23, 2008), the court dismissed the petition after concluding that the ILC did not have the capacity to sue. The court noted that Directive 4002 limits the ILC's authority to discussing, and advising prison officials on, matters concerning the general welfare of the inmate population. The court was not swayed by the petitioner's references to Directive 4556 – which gives the ILC authority to contract for premium television channels – or to Directive 2771 – which gives the ILC authority to disburse funds for the payment of premium television channels – concluding that the organization is an advisory body from which a capacity to sue cannot be derived.

Court Orders DOCS to Admit Inmate to CASAT

Petitioner Ferreri went into DOCS custody in March 2007 for a conviction of Criminal Possession of a Forged Instrument in the First Degree (CPFI1). Pursuant to Penal Law §60.04, the court that sentenced him had imposed CASAT as part of his sentence. Because a defendant convicted of CPFI1 is not eligible for CASAT, DOCS refused to let the petitioner in the program. Petitioner Ferreri then filed an Article 78 seeking an order requiring that DOCS place him in ASAT. In Matter of Ferreri v. Fischer, 2008 W.L. 2401211 (Sup. Ct. Franklin Co. May 30, 2008), the court, ruling in the petitioner's favor, held that DOCS is required to implement the sentence that is set forth on an inmate's sentence and commitment papers. Nonetheless, the court noted, the sentencing order only requires that DOCS place the petitioner in phase 1 of ASAT. DOCS exercises discretion over which inmates participate in phase 2 and work release. Further, the court ordered, DOCS must place the petitioner into phase 1 of ASAT **forthwith** (without delay).

Federal Cases

Hearing Officer's Civil Service Classification Not Grounds For Reversal

In McEachin v. Goord, 2008 W.L. 1788440 (NDNY April 17, 2008), the plaintiff argued that his due process rights were violated by DOCS' policy of allowing Superintendents to appoint, as hearing officers, staff whose civil service job descriptions did not include serving as hearing officers. The policy is set forth in 7 N.Y.C.R.R. § 253.1. The plaintiff argued that this policy violates the New York State Civil Service Law and the contract between New York State and the Public Employees Federation (NYS PEF), both of which prohibit out of title work.

The court held that the plaintiff did not have standing to sue for the claimed violation of the contract as he was not a party to the contract. In order to have standing, the person who brings the suit must be the intended beneficiary of the law or contract which is the basis of his or her lawsuit.

Here, the court ruled, as an inmate, the petitioner did not have a stake in either the NYS PEF contract or the Civil Service Law.

The court also ruled that the claimed violation of the state civil service law could not be raised in a §1983 action, as it was a state claim, not a federal claim. Finally, with respect to the claim that the regulation violated the plaintiff's right to due process of law, the court ruled that a prisoner does not have federal due process right to a hearing officer with a specific job title; due process requires only that the hearing officer be impartial and not pre-judge the evidence.

Right to Wear Atheist Pendant

In Diaz v. Goord, 2008 W.L. 24049522 (W.D.N.Y. June 11, 2008), the plaintiff challenged DOCS' decision not to allow the plaintiff to wear an atheist pendant that he had worn for four years at two different prisons. When the plaintiff arrived at Attica, security staff told him he could not wear the pendant because it could be used as a weapon. In his letter brief opposing the defendants' motion to dismiss, the plaintiff argued that the pendant is a core affirmation and expression of his adherence to the tenants of science and logic, as well as to the philosophy of materialism, just as wearing a cross reminds a Christian of his faith in a divine creator. He argued that since the pendant had been approved by security at two other prisons, Attica's refusal to let him wear the pendant could not possibly further a legitimate penological interest. Construing the argument as raising an equal protection claim – and asking rhetorically why a pendant is considered a weapon but a cross is considered to be a harmless religious symbol – the court denied the defendants' motion to dismiss.

