Pro Se

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PRS Re-Sentencing Cases Advance, Raise Questions

DOCS and the Division of Parole have begun the process of returning thousands of prisoners and parolees to their sentencing courts for re-sentencing, pursuant to the new law providing for the re-sentencing of inmates serving determinate terms who were not also sentenced to a period of post-release supervision (PRS).

The new law requires DOCS and Parole to notify the sentencing court whenever they become aware that the commitment order of a prisoner or parolee serving a determinate sentence imposed after September 1, 1998 did not include PRS. The law requires that the sentencing court then review its records. If PRS was pronounced at sentencing, but simply omitted from the commitment papers, it may issue a new commitment order, with PRS.

If PRS was not pronounced at sentencing, the court must appoint counsel for the prisoner or parolee and commence the re-sentencing proceeding.

Because of the large numbers of persons subject to re-sentencing, DOCS, Parole, and the Office of Court Administration (OCA) entered into an agreement to prioritize the cases.

Under the agreement, inmates being held in DOCS' custody or in a local jail based solely on a technical violation of PRS, whose commitment papers did not show that they were sentenced to PRS, were to be referred to their sentencing courts for re-sentencing not later than July 31, 2008. Inmates scheduled to be released by DOCS to PRS prior to October 1, 2008 were to be referred to their sentencing courts at least 45 days prior to their release date. Inmates who are scheduled to be released to PRS after October 1, 2008, are to be referred to their sentencing courts at least 60 days prior to their release date.

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A Message From Karen Murtagh-Monks, Executive Director

On July 21, 2008, with very little fanfare and no press coverage to speak of, Governor Paterson signed a bill amending the Executive Law and, in turn, dramatically affecting the lives of hundreds of New York State citizens. The bill [Senate bill - S6731 and Assembly bill - A9727] was sponsored by Senators Dale Volker, Serphin Maltese, and Velmanette Montgomery, and Assemblymen Jeffrion Aubry and Joseph Lentol. The bill amends Executive Law 259-j by restoring to the Board of Parole the discretion it had, from 1930 to 1998, to grant a discharge from parole supervision to any person who has served three consecutive years of unrevoked parole in cases where the Board is satisfied that such a discharge will be in the best interests of society. Even though there was no evidence of any problems resulting from the exercise of this discretion, in 1998 under the umbrella of "Jenna's Law," the Board of Parole's discretion "to grant a discharge from parole for one class of persons--those who had been sentenced to an indeterminate sentence with a maximum sentence of life" was removed. Thus, since 1998, such individuals have been subjected to mandatory lifetime parole supervision.

In justification for the bill, the sponsors noted that there is "no indication that such mandatory lifetime supervision is necessary to promote public safety. Recidivism studies indicate that persons who have served long terms in prison are among the least likely to re-offend." The sponsors also pointed out that, for almost 70 years, the Parole Board demonstrated sound judgment on this issue and successfully exercised its discretion in determining when to discharge a person from parole.

The sponsors also noted that the 1998 change in the law unnecessarily burdened parole officers by forcing them to supervise individuals who did not require supervision and resulted in an annual cost of approximately $4,000.00 per person. Restoring discretion to the Board of Parole in this area will allow Parole to focus its time and energy on those individuals who do raise concerns of public safety and will result in a significant cost savings to the State.

For hundreds of individuals who have served their time in prison and who have successfully completed a minimum of three consecutive years on parole, this means that the Board of Parole can now consider whether to discharge them from parole. Whether such a discharge will occur will depend on the independent factors associated with each individual. There is no guarantee that any one person will be discharged from parole, but at least there is a chance.

Lawyer, lobbyist, and supporter of the bill, Ed Wassermann, stated: "The sponsors of this bill and Governor Paterson should be commended for enacting this change in the law, not because it was necessarily the popular thing to do, but because it was rational, just and fair." It simply makes sense to restore discretion to the Parole Board to do a job that it did extremely well for almost 70 years. But, this bill restores something more than discretion to the Parole Board. For those individuals who have served their debt to society and have demonstrated that they are not a public safety risk, this bill restores the hope that there may come a day when they really will be free.

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The agreement contains additional provisions for persons who have been previously released to PRS and who may be serving new sentences (they should be referred for re-sentencing not later than December 1, 2008) and persons presently serving a period of PRS in the community (who were to be referred to their sentencing courts not later that November 1, 2008).

As of this writing, thousands of inmate and parolees have been referred for re-sentencing, with thousands more to follow.

What happens at the re-sentencing hearings? Much depends on the facts of the individual case. In some cases, courts are imposing a new sentence, with PRS. The new law, however, authorizes the sentencing court to decide not to impose a new sentence and allow the original sentence--without PRS--to stand.

In some cases, inmates and parolees have argued that the court lacks authority to impose a new sentence with PRS on the grounds that such a re-sentencing violates the double jeopardy clause. Such claims are more likely to succeed where the inmate or parolee was not advised of the PRS requirement at the time of sentencing and/or where he or she has served all or most of the underlying term of incarceration. For instance, in at least one reported case, a judge agreed with that argument, holding that re-sentencing a parolee to a term that included PRS, after she had served the entirety of the underlying term of incarceration, would violate double jeopardy. The case is People v. Washington, 21 Misc. 3d N.Y.S.2d.349 (Sup. Ct., NY County, July 24, 2008).

The re-sentencing process has also raised questions about the *effects* of a re-sentence.

Among them are:

- What happens if the sentencing court decides not to impose PRS, but the inmate or parolee has already served time on PRS? Can the time served on PRS be credited to any time owed to the term of incarceration?

- What happens if the court decides not to impose PRS, but the inmate or parolee was previously held on a PRS violation? Can time served on the PRS violation be credited to another, pending charge?

- What happens if the court does impose PRS at re-sentencing? Does the imposition of PRS retroactively validate a prior PRS violation and any re-computation of the sentence based thereon? Or is the PRS, and any violation thereof, considered a nullity for the period it was illegally imposed?

- Does the answer to the above question differ if the court imposed the sentence "nunc pro tunc" (*i.e.*, to commence on the same date as the original sentence commenced)? or if the court orders--as many have--"no PRS violation"?

- When an earlier sentence would have expired but for the existence of illegally imposed PRS and the inmate is serving a new sentence consecutive to the time owed on the earlier sentence, must the new sentence be recalculated if the sentencing court removes PRS from the prior sentence?

All of these questions--and there will certainly be more--will have to be addressed by the courts in due course.