Court Sanctions Defendants In 1983 Action Filed Pro Se

Inmate Messa filed a 1983 action against the officers who allegedly assaulted him. He also sued the superintendent of Upstate C.F., alleging that the superintendent had supported and condoned the use of force and supported false statements made by officers. Mr. Messa served interrogatories and a request for production of documents. When the defendants did not respond, he filed a motion to compel. In its decision on the plaintiff's motion, the court, in Messa v. Woods, 2008 WL 243701 (N.D.N.Y. June 12, 2008), made the following observations. First, actions alleging violations of §1983 require especially generous discovery. Second, when a party objects to a discovery demand, it must set forth the specifics of the objection and explain how the objection relates to the requested documents.

The plaintiff requested policies in effect on the day of the incident for escorting inmates for urinalysis testing and for uses of force. The defendants said that they would produce those policies to which inmates are permitted access, but did not give a reason for withholding policies to which inmates do not normally have access, and did not produce any documents. Noting that the objection to the production of these records was insufficiently detailed, the court ordered the documents produced within 30 days.

In response to the plaintiff's request for reports on the use of force involving the defendants who admitted to using force on the plaintiff and for grievances pertaining to excessive use of force by these same defendants, the court ordered that the reports and grievances

be produced for two years preceding the date of the incident. The court issued the same type of order with respect to grievances filed in the two years preceding the incident, against two defendants whom the plaintiff alleged had failed to provide him with medical care.

Finally, the court noted that several of the defendants failed to timely respond to the plaintiff's interrogatories and that the defendants had not asked the court for extensions for responding to the discovery demands.

As a result of the defendants' delayed and incomplete responses to the plaintiff's discovery demands, the court found that the defendants' counsel had not complied with his obligation to seek an extension from the court and offered no explanation for failing to do so. Further, the court found, counsel's actions had frustrated discovery and caused unnecessary delay and court intervention. For these reasons, the court ordered that all of the documents that the court had ordered the defendants to produce would be produced without expense to the plaintiff and within 30 days.

Pro Se Practice

Legal Basics: State Rights and State Courts

This is an introduction to rights that prisoners in New York State are **accorded** (granted, given) by the constitution, statutes, regulations of the State of New York. The article also describes the state courts that hear claims for violations of the state law and the remedies that the state courts can give to prisoners when their state rights are violated. As part of our commitment to teaching prisoners new to the study of law some of the legal basics, instructions for reading state court case citations are provided.

State Sources of Prisoners' Rights

The New York State Constitution

The New York State constitution **confers** (gives) prisoners many of the rights that are also guaranteed by the federal constitution. The state constitution is divided into 20 articles. Article 1 is known as the bill of rights, and incorporates those rights that are most well known, such as the rights to free exercise of religion and freedom of speech. Article 1 is broken down into sections; each section describes a particular right or group of rights. The state constitution is published in McKinney's Laws of New York. In McKinney's Laws of New York Annotated, following each **section** (the symbol for section is "§" and the symbol for sections is "§§") is a set of **annotations** (notes). The annotations set forth summaries of the case decisions **interpreting** (discussing and analyzing) the rights set forth in the section. To find cases interpreting the various rights, you would ask the prison law library for a copy of the section dealing with the right that you are researching, and its annotations. For instance, if you were interested in cases discussing the state constitutional right to free exercise of religion, you would ask the law library for a copy of Article 1, Section 3 of the New York State constitution, and the annotations thereto.

Many of the rights guaranteed by the State constitution are also guaranteed by the federal constitution. The following is a list of rights included in the state bill of rights and their **federal counterparts** (the same federal right):

The right to freedom of religion – protected by the 1st Amendment to the U.S. Constitution – is protected by Article 1, §3 of the N.Y. Constitution;

The right to be free from cruel and unusual punishment – protected by the 8th Amendment to the U.S. Constitution – is protected by Article 1, § 5 of the N.Y. Constitution;

The right not to be deprived of liberty, property or life without due process of law – protected by the 14th Amendment to the U.S. Constitution – is protected by Article 1, §7 of the N.Y. Constitution;

The right to freedom of speech – protected by the 1st Amendment to the U.S. Constitution – is protected by Article 1, §8 of the N.Y. Constitution.