In one notable development in the PRS story, the Supreme Court, Albany County, recently dismissed a proposed class action brought by DOCS and the Division of Parole called State of New York v. Myers. In the Myers case, the State sought to establish the right to maintain custody and supervision over

inmates improperly subjected to PRS until they could be subjected to the re-sentencing process. The court dismissed the case on the grounds that it lacked any definite legal basis. "We do not, in this country," wrote the court, "adjudicate the rights of criminal defendants en masse for the simple reason that it is unfair and a denial of due process…. The plaintiff's broad request for relief would keep individuals, even those known to be not subject to post release supervision…under custody." The court noted that the new law specifically grants inmates and parolees subject to an administratively imposed period of PRS the right to contest the period in an Article 78 proceeding or habeas corpus proceeding.

The defendants in the Myers case (i.e., the inmates and parolees) were represented by the Legal Aid Society of New York, Prisoners' Legal Services of New York, and the Albany County Public Defenders' Office.

News and Briefs

Gill Case Goes to Court of Appeals

The case of People ex rel Gill v. Greene, 852 N.Y.S.2d 457 (3d Dep't 2008), in which the Appellate Division, Third Department held that DOCS has no authority to run the sentences of predicate offenders consecutively to time owed to a prior sentence absent an explicit order from.the sentencing court, has been accepted for appeal by the Court of Appeals, New York's highest court. The case is scheduled to be argued on January 6, 2009. The petitioner, Mr. Gill, is being represented by the Legal Aid Society of New York. A decision can be expected in March or April 2009. If affirmed, the case could have a broad impact, requiring either the re-sentencing or the re-calculation of the sentences of thousands of prisoners serving predicate felony sentences.

The Third Department, meanwhile, has removed any doubt that it meant what it said in Gill. In Ettari v. Fischer, 862 N.Y.S.2d 413 (3d Dep't 2008), the court, addressing a claim similar to that in Gill, held, "Our recent decision in People ex rel. Gill v. Greene, is dispositive of the case at hand," and "DOCS had no authority to calculate [a prisoner's] sentences as running consecutively to previously imposed sentences when the sentencing court was silent on this issue."

Lower level courts within the Third Department have just begun to grapple with the implications of Gill. In Matter of Lopez v. New York State DOCS and Parole, et. al., the Supreme Court, Albany County, granted an Article 78 proceeding predicated on Gill, and prohibited DOCS from calculating the petitioner's sentences consecutively. The court noted that courts had previously held that because the sentencing court lacks discretion to impose a concurrent sentence on a predicate offender, there was no need to state whether a new sentence was to run consecutively or concurrently with a prior undischarged sentence. However, it continued, "the Third Department had now reversed its long standing position [on the issue]."

In People ex rel Moeller v. Rivera, however, the Supreme Court, Ulster County, denied a habeas corpus petition on raising the same claim. Although the court acknowledged the authority of Gill, it declined to order DOCS to recalculate the sentence on the grounds that a concurrent sentence would violate Penal Law 70.25(2-a). It found that re-sentencing, rather than re-calculation, was the appropriate remedy. It therefore dismissed the petitioner's habeas claim while stating that he was "free...to pursue Article 78 relief in a separate proceeding." (In our view, this decision is erroneous. If the petitioner is entitled to have DOCS recalculate his sentences--and, under Gill, he is--then there is

no substantive difference between a habeas corpus proceeding and an Article 78 proceeding; both seek an order that DOCS recalculate the sentence. If re-sentencing is the appropriate remedy, a CPL 440 motion directed to the sentencing court, rather than an Article 78 proceeding, would be the appropriate procedural mechanism. However, we do not know why an inmate whose sentence and commitment papers do not now reflect the imposition of consecutive sentences, but do indicate that the inmate is a predicate felony offender, would want to move for re-sentencing, as that would presumably risk having the consecutive sentences imposed.)

The Second Department, meanwhile, recently avoided a ruling on the Gill issue. In People ex rel Harris v. Fischer, 860 N.Y.S. 2d 752 (2d Dep't 2008), the court rejected the petitioner's habeas corpus proceeding on the ground that, "[e]ven if the petitioner were to prevail on his argument that DOCS improperly deemed his 2005 sentence to run consecutively to his 1991 sentence, the petitioner would not be entitled to immediate release from prison and, thus, habeas corpus relief is unavailable." Courts generally have the discretion to convert an improperly filed habeas corpus proceeding to an Article 78 proceeding in order to reach the merits and avoid the need for future litigation over the same issue. The Second Department, however, apparently had no interest in doing so in this case.

Finally, at least one Federal District Court has also considered--and rejected--a "Gill" claim. In El-Aziz v. LeClair, (S.D.N.Y. September 29, 2008) (Sheindlin, J.) the court distinguished the "Gill"
situation (in which DOCS runs a sentence consecutively to parole time owed without explicit court authorization) from the situation at issue in Earley v. Murray, 451 F.3d 71, (2d Cir. 2006) (in which DOCS added post-release supervision to a sentence without explicit court authorization). In the "Earley" situation, the court found, "administrative personnel effectively increased the sentences imposed upon the defendants by the court." In the "Gill" situation, however,

> DOCS did not alter the length of [the defendant's] sentence or impose additional terms upon its own initiative. Instead, DOCS merely calculated the sentence in accord with a statutory directive by which judges themselves were bound. Penal Law § 70.25(2-a) mandates that because [the defendant] was sentenced as a second violent felony offender and a second felony offender for his 1985 convictions, those sentences must run consecutively to his undischarged 1968 sentence, even without explicit instruction from the court.

The court's decision, distinguishing Gill from Earley, is ironic, since the State court, in Gill, had specifically relied on Earley in holding that DOCS could not run the sentences consecutively.

***Practice pointer**: Few articles have prompted as much mail to Prisoners' Legal Services as that in our Spring 2008 issue concerning Gill. Most of our correspondents sought representation for a lawsuit demanding that DOCS recalculate their sentences to run concurrently with their parole time.*

We continue to advise, however, that only a minority of prisoners should consider such a lawsuit now. This is largely because, first, Gill itself will be decided by the Court of Appeals shortly. That Court's decision will apply statewide. Any lawsuit filed now will likely be controlled by it. Second, only prisoners who can bring a habeas corpus proceeding stand to benefit from Gill. Although prisoners may bring an Article 78 proceeding to challenge their sentence

computations, such proceedings are subject to being stayed pending appeal, and by the time the appeal is completed, the Court of Appeals will have decided Gill. Third, habeas corpus proceedings can only be brought by prisoners who can show that, if they win, they would be entitled to immediate release. Finally, habeas corpus proceedings must be filed in the county in which the prisoner resides. Thus, the only category of prisoners who should, in our view, consider bringing a Gill claim are those who are presently in a Third Department county and who would be entitled to be immediately released if their sentences were calculated as running concurrently, rather than consecutively, to their parole time. As the Moeller case above suggests, however, even those prisoners do not necessarily have a straightforward path to victory.

Former Inmate Awarded $1.4 Million in Damages For Injuries From Guards

A former inmate in Oneida Correctional Facility in Rome has been awarded $1.4 million in damages for injuries from correctional officers. Angel L. Martinez, 45, of the Bronx was awarded the judgment by a jury in U.S. District Court for the Northern District of New York, according to an article in The Daily News. The decision was made on September 12, 2008.