The right to petition the government – protected by the 1st Amendment to the U.S. Constitution – is protected by Article 1, §9 of the N.Y. Constitution.

The rights to equal protection, and to be free from discrimination based on race, religion, or beliefs – protected by the 14th Amendment to the U.S. Constitution – are protected by Article 1, §11 of the N.Y. Constitution.

Ideally, prisoners' rights advocates would like the courts to interpret the requirements of the state constitution in a manner that is more protective of prisoners' rights than the federal courts' interpretation of the comparable federal constitutional right. Unfortunately, case law interpreting the New York State Bill of Rights – while sometimes using language that is different from the language used to interpret the comparable federal constitutional rights – has concluded that, in the area of prisoners' rights, the state constitutional guarantees have the same limitations as the courts have given to the comparable federal rights. This means, for example, that an inmate must produce evidence of deliberate indifference to a serious medical need whether s/he is trying to establish an 8th Amendment violation or an Article 1, §5 violation. See Thomas v. State, 814 N.Y.S.2d 564 (Ct. of Claims 2005). See also, Matter of Bunny v. Coughlin, 593 N.Y.S.2d 354 (3d Dep't 1993) (holding that state standard for review of policies that restrict religious rights is the same as the federal standard); Matter of Lucas v. Scully, 526 N.Y.S.2d 927 (1988) (holding that state standard for deciding whether a DOCS policy violates an inmate's right to freedom of speech under the state constitution is the same as the standard used to make the decision under the federal constitution).

State Laws Conferring and Affecting Prisoners' Rights

The primary bodies of law that impact on prisoners are the Correction Law, the Executive Law – Article 12-B of the Executive Law sets forth the provisions pertaining to the Division of Parole – the Criminal Procedure Law, the Penal Law, the Civil Practice Law and Rules, 7 N.Y.C.R.R. (New York Code Rules and Regulations), Chapters I through XXII (the regulations enacted by DOCS), and 9 N.Y.C.R.R. Subtitle CC (the regulations of the Division of Parole). Here, in order to discuss the structure of state law, we focus on the Correction Law and the DOCS regulations.

The Correction Law

The Correction Law is a **compilation** (collection) of laws that control the operation of the Department of Correctional Services. The Correction Law, also known as Chapter 43 of the laws of New York, is arranged by subject matter. Each subject matter grouping is called an article. The articles are further divided into sections, and

the sections into subsections. For instance, Article 26 of the Correction Law is **titled** (called) Temporary Release Programs for State Correctional Facilities. This article consists of 11 sections, numbered from §851 through §861. Article 26-A is the article in the Correction Law pertaining to Shock Incarceration. It consists of three sections, §§865 – 867.

The Correction Law, like all of the laws in New York State, is published in McKinney's Consolidated Laws of New York (McKinney's). Following each section of the law in the **annotated** (with notes) version of McKinney's are short summaries of the case decisions interpreting the preceding section. Many of the sections (and sometimes Articles) are also followed by a "Practice Commentary," a summary of the section (or Article), its purposes and the issues raised by the language of section or by conflicts with other sections of law. If you want to see the case law interpreting a particular section of the Correction Law, or the practice commentary, you can ask the law library for the annotations and/or the practice commentary to the section that is of interest to you.

Among the provisions of the Correction Law that might be of interest are:

§ 23 Transfer of Inmates from One Correctional Facility to Another: This section gives the Commissioner the power to confine an inmate in any prison that the Commissioner deems appropriate.

§24___Civil Actions Against DOCS Personnel: This section provides that DOCS employees cannot be sued for money damages in the state courts. It is not a bar to prisoner law suits in the Court of Claims, where the defendant is the State of New York, as opposed to a particular individual. The section is being challenged as unconstitutional in a lawsuit that is currently pending before the United States Supreme Court.