According to The Daily News, Martinez had been serving a sentence for attempted robbery.

In his federal complaint, he alleged that he was beaten repeatedly, denied medical care, and falsely charged with assault and placed in SHU in the spring of 2003 because he annoyed an officer by ringing a buzzer multiple times. He claimed that the beatings caused broken ribs, herniated discs, and dozens of cuts, bruises, and welts.

Correctional Officers' claims that Martinez had assaulted them were rejected by a jury, which instead ordered the officers to pay Martinez damages for his injuries.

The breakdown of the award by each of the Correctional Officers involved was: $200,000 against Scott Thompson, $150,000 against Larry Sisco, $100,000 against Michael Duvall, and $50,000 against Roland LaBrague; plus punitive damages of $500,000 against Thompson, $200,000 against Duvall, $150,000 against Sisco, and $50,000 against LaBrague. There were also $1 damages awarded against Thompson, Duvall, and LaBrague for nominal damages, as well as $1 each against Thompson, Sisco, and Scott Meyers for malicious prosecution.

Claims against four other officers and one administrator were dismissed.

Parole Commissioner Charged With Sex Offense

A New York State Parole Board Commissioner was arrested in October and charged with trying to set up a sexual liaison with two underaged girls. The commissioner, Chris Ortloff, 61, was arrested in an Albany-area hotel by federal officials. According to the officials, Ortloff thought he was going to be meeting a 12-year-old girl and her 11-year-old sister who were to be dropped off by a parent. Ortloff was charged federally with using the Internet to solicit sex from underaged girls. If convicted, he faces 10 years to life and a $250,000 fine.

Ortloff is a former State assembly member representing the Plattsburgh area. Ortloff rose to the ranks of Assistant Minority Leader and was considered a tough-on-crime legislator, and often called for stronger criminal justice laws, particularly for crimes against children. In 2006, then-Governor George Pataki appointed him to the Parole Board, where he was part of panels who interviewed inmates before voting whether to authorize their release. He now faces up to life in federal prison.

Practice pointer: *An obvious question for any prisoner denied parole by a panel which included Commissioner Ortloff is whether this new development provides grounds for challenging the parole denial in court. Unfortunately, we are skeptical. The courts' standard of review of Parole Board decisions is extremely deferential. In general, so long as the Board has considered the statutory factors set forth in Executive Law § 259-i (2)(c), a court will not disturb the decision absent a showing of "irrationality bordering on impropriety." Thus, if the underlying record supports the Parole Board's decision, the court will likely uphold it, regardless of one commissioner's subsequent malfeasance.*

In 2000, former Parole Commissioner Sean McSherry was convicted in a federal court of having lied to a grand jury about his role in securing the release of an inmate whose family was a financial supporter of former Governor George Pataki. Nevertheless, claims by other inmates that their parole denials were tainted by McSherry's participation were rejected. For example, in Hernandez v. McSherry, 706 N.Y.S.2d 647 (3d Dep't 2000), the court held: [P]etitioner's allegations of bias on the part of the Board Commissioner are not supported by the record and, further…petitioner has failed to offer proof that the outcome of this case flowed from the alleged bias." This requirement, i.e., that an inmate show that the outcome of the case "flowed from the alleged bias," is essentially equivalent to a requirement that the inmate show that ***but for*** *the bias, he would have been released, a very difficult burden to meet.*

DOCS Settles Class Action Over Sex Offender Program: Grants "Use Immunity" to Participating Inmates

DOCS' Sex Offender Counseling Program (SOCP) has long required inmates to accept responsibility for their sexually offending behavior and to divulge any history of sexually offending behavior, including acts or conduct for which the participant was not or has not been criminally charged. According to SOCP policy, if an inmate elected to participate and disclosed offending behavior for which he had not been charged, program counselors were "required to report evidence of child physical and/or sexual abuse that has occurred or is planned and any specific details of previous crimes for which the offender has not been charged." SOCP policy manuals further stated that "an inmate who discloses the details of any prior crime(s), must be reported to the appropriate authorities so that society will be protected."

In 2000, inmate David Donhauser was told by his counselor that he should take the SOCP. Donhauser refused, citing the SOCP policy requiring him to discuss uncharged offenses. He was thereafter told by various officials in DOCS that his failure to take the SOCP would almost certainly result in his loss of good time.

In 2002, he filed suit in the federal district court for the Northern District of New York, claiming that the program, by requiring him to divulge a history of sexual conduct, including illegal acts for which no criminal charges had been brought or else face a loss of good time credits, violated his Fifth Amendment privilege against self-incrimination.

In 2004, he court agreed, and issued a system-wide preliminary injunction enjoining DOCS from denying a prisoner good time credits based on a refusal to provide his sexual history so as to be eligible for SOCP. See, Donhauser v. Goord, 314 F. Supp.2d 119. The case was then converted into a class action, with Donhauser representing all "current or former New York State prisoners who have lost or been denied good time credits or have been threatened with the loss or denial of good time credits because of a refusal to admit guilt to criminal conduct as part of the SOCP."

DOCS, meanwhile, appealed the preliminary injunction. The Second Circuit Court of Appeals stayed the injunction and, in 2006, remanded the case to the district court for "further development of the factual record in light of various changes that have occurred since the District Court issued the preliminary injunction." The court further stated that, on remand, DOCS should "consider whether granting use immunity to prisoners for any information disclosed in the course of the prisoners' participation in SOCP would [resolve] the issues in dispute."

Two years of negotiations followed. Finally, in Ocotber of 2008, DOCS and the plaintiff class entered into an agreement to settle the case. Under the agreement, inmates will no longer be required to disclose details of past offenses in order to participate in the SOCP or admit the commission of a particular crime. Instead, inmates will be required to discuss their behavior "in general terms" without providing victims' names, or the dates, times, or places of any offending behavior, although they are still required to "openly and honestly discuss the behavior that resulted in...incarceration and referral to the program, demonstrate acceptance of responsibility of their conduct...and demonstrate an understanding of [the] sexually offending behavior...." In turn, DOCS has agreed that "no written or oral statement made...in conjunction with…the Sex Offender Counseling and Treatment Program" may be used against an inmate in a subsequent criminal proceeding.

Practice pointer: *The Donhauser settlement grants "use immunity" for any statement made about a past offenses in the SOCP (now the "SOCTP"). That means that the State cannot use the statements made in connection with SOCTP, or information derived from the statements, in a future prosecution. But that is not the same as full (sometimes called "transactional") immunity, which would preclude the State from later prosecuting an inmate for the offense entirely. The Donhauser settlement would not prohibit the State, for instance, from conducting an independent investigation and collecting independent evidence of the divulged crimes, or in bringing charges based thereon.*

New Law Requires Parole to Assist Inmates Find Housing and to Consider Additional Factors Before Releasing Certain Sex Offenders

The Division of Parole must assist inmates find suitable housing, under a recent amendment to Executive Law § 259-a(6). That statute previously required Parole to "assist inmates eligible for presumptive release, parole or conditional release…to secure employment, educational or vocational training." The amendment added the word "housing" to the list of items Parole must assist inmates to secure.

This appears to be a welcome step forward, as a lack of suitable housing can be a major obstacle to successful re-entry. We look forward to seeing how it works in practice.

At the same time, the Legislature required Parole to take additional factors into account "when investigating and approving the residence of level two or level three sex offenders." This new law, a new subdivision 5 added to Executive Law 259-a, appears to complicate the release of certain sex offenders. In deciding whether to approve a residence for a level one or two sex offender, it requires Parole to take into account the following factors: the number of other registered sex offenders near or in the proposed residence; the proximity of the proposed residence to "entities with vulnerable populations"; the proposed residence's accessibility to family, friends, and other support; and whether there is

"permanent, stable housing" available to the offender "in order to reduce the likelihood [of his or her becoming] transient."

The law was apparently prompted by legislators' concerns that Parole was concentrating too many paroled sex offenders in certain neighborhoods and residences--concentrations which often result from restrictive local laws limiting the areas in which sex offenders may live.

A Tribute to Paul Curran, PLS Board Chairman, 1988 - 2008

By David C. Leven

Paul Curran, who passed away this year, was the Chairman of the Board of Prisoners' Legal Services for twenty years, from 1988 until 2008.

During much of that time, I was the Executive Director of PLS. I was a little apprehensive when Paul became Chaiman because, despite Paul's sterling reputation--he had been the United States Attorney for the Southern District, State Assemblyman, the chair of the State Investigations Commission, a highly regarded litigator, and the managing litigation partner at a large New York City law firm, Kaye Scholer--he was also a Republican, at a time when Republicans were believed hostile to prisoners' rights.

As it happened, it was incredibly good fortune for PLS and the clients we serve that Paul became the Chair of PLS. For the next 11 years, Paul was an exceptional leader during many difficult years and many difficult situations which PLS confronted, and an amazingly strong advocate for a cause in which he believed: protecting and expanding the legal rights of prisoners. Resolute in his determination to ensure effective access to and justice for New York State inmates, he steadfastly supported the mission of PLS. Greatly respected in Albany, he was able to open up doors, going with me to Albany to make the case for funding PLS at an adequate level. And he made the case brilliantly, helping to ensure our continued funding, sometimes with increases that may not have been secured without his involvement.

When, despite Paul's efforts, Governor Pataki vetoed our budget in 1998, forcing us to close our six offices for inmate representation and lay off 56 of 60 staff, Paul helped us to survive that awful year against all odds, survive and rebound, albeit with reduced funding.

Paul's unwavering support of PLS, his commitment to its mission, and the unbelievable amount of time and energy he devoted to PLS for two decades made him something he probably never thought he would be, a hero of the prisoners' rights movement. He was certainly a hero of mine.

Federal Cases

Second Circuit Reinstates Conviction of Correctional Officer Who Fatally Injured County Jail Prisoner

United State v. Cote, 544 F.3d. 88 (2d Cir. 2008)

The Second Circuit Court of Appeals reinstated the civil rights conviction of a correctional officer who fatally kicked a county jail inmate while allegedly trying to restrain him.

A jury found Officer Paul M. Cote guilty of violating inmate Zoran Teodorovic's civil rights after he stomped and kicked Teodorovic in the head and chest on October 10, 2000. The incident occurred after Teodorovic allegedly sucker punched another officer. Teodorovic, who was mentally ill and homeless, and was being held in the county

jail on misdemeanor trespassing charges, went into a coma and died of his injuries 14 months later.

Following the incident, Officer Cote was charged under state law with assault and reckless battery. He was acquitted of assault but convicted of battery. When Teodorovic subsequently died of his injuries, federal authorities charged Cote with civil rights violations. After the jury found him guilty, Southern District Judge Charles Brieant granted a judgment of acquittal to Cote, saying he had a "real concern that an innocent person may have been convicted." The court specifically concluded that much of the inmate testimony in the case "was so exaggerated and vindictive as to be entirely incredible as a matter of law…."

The Court of Appeals reversed, saying that Judge Brieant had "usurped the jury's role in determining [the inmate] witness[es] credibility" and "improperly concluded that the jury was erroneously instructed." For example, Judge Brieant had found that the testimony of some of the witnesses as to the number of stomps and kicks administered by Officer Cote was incredible and that if Cote had kicked or stomped Teodorovic in the head as many times as the witnesses claimed, Teodorovic's face would have been unrecognizable in the photographs. The appeals court said that question should have been left to the jury. "The purported inconsistencies that troubled the district court, and the inferences to be drawn from the photographic evidence, are factors relevant to the weight the jury should accord to the evidence, and do not on this record justify the grant of a judgment of acquittal."

The court also criticized Judge Breiant for finding that Officer Cote lacked the specific intent needed to be convicted under the statute. The "nature of the force itself--repeatedly striking and kicking Teodorovic in the head" suggested an intent to injure rather than restrain the prisoner, the court wrote, and the words Mr. Cote allegedly screamed at the prisoner "betrayed his willful intent and belied any possibility that he was engaged in a good-faith effort to restrain the inmate."

The court remanded the case to the lower court with instructions that Cote be sentenced. He faces up to 10 years in prison.

Practice pointer: *The factors that the jury had to consider in determining whether Officer Cote was criminally liable for using excessive force are similar to those that a court or jury would have to weigh in deciding an inmate's civil claim for damages against an officer for excessive force. As recited by the court in this case, they are: "the need for the application of force, the relationship between the need and amount of force that was used, the extent of the injury inflicted, and whether the force was applied in a good-faith effort to restore discipline or sadistically for the purpose of causing harm."*

Here, a number of eyewitnesses testified that Cote punched, kicked, and stomped Teodorovic while he was lying on the ground, already in a position of weakness: Officer Reimer, the officer who had been punched by Teodorvoic, testified that, while he was holding Teodorovic on the ground, Cote ran into the cell block and punched, kicked, and stomped on Teodorovic.The appeals court noted that even if, as Judge Breiant suggested, Cote had a duty to aid Reimer to subdue Teodorovice, the available evidence "would plainly allow a reasonable juror to determine that Cote used excessive force" in doing so.

District Court Rejects Claim That Extension of Sex Offender Registration Period Violates Ex Post Facto Clause, Due Process

Woe v. Spitzer, 571 F.Supp.2d 382 (E.D.N.Y. 2008)

"SORA," New York's Sex Offender Registration Act, requires that sex offenders register with the New York State Division of

Criminal Justice Services and be subject to "community notification" for a specified period of time. The time period of registration and the degree of community notification depend upon the "risk level" assigned to the offender, as determined by the New York State Board of Sex Offenders. See, generally, Correction Law § 168.