§§100 - 109 Interstate Corrections Compact: These sections, found in Article 5-A, permit a state that is a member of the compact to transfer inmates to any other state that is a member of the compact. (New York is a member of the compact).

§113 Funeral and Deathbed Visits: This section authorizes DOCS to allow inmates to attend funerals and make deathbed visits in New York, at DOCS' expense, if necessary, where the deceased or ill individual is an immediate family member or an inmate's guardian.

§116 Inmates' Funds: This section requires that on a weekly basis, DOCS deposit the inmate funds received over the preceding week in a bank, and authorizes DOCS to use the interest earned on these accounts "for welfare work among the inmates." It also requires the Commissioner to notify the State Crime Victim's Board if any inmate has more than $10,000.00 in his/her account.

§125 Inmate's Money, Clothing and Other Property: This section imposes a duty on the Commissioner to put any money that an inmate has with him/her when s/he comes into custody into an account and to return the money when s/he leaves DOCS custody. The section also requires that DOCS provide each inmate, upon discharge from DOCS custody, with clothing having a value of $40.00 or less, transportation to the county from which s/he was committed to DOCS custody, and at least $40.00 in cash.

§136 Correctional Education: This section requires that DOCS provide each inmate with the educational program which seems most likely to further the inmate's process of socialization and rehabilitation.

§137 Program of Treatment Control and Discipline: Pursuant to this section, DOCS is:

1. required to establish program and classification procedures designed to assure the assessment of each inmate
2. required to assign each inmate to a program that is most likely to assist him to refrain from violating the law in the future.
3. required to provide each inmate with a sufficient quantity of wholesome and nutritious food and clothing suited to the season and weather.
4. required, whenever possible, to house each inmate in a single cell or in a dormitory.
5. required to refrain from subjecting inmates to degrading treatment, and not to allow any officer to strike an inmate except in self defense or to suppress a revolt.
6. allowed to use all suitable means to defend its employees, to maintain order, to enforce discipline and to prevent escape when inmates act violently toward other people, injure or attempt to injure property, attempt to escape or fail to obey a direct order.
7. allowed to house an inmate separate from other inmates who are participating in programs, for such period as may be necessary to maintain order and discipline. Inmates in segregated housing must be provided with adequate nutritious food, sanitary living conditions to the extent required to preserve health, and daily medical monitoring.

§138 Institutional Rules and Regulations: This section requires the Commissioner to publish and post in every prison, in English and Spanish, all rules and regulations that define and prohibit conduct by inmates. It also requires that the Commissioner give each inmate a copy of the rules and regulations. The rules must be specific and give inmates actual notice of the conduct that is prohibited and the range of disciplinary sanctions that can be imposed for violation of each rule. The law permits inmates to be punished only for violations of published and posted rules. The law does not permit DOCS to punish inmates for advocating for changes in DOCS's policies, conditions, rules, or regulations of laws affecting prison conditions.

§139 Grievance Procedures: This section of the law requires that the Commissioner establish grievance resolution committees at each prison and that he establish a grievance procedure.

§146 Persons Allowed to Visit Correctional Facilities: Other than a number of people, who by virtue of their professional status are permitted to visit prisons, only those persons who the Commissioner authorizes to visit, by means of regulations, will be allowed to enter correctional facilities.

§147 Alien Inmates: Within 3 months of receiving custody of an inmate who is not authorized to be in the United States, the Commissioner is required to notify U.S. Immigration and make a recommendation as to whether the inmate should be deported.

§170 [Inmate Labor] Contract Prohibited: This section prohibits the state from entering into contracts which would use inmates as workers, except to produce goods for and provide services to, the State of New York.

§171 Inmate Employment: This section allows the Commissioner to require inmates to work up to 8 hours a day, six days a week, except that no inmate may be required to work on Sundays or public holidays.