When SORA was first enacted, in 1995, level one sex offenders--those with the lowest risk of re-offense--were required to register for ten years from the date of their discharge or parole from prison.

The plaintiff in this case is a level one sex offender who became subject to SORA in 1996.

In 2006, ten days before the plaintiff's required period of registration would have expired, the Legislature amended SORA to provide that level one offenders register for twenty years.

The plaintiff sued, claiming this new requirement violated the *ex post facto* clause of the constitution, as well as his right to due process of law. The *ex post facto* clause of the constitution prohibits the government from increasing someone's punishment after a punishment has already been imposed.

The court rejected the plaintiff's *ex post facto* claim, noting that both the Second Circuit Court of Appeals and the Supreme Court had previously rejected such claims concerning sex offender notification laws, on the grounds that they are civil in nature and do not constitute additional "punishment." See, Doe v. Pataki, 120 F.3d 1263(2d Cir.1997) (New York SORA does not violate *ex post facto* clause); Smith v. Doe, 538 U.S. 84 (2003) (Alaska's sex offender registration act does not violate the *ex post facto* clause).

The Court also rejected the plaintiff's due process claim. Although it found that the plaintiff did have a "liberty interest" in being free of the requirements of the sex offender registration–and was therefore entitled to procedural due process before he could be required to register--it found that the due process entitlement arose at the original risk level determination--that is, when the registration requirement was imposed--and was not implicated by the "the length of the registration period."

The court therefore dismissed the plaintiff's claims.

Practice pointer: *In doing so, however, the court noted that SORA contains a provision that allows any sex offender to petition a court for an order modifying the level of notification. See Correction Law § 168- o(2). As applied to level one offenders, the court stated, an adjustment of the risk level would "relieve the offender from any registration requirement." Therefore, the court continued, the plaintiff was not without a potential remedy.*

District Court Rejects Claim That Commissioner, Superintendent, Should Have Done More to Prevent Assault at Green Haven

Warren v. Goord, __ F. Supp.2d. __ (S.D.N.Y. 2008)

Between 1995 and 2003, there were 148 inmate-on-inmate assaults in the Green Haven yards. Between 2000 and 2003, there were thirty-seven attacks in the yards, thirty of which involved the use of weapons. There were eight inmate-on-inmate assaults in the Green Haven yards in 2003, six involving weapons. In July of 2003, an inmate was stabbed and killed with an unidentified weapon.

On January 1, 2004, the plaintiff was watching television in the E/F recreation yard at Green Haven around 9:00 p.m. when another inmate attacked him with a razor, cutting him across his left cheek. The resulting wound was approximately three inches in length and required twelve stitches to close.

The plaintiff sued both (then) Commissioner Glenn Goord and Superintendent Phillips, claiming that their failure to install metal detectors at the entrance to the recreation yards in Green Haven constituted deliberate indifference to the risk to inmates in this yard of violence from other inmates.

The defendants disagreed, arguing that the security measures they had in place were sufficient. They stated that, in order to prevent inmates from bringing weapons into the yards, Green Haven subjected inmates to random frisks using a hand-held metal detector or metal detector chair. Correctional officers were physically present in the yard during recreation, they regularly performed visual inspections of the yards and bathroom, and periodically swept them with metal detectors.

The defendants also argued that metal detectors would be impractical: the recreation period was not long enough to permit numerous inmates to remove their shoes, belts, jackets, and other articles and pass through a metal detector, and in any event, the installation of metal detectors would not prevent weapons from entering the recreation yards for a number of reasons: inmates may make weapons out of plexiglass or foil a metal detector in other ways; in addition, they "routinely" throw weapons into the yard through windows which face the yard (despite what the defendants argued were diligent efforts to screen the windows). The defendants also argued that an inmate can commit an assault in the yard without a weapon, or by using weight bars or other exercise equipment.

"Prison officials have a duty…to protect prisoners from violence at the hands of other prisoners." Farmer v. Brennan 511 U.S. 825, 833, (1994) (citations omitted). When a prisoner is incarcerated under conditions posing "a substantial risk of serious harm" and can show that the officials knew or should have known about the risk and failed to take reasonable steps to abate it, he or she can bring a civil rights action for damages.

In this case, the court found that the evidence showed that the plaintiff was incarcerated in conditions that posed a substantial risk of harm and that there was an at least triable question over whether defendant Phillips knew or should have known of the risk.

The court further found, however, that the plaintiff had not presented sufficient evidence that the steps Phillips had taken to address the danger of assaults in the yard were unreasonable. The court noted that Green Haven had a number of security measures to address the dangers of attacks in the yards, including random frisks and metal detector screenings, more extensive screenings when alerted to specific dangers, placement of officers in the yard during exercise periods, and regular visual inspections and periodic metal detector sweeps. The plaintiff, meanwhile, offered "nothing but his own conclusory statements to support the argument that metal detectors would significantly reduce the risk to inmates of being assaulted by other inmates." As the defendants pointed out, inmates can and do commit assaults with non-metal weapons and with their bodies and have other ways of getting weapons into the yards or, indeed, to other areas in the facility. "While the system in place at Green Haven may not be infallible," the court concluded, "no reasonable fact finder could conclude on this record that Defendants disregarded an excessive risk to plaintiff's…safety by failing to adopt the security measures that he proposed."

Therefore, the court dismissed the claim.

Magistrate Judge Appoints Counsel for One Inmate, Denies It for Another

Prisoners litigating *pro se* in the federal courts often make a motion for the

appointment of counsel. To prevail in such a motion, the inmate must show that:

1. the case has merit;
2. the prisoner is unable to pay for private counsel;
3. the prisoner has made efforts to obtain a lawyer; and
4. "the prisoner's ability to gather the facts and deal with the issues will be significantly impeded if unassisted by counsel."

See, Cooper v. A. Sargenti Co., 877 F.2d 170, 172 (2d Cir.1986).

The most important of these factors is the merits. For instance, the Second Circuit, in Cooper, held:

> Courts do not perform a useful service if they appoint a volunteer lawyer to a case which a private lawyer would not take if it were brought to his or her attention. Nor do courts perform a socially justified function when they request the services of a volunteer lawyer for a meritless case that no lawyer would take were the plaintiff not indigent.

The above standard was recently applied by a district court to two prisoner *pro se* cases, with differing results.

The plaintiff in Blailey v. Sloly (S.D.N.Y. August 15, 2008) (Pittman, MJ) was an inmate on Rikers Island who alleged that he was sprayed with pepper spray by the defendant-guards, hit with a chair, kicked and punched while on the ground, and handcuffed. He also alleged that he was hit with riot clubs and helmets. All of these acts allegedly occurred after the plaintiff returned to his cell with a razor that he had used to shave his head. The plaintiff alleged that he was given no warning before the attacks and that he complied immediately when ordered to drop the razor. The plaintiff also alleged that there were twenty-five to thirty witnesses, that his injuries included fractured ribs and contusions all over his body, and that he required eight sutures on the right side of his head as a result of the incident.

The court noted the Supreme Court has held that significant injury is not necessary for an Eighth Amendment claim, and that "when prison officials maliciously and sadistically use force, contemporary standards of decency are always violated." In that case, the court noted, guards allegedly beat a shackled prisoner, which the court found to be "malicious and sadistic"--and thus in violation of the Eight Amendment--even though only minor injuries resulted.

Here, the court noted, the plaintiff was allegedly beaten while he was handcuffed and suffered more than just bruises. "Thus, it appears that the plaintiff may have a meritorious Eighth Amendment claim."

The court also noted that the plaintiff is in jail, that his only employment lasted for less than two months in 2006, and that he therefore "lacks the funds to hire private counsel." Also, the court continued, "the plaintiff has sufficiently attempted to obtain a lawyer on his own but was denied assistance three times." Finally, although the plaintiff's need for counsel was "debatable"--he stated that he needed counsel to "properly assist…in making the right decisions, and…help file the motions"--the court found that when all of the factors were weighed together, "it is appropriate to add plaintiff's case to the list of cases considered by the Court's Pro Bono Panel."

The court reached the opposite conclusion in Brown v. Banks (S.D.N.Y. August 15, 2008) (Pittman, MJ). In that case, the plaintiff alleged that, after he disobeyed an order to remove his jacket, the defendants sprayed him with mace, kicked and punched him, threw him to the floor, and handcuffed him. He

claimed to have suffered numbness in his hand and a swollen ankle.

The court found it likely that "plaintiff will confront several difficulties in litigating his case because: (1) prison guards are given some leeway in using force, especially when a prisoner disobeys an order; (2) the use of mace is not necessarily excessive force; (3) the occurrence of minor injuries because of tight handcuffs does not necessarily imply excessive force was used; and (4) there were no uninterested witnesses to the incident."

Therefore, the court held, even assuming the plaintiff's financial inability to retain counsel and that he had made sufficient efforts on his own to secure counsel, his current application "establishes none of the other elements relevant to an application for counsel." In response to the question on the form motion that asks the plaintiff to explain why he feels he needs a lawyer, the plaintiff stated, "To reassure professional guidance." But, the court stated, "The need for guidance is not sufficient. If the need for guidance were sufficient to warrant adding a case to the list circulated to the Pro Bono Panel, nearly every *pro se* case would be added to that list.... Accordingly, because plaintiff has failed to show that his petition is sufficiently meritorious, his motion for counsel is denied…."

Practice pointer*: In a civil case such as this, the court does not actually "appoint" counsel. Instead, the court submits the case to a panel of volunteer attorneys. The members of the panel consider the case, and each decides whether he or she will volunteer to represent the plaintiff. If no panel member agrees to represent the plaintiff, there is nothing more the court can do. Thus, even in cases where the court finds it is appropriate to request volunteer counsel, there is no guarantee that counsel will actually volunteer to represent the plaintiff.*

State Cases

Disciplinary

Inmate Found Not Guilty of Solicitation, Guilty of Harassing Facility Nurse

Matter of Wells v. Dubray, 862 N.Y.S.2d 187 (3d Dep't 2008)

The petitioner was charged in a misbehavior report with stalking, harassment, and soliciting a sexual act after admittedly kissing a facility nurse on the cheek. At the conclusion of the Tier III disciplinary hearing that followed, he was found not guilty of stalking but guilty of the remaining charges and sentenced to 180 days in the Special Housing Unit. In an Article 78 proceeding, the petitioner argued that the evidence did not support the charge.

With respect to the solicitation charge, the court agreed. Disciplinary Rule 101.10 provides that "[a]n inmate shall not engage in or encourage, solicit or attempt to force another to engage in sexual acts" (7 NYCRR 270.2 [B] [2] [i]). The petitioner's kiss could not reasonably be construed as the solicitation of a sexual act, the court found. Further, although the nurse testified that the petitioner "insinuated" and she "thought" that he "wanted more" than a professional relationship with her, she conceded that he did not go into detail or otherwise explain what he meant by "more." "[T]his vague and unspecified request is insufficient to sustain the solicitation charge," concluded the court.

With regard to the harassment charge, however, the court disagreed. Disciplinary Rule 107.11 provides that,

> [a]n inmate shall not harass an employee or any other person verbally or in writing. 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.
>
> 7 NYCRR 270.2 (B)(8)(ii).

The court found that although the petitioner did not expressly articulate his desires or explain what type of relationship he wanted with the nurse, he nevertheless "communicated a message of a personal nature to a facility employee." Thus, notwithstanding the nurse's testimony that the petitioner did not harass her, the court held, "the cited rule is sufficiently broad to encompass petitioner's conduct."

Inmate Found Guilty of Conspiring to Smuggle Drugs Into Facility

Matter of Gomez v. LeClaire, 862 N.Y.S.2d 633 (3d Dep't 2008)

The petitioner was found guilty at a Tier III hearing of conspiring to bring drugs into the facility, smuggling or soliciting another to smuggle items into the facility, possessing contraband, and violating facility correspondence procedures and was sentenced to 12 months in the Special Housing Unit, together with a 36-month loss of privileges and a recommended loss of good time of 24 months. In reply to his Article 78 proceeding, the Attorney General agreed that there was insufficient evidence to sustain the contraband charge, as no contraband had been introduced into the facility.

The court concluded that there was sufficient evidence to support the remaining charges, however. With respect to the smuggling charge, the fact that the petitioner was not found to be in possession of any drugs or that no drugs actually were brought into the facility "is of no moment," held the court, "as the rule was violated when petitioner conspired with another to introduce drugs into the facility." Further, although the correspondence between the petitioner and his friend, which formed the basis for the charges, made no express mention of drugs, "the Hearing Officer could reasonably infer, based upon the totality of the evidence, that the underlying transaction involved drugs." The petitioner's assertion that he was asking his friend to smuggle tattoo ink, not drugs, into the facility, as well as his varying explanations for the $400 he had received from fellow inmates or members of their families, merely "presented credibility issues for the Hearing Officer to resolve."

Inmate Held Not Entitled to Back Pay After Disciplinary Conviction Reversed

Matter of Henriquez v. Goord, 862 N.Y.S.2d 411 (3d Dep't 2008)

After the petitioner's disciplinary hearing was administratively reversed, he sought back pay for wages lost as the result of his removal from his prison job and placement in the Special Housing Unit. Pursuant to Department of Correctional Services Directive No. 4802, the petitioner was reimbursed in the amount of $36.45, the idle pay rate. Dissatisfied, he filed a grievance. The Central Office Review Committee (CORC) denied the grievance, finding that his back pay had been properly calculated. The petitioner then commenced an Article 78 proceeding challenging that determination, as well as a separate

determination denying his request to be reinstated to his former pay grade.