§187 Inmate Earnings: This section requires the Commissioner to set up a system of pay grades, based on the value of the work, according to which inmates will be paid. It also requires the Commissioner to set up an inmate account system.

§401 Establishment of Programs for Mentally Ill Inmates: This section authorizes the Commissioner of DOCS and the Commissioner of Mental Health, to establish programs in correctional facilities for the treatment of mentally ill inmates who do not need to be hospitalized.

§402 Commitment of Mentally Ill Inmates: This section outlines the procedures for emergency and non-emergency hospitalization of mentally ill inmates.

§610 Freedom of Worship: This section guarantees inmates the right of free exercise of religion.

§611 Birth and Care of Infants: This section states that when a woman is about to give birth, she must be taken out of the prison for medical care. It also provides that after giving birth, a mother may keep her child with her in prison for up to a year, unless the woman is physically unable to care for the baby.

§803 Good Behavior Allowances (Good Time): This section permits prisoners serving indeterminate sentences to earn up to 1/3 of their maximum term of imprisonment as good time, and those serving determinate sentences to earn up to 1/7 of the determinate sentence as good time, and thereby reduce the maximum (or determinate) term by 1/3 (or 1/7). The section also establishes a merit time sentence reduction.

§ 805 Earned Eligibility Program: This section sets forth the Commissioner's duty to review the prison records of eligible inmates to determine whether they should be issued certificates of earned eligibility.

§§851 - 861 Temporary Release Programs: The sections in this article define who is eligible to participate in temporary release programs, the various temporary release programs – ranging from funeral visits to work release programs – procedures for applying for temporary release programs, and **consequences** (results) of violating the conditions of temporary release.

DOCS Regulations

Based on the responsibilities imposed by the Correction Law, the DOCS Commissioner has adopted regulations. The regulations are published in Title 7 of the Codes, Rules and Regulations of the State of New York. The regulations are divided into chapters by subject matter. Chapter V, Procedures for Implementing Standards of Inmate Behavior and for Granting Good Behavior Time Allowances, is divided into four subchapters: A) Procedures for Implementing Standards for Inmate Behavior, B) Procedures for Granting Good Behavior Allowances, C) Standards for Inmate Behavior and D) Merit Time. The chapters and subchapters are further divided into parts. At the end of Title 7 is a section called Annotations: Case Notes and Administrative Notes. The Annotations Section is arranged numerically by Part Number. Under each Part number, is a summary of the case decisions interpreting the regulation. For example, Part 305.3 is entitled "Use of restraints, generally." In the annotations section of Title 7, under the heading Part 305.3, is a summary of the court's holding in Malik v. Wilhem, 552 N.Y.S.2d 59 (3d Dep't 1990). The summary states that in Malik v. Wilhelm, the court held that the restraint order imposed pursuant to 7 N.Y.C.R.R. §305.3(a) was appropriate and constitutional as it was rationally related to legitimate penalogical interests, where the petitioner became belligerent in the special housing unit and threatened to assault a guard, and where the petitioner had a long history of threats and assaultive behavior toward staff.

If you think that your rights under the regulations may have been violated, you can research this issue by giving the law library the part or chapter number of the regulation at issue, and asking for a copy of the regulation and its annotations.

Regulations that are of particular interest to prisoners include:

Part 130 Transfer of Foreign Nationals:

This regulation establishes the procedures for determining whether inmates who are foreign nationals can be voluntarily transferred to their home countries.

Chap. IV Visitation:

These regulations establish who can visit an inmate and the procedures for arranging and conducting visits, entering the prison, and for terminating, suspending and revoking visits.

Chap. V Standards of Inmate Behavior and Good Behavior Allowances:

This Chapter sets forth the inmate rules, procedures for conducting disciplinary and superintendent's hearings, procedures for making good time allowances, and procedures for making merit time decisions.