The lower court partially granted the petition. It returned the matter to DOCS to recompute the amount the petitioner was owed under the idle pay rate. However, it dismissed the remainder of the petition, finding, "[a] prison inmate does not have any statutory, constitutional or precedential right to a prison job. Since petitioner's prior pay grade was simply one attribute of his former employment, he is not entitled to restoration of his prior status."

Inmate Found Guilty of Interfering With An Employee

Matter of Harvey v. Woods, 862 N.Y.S.2d 630 (3d Dep't 2008)

The petitioner, an inmate, was found guilty of creating a disturbance, demonstration, and interference with an employee after attempting to lessen the effects of a chemical agent that was being used by correctional officers on another inmate by throwing water into the inmate's face. He also allegedly encouraged the inmate to continue resisting the officers and defy their orders. He challenged the decision on the ground that it was not supported by the evidence.

The court disagreed. The determination of guilt, the court found, was "supported by substantial evidence consisting of the misbehavior report and corroborating hearing testimony from the correction officer who authored it." Contradictory testimony from the other inmate involved in the incident, the court held, "merely created credibility issues for resolution by the Hearing Officer."

Evidence Did Not Support Charge of Smuggling, Drug Possession, and Violating Visiting Room Procedure

Matter of Gibson v. Fischer, 864 N.Y.S.2d 183 (3d Dep't 2008)

The petitioner was found guilty of smuggling, drug possession, violating visiting room procedures and making unauthorized calls in a Tier III proceeding after an investigation into a telephone call that the petitioner made to his wife. He challenged this result, arguing that the charges were not supported by the evidence. The court agreed.

> The misbehavior report and the hearing transcript do not contain sufficient detail to conclude that petitioner violated the rules alleged. Likewise, the transcript of the conversation between petitioner and his wife is vague and does not indicate that the two were discussing smuggling drugs into the facility through use of the facility visiting room nor does the record suggest that any drugs were recovered.

Therefore, the court concluded, "the determination must be annulled and all references thereto expunged from petitioner's institutional record."

Other Cases

Denial of Temporary Release to Former Supreme Court Justice Not Improper, Court Holds

Matter of Garson v. NYS Department of Correctional Services, 863 N.Y.S.2d 537 (Sup. Ct., Albany Cty., August 8, 2008) (Ceresia, J.)

The petitioner, a 76-year-old former New York State Supreme Court Justice, is serving a sentence of 3 to 10 years after being convicted of accepting a bribe and receiving an award for official misconduct. The charges arose out of the performance of his duties as a judge.

Soon after his incarceration, he applied to participate in the Temporary Release Program. The application was denied based on the nature of his offense. The decision of the Central Officer Reviewer stated, in part: "Explanation: Instant offense included Garson, while employed as Kings County Supreme Court Judge, accepting bribes with understanding his decisions as a public servant would be influenced. Many innocent lives were affected by his actions. Not considered appropriate for work release at this time. You may not re-apply for work release until 08/2009."

The petitioner appealed but his appeal was also denied. The appeals decision stated, in part, as follows: "After reviewing all factors in this case, both positive and negative, the decision has been made to affirm the TRC decision in this case…The present offense involved you employed in the capacity of a county supreme court justice, accepting bribes with the understanding your decision as a public servant would be influenced…Noted is your recent Tier II conviction. Your poor custodial adjustment coupled with the serious impact the instant offense has on the community renders you an unsuitable candidate for work release."

The petitioner subsequently commenced an Article 78 proceeding challenging the decision. In it, he argued that the decision was irrational, his crimes were non-violent, and he was an ideal candidate for temporary release.

Corrections Law § 855(9) provides that "participation in a temporary release program shall be a privilege" and [n]othing contained in this article may be construed to confer upon any inmate the right to participate, or to continue to participate, in a temporary release program."

Courts have held that judicial review of a determination to deny an application to participate in such a program is limited to consideration of whether the determination "violated any positive statutory requirement or denied a constitutional right of the inmate and whether [it] is affected by irrationality bordering on impropriety." Matter of Abascal v. Maczek, 796 N.Y.S.2d 757 (3d Dep't 2005). They have specifically noted that denial of a temporary release application may be based upon the seriousness of the crime for which the petitioner is incarcerated. See, *e.g.*, Matter of Peck v. Maczek, 830 N.Y.S.2d 846 (3d Dep't 2007).

DOCS has established a point system for the consideration of temporary release applications. See, generally, 7 NYCRR 1900. But DOCS' regulations also state that "[t]he [Temporary Release] Committee shall also take into account any factors, besides the items in the point system, which, in their best judgment, they find significant." 7 NYCRR 1900.4(l)(2). They also state that, "inmates should be denied temporary release if their presence in the community or in minimum security institutions would pose an unwarranted threat to their own or public safety, if public reaction is such that the inmate's successful participation in the program would be made difficult and public acceptance of the temporary release program would be jeopardized."

Under the circumstances, the court found, DOCS' decision was neither irrational nor otherwise affected by an error of law. "The factors considered by the Temporary Release Committee were proper, and adequate to support the determination. They also comport with the standard…set forth in § 1900.4(l)(4) of the Rules of the Department of Correctional Services." According to the court, the Temporary Release Committee could "properly take into account the nature

and consequence of petitioner's criminal acts, particularly the fact that they were committed by an elected judicial official uniquely entrusted with the responsibility to impartially uphold and follow the law, not violate it"--notwithstanding the fact that his crimes were nonviolent.

DOCS Did Not Err In Withholding Good Time

Matter of Reed v. Fischer, 863 NYS2d 524 (3d Dep't 2008)

The petitioner in this case is serving a sentence of from 6 to 18 years for attempted murder. In May 2007, he appeared before a Time Allowance Committee (TAC) to determine whether some or all of his good time credit should be withheld after he was removed from an academic program for disciplinary reasons. Following the hearing, TAC recommended that all six years of the petitioner's good time be withheld and that, following his completion of an aggression therapy program, despite the fact that he had already completed one aggression therapy program, he could reapply for reconsideration. The petitioner commenced an Article 78 proceeding challenging the determination.

The court rejected the petitioner's challenge. The court noted, initially, that, "[i]t is well established that good behavior allowances are in the nature of a privilege…and no inmate has the right to demand or to require that any good behavior allowance be granted to him." Whether to withhold a good time behavior allowance is a discretionary determination and, "as long as it is made in accordance with law and is based upon a review of an inmate's entire institutional record, it is not subject to judicial review."