Chap. VI Special Housing Units:

This chapter discusses admission to various special housing units – including disciplinary, detention, protective custody and administrative segregation – and the permissible conditions of confinement in those units.

Chap. VIII Institutional Programs:

This chapter sets forth the rules governing the following programs: inmate grievances, marriages during incarceration, media review, education, inmate correspondence, inmate telephone calls, and packages.

Chap. IX Institutional Security:

This chapter sets forth the rules governing the "Central Monitoring Case [CMC] designation process," the procedures to be used when contraband drugs are found, and the urinalysis testing program.

Chap. X Facility Administration:

This chapter sets forth the rules governing personal property claims, double-celling and the minimum provisions for health and morale.

Chap XI Shock Incarceration:

This chapter sets forth the regulations that control participation in and removal from the Shock Incarceration Program.

Chap. XII Temporary Release:

This chapter describes the various short and long term temporary release programs, eligibility requirements and procedures for removal from the programs.

Chap. XXI Earned Eligibility:

This chapter describes the Earned Eligibility Program and its procedures.

Chap. XXII Presumptive Release:

This chapter describes the Presumptive Release Program and the procedures governing the program.

Use of the State Constitution, Statutes and Regulations

To get relief from the state courts, when you sue, you must identify the right that has been violated and the individual whose conduct led to the violation. The rights that you have through state law are **derived** (come from) the state constitution, statutes, and regulations. For example, if you are not allowed to practice certain aspects of your religion – such as wearing an atheist pendant – and you want a court to order DOCS to allow you to wear it, you could bring a case in state supreme court alleging that DOCS' policy of not allowing you to wear that pendant violates your rights under the state constitution, Article 1, §3, and § 601 of the Correction Law. To research this issue, you could request the annotations to these statutes.

The Structure of the State Courts Responsible for Deciding Lawsuits Filed by Prisoners

There are three levels of state courts: the trial courts, the appellate divisions, and the Court of Appeals. Cases begin in the trial courts with the filing of a complaint, a claim, or a petition. After the trial court issues its final decision, most cases can be appealed **as of right** (the losing party does not have to get permission to appeal) to the appellate division that covers the county in which the case began. There are four appellate divisions, each covering the trial level courts in a specific geographic area. There is a right of appeal from an appellate division decision in four situations. The two most often used are either where two or more justices dissent from the majority opinion or where the validity of a statute is challenged under the state or federal constitution. Otherwise, if the losing party wants to appeal, he or she must ask permission to do so.

Permission may be requested of either the appellate division or the Court of Appeals. If a federal constitutional issue is decided by the Court of Appeals, the losing party may **petition** (ask) the United States Supreme Court to consider the constitutional issue. PLS publishes an address packet that gives the address of each of the appellate divisions and the Court of Appeals and describes the geographic area from which each appellate division accepts, cases.

The Process of Litigating a Case in the State Courts

Generally speaking, prisoners bring legal actions in one of two state courts. The two courts that hear most prisoner cases are the state supreme courts, which are located in every county, and the Court of Claims, which is located in Albany, but has judges in a number of locations throughout the state. These judges are assigned cases based on the county in which the claim arose.

Court of Claims

The Court of Claims has **jurisdiction** (authority) to hear cases for damages resulting from the conduct of state employees who were acting within the scope of their employment at the time that the claim arose. The state employee must owe a duty of care to you that he or she violated either accidentally (negligently) or intentionally. The failure to live up to a duty of care is called a tort. Torts that commonly serve as the basis for prisoner claims are workplace accidents, slip and fall, the destruction or loss of property, failure to protect an inmate from another inmate, negligent medical treatment and assaults by staff. Filing a claim in the Court of Claims commences a **plenary proceeding**. This means that there will be pre-trial discovery and a trial. The Court of Claims has its owns rules and procedures that you can obtain from the court. Matters not expressly covered by the Court of Claims rules are governed by the Civil Practice Law and Rules (CPLR). If you are interested in learning more about the kinds of claims that you can bring in the Court of Claims and the procedures for doing so, you can write PLS and request our form materials on the Court of Claims. The PLS address package has the address of the Court of Claims in Albany.

State Supreme Court

The state supreme courts have **jurisdiction** (authority) over actions brought by prisoners for declaratory and injunctive relief. At present, Section 24 of the Correction Law prohibits suits for money damages against DOCS employees. (As noted above, there is a case that is now pending before the United States Supreme Court seeking to have Section 24 declared unconstitutional). This means that you can only sue a DOCS employee, such as a correction officer or a doctor employed by DOCS, for a decision declaring that a DOCS employee's conduct violated your rights (known as declaratory relief), and ordering the defendant to take an action that the court decides is the appropriate action to remedy the violation of your rights (known as injunctive relief). Presently, the state supreme court cannot, however, award you money to compensate you for the harm caused by the wrongful conduct.

The two types of legal actions that prisoners typically pursue in the state supreme courts are the Article 78 Petition and the Article 70 Petition (for habeas corpus relief). Article 70 and 78 actions are known as **summary actions**; typically the court grants or denies such petitions based on the papers, accompanying documents and records, and the **memoranda of law** (briefs) submitted by the **parties** (the petitioner and the respondent). The rules of procedure that apply to actions in the supreme court are set forth in the Civil Practice Law and Rules (CPLR). If you are interested in learning more about Article 70 and 78 actions, you can write PLS and request our form materials on these two procedures.

Reading State Case Citations

Court decisions are published in bound volumes called reporters. In New York there are official reporters and unofficial reporters. Each official reporter publishes the decisions of a specific level of court. For example, the official reporter for decisions issued by the New York Court of Appeals is called the New York Reports (abbreviated as *N.Y.*), the official reporter for trial court decisions is known as the Miscellaneous Reports (abbreviated *Misc.*), and the official reporter for Appellate Division decisions is called the Appellate Division Reports (abbreviated as *A.D.*). The unofficial reporter is call the New York Supplement (abbreviated as *N.Y.S.*).

There are 999 volumes in each series of reporters. Decisions are published in the order that they are issued. Thus, a decision published in volume 1 of a reporter was issued earlier than a decision published in volume 50. The volume number is the first number in a case cite. Following the volume number is the abbreviation of the Reporter, which is followed by the page number of the volume.

Here is a break down of one of the most commonly used state citation formats: Matter of Fitzpatrick v. Goord, 269 A.D.2d 642, 704 N.Y.S.2d 173 (3d Dep't 2000). The first two words of the underlined portion of the citation – Matter of -- tells you that the this is a decision in an Article 78 proceeding. (If it was a decision in a habeas corpus action, the citation would be: People ex rel. Fitzpatrick v. Goord). The first name in the citation is the petitioner (in a habeas action the first person listed is called the relator); the second is the respondent. The decision was issued by the Third Department in 2000. The decision was published in volume 269 of the second series of the Appellate Division Reports and begins on page 642. That is the cite to the official reporter. The decision was also published in the unofficial reports on page 173 of volume 704 of the second series of the New York Supplement.

Until you know whether the law library to which you are sending your request for a copy of a case decision has the official or the unofficial reporters, if you know both citations, you should send both. If you only know one, send the one you have. Law librarians know how to convert the official citation into the unofficial citation, and vice versa.

A case citation gives you valuable information about the decision to which it refers. You can determine the court that issued the decision, when the decision was issued, the names of the parties, and whether the decision is from a trial court or an appellate court. In addition, using the case citation, you can find out whether other decisions, issued in the years since the case was issued, have cited to the decision. When you write briefs and memoranda of law, you use case citations to direct the court to decisions that you think would be helpful to the court in deciding your case.

We hope that this introduction to your rights under the laws of New York State, the state courts and state case citations will be helpful to you in researching the law, reading cases, reading *Pro Se,* and, should you ever need to do so, representing yourself in court.

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