Here, the court found, the record showed that the TAC had considered the petitioner's complete institutional record, including his several prior disciplinary infractions, in addition to his program accomplishments. The petitioner agreed that the basic facts were accurate. The TAC placed particular emphasis on the petitioner's recent disciplinary infractions incurred as the result of a fight in which he exhibited behavior "inconsistent with [his] prior aggression therapy program." Noting that good time may be withheld for "bad behavior, violation of institutional rules or failure to perform properly in the duties or program assigned" (See Correction Law § 803[1][a]), the court concluded that the withholding of the petitioner's good time credit was "entirely rational under the circumstances presented here."

Inmate Denied Parole Based on Seriousness of Offense

Barnes v. New York State Division of Parole, 862 N.Y.S.2d 639 (3d Dep't 2008)

The petitioner in this case is serving an aggregate prison term of 20 years to life imposed in 1979. He commenced an Article 78 proceeding following his fifth unsuccessful appearance before the Board of Parole in January 2007. The Appellate Division, in a brief and boilerplate opinion, upheld the Board. "It is well settled," wrote the court, "that decisions regarding release on parole are discretionary and will not be disturbed absent a showing of irrationality bordering on impropriety" and "although the Board indeed is required to consider the statutory factors set forth in Executive Law § 259-i (2)(c)," it need not "enumerate, give equal weight to or explicitly discuss every factor considered."

Here, the court found, the record did not show that the Board denied the petitioner's request for parole release based solely upon the severity of the underlying offense. Rather, the record reflects that the Board also considered the petitioner's good disciplinary record, his positive institutional adjustment,

and his successful completion of various programs. "In sum," concluded the court "we are satisfied that the underlying determination evidences a proper exercise of the Board's discretion."

Practice pointer: *There is some tension between Appellate Division decisions holding that the Parole Board may not deny parole based "solely" on the seriousness of the underlying offense (See, e.g., Matter of King v. New York State Div. of Parole, 598 N.Y.S.2d 245, affd. 83 N.Y.2d 788 [1993]) and others holding that so long as the Board has considered the statutory factors set forth in Executive Law § 259-i, its decisions are not subject to judicial review absent "irrationality bordering on impropriety."*

Here, for example, all of the factors other than the seriousness of the offense weighed in favor of Parole. The court nevertheless upheld the Board on the ground that it at least considered the positive factors. But if the Board considered them only to reject them in light of the seriousness of the offense, what difference is there from denying parole based "solely" on the seriousness of the offense?

Inmate Not Entitled to Damages for Mouse Bite

Covington v. State, 863 N.Y.S.2d 852 (3d Dep't 2008)

The claimant, an inmate at Great Meadow Correctional Facility, sought damages for an injury allegedly sustained as the result of a mouse bite on his left big toe. Following a trial, the Court of Claims dismissed his claim and the claimant appealed.

The appellate court sustained the Court of Claims, noting that although the State "bears a duty to maintain its property in a reasonably safe condition in view of all of the circumstances," it is not "an insurer against every injury that might occur on its property, including the likelihood and seriousness of a potential injury and the burden of avoiding such risk."

Here, the court found, the claimant's claims that the cell block in which he was housed was infested with rodents was contradicted by the testimony of the Plant Superintendent of Great Meadow, who explained that the facility contracted with an outside exterminator who visited the facility weekly and treated all of the common areas, as well as individual cells that had been reported by inmates to have had problems. In addition, the defendant submitted service reports from the pest control company from January 2005 and February 2005, just prior to the claimant's alleged injury, describing the extermination procedures employed, which included the placement of glue boards in the claimant's cell block for the purpose of catching mice. Given that evidence, the court found, there was "ample" basis in the record to support the lower court's determination that the claimant failed to prove that the State was negligent.

Practice pointer*: The mere occurrence of an unfortunate event, such as a mouse bite, is not in and of itself proof of negligence, unless the event could not have occurred but for the negligence. Here, the court found, the claimant's injuries could have occurred despite the fact that the State took reasonable steps--such as the placement of mouse traps--to prevent them. Therefore, there was not basis upon which to find the State liable for negligence.*

Court Rejects Jury's Conclusion That Sex Offender Should Be Released From Civil Confinement

In re Daniel XX., 861 N.Y.S.2d 838 (3d Dep't 2008)

The petitioner, a sex offender, was paroled from a sentence of 6 to 12 years for attempted

rape and other offenses on the condition that he voluntarily commit himself to the Sunmount Developmental Disabilities Services Office, a mental health facility. Thereafter, Sunmount's Director applied for and obtained several involuntary extensions of the petitioner's commitment. In 2006, the petitioner sought a trial on the question of the need for his further retention, as provided for by Mental Hygiene Law § 15.35. A jury found that the respondent was not in need of inpatient care and treatment and Sunmount's application to retain him was dismissed.

On appeal, the court reversed the Jury verdict.

The court noted that to involuntarily retain a person as a resident at a facility such as Sunmount, the petitioning agency has the burden of proving "that the person is in need of in-patient care and treatment, such care and treatment is essential to the person's welfare, and the person's judgment is so impaired that he or she is unable to understand the need for care and treatment." Additionally, "[i]ncluded within such proof must be the constitutionally required showing that [respondent] poses a substantial threat of physical harm to [him]self or others."

At the trial, Sunmount presented the testimony of an expert witness, a Sunmount psychologist, who testified that the petitioner had a disability attributable to a neurological impairment and that he has psychiatric diagnoses of polysubstance abuse, which arises from his history of alcohol and drug abuse, and schizoaffective disorder, bipolar type, which is manifested by his history of hallucinations and depression. The psychologist also opined that the petitioner suffers from antisocial personality disorder and that, given his assaultive, abusive behavior, combined with his refusal to voluntarily take necessary medications, he "would be dangerous to other people" if released. The psychologist stated that the petitioner lacked anger management and social skills and received training and counseling in those areas at Sunmount. He also gave his opinion that the petitioner "is in need of in-patient care and treatment as a resident at Sunmount because "he [cannot] get along in society[, nor can he] meet his own needs without a tremendous amount of support."

The court found that the psychiatric testimony was corroborated by Sunmount's daily monitoring notes on the respondent which revealed "a pattern of assaultive, verbally abusive and sexually inappropriate behavior." In addition to harassing patients and staff on an almost daily basis, the petitioner, according to the court, started three physical altercations with patients, one of which involved him punching a staff member in the back, and he masturbated in front of female staff on three separate occasions.

A treatment aide at Sunmount described an incident that occurred during the initial hearing on the petitioner's application in which the petitioner "jumped out of his seat and violently punched his attorney in the side of the head [and] had to be physically restrained and…injected with a sedative…."

The petitioner testified that he should be released because he had "paid [his] debt to society and will not harm himself or anyone else." When asked about some of the specific conduct noted in the evidence, however, the respondent defended his behavior. With respect to the assault upon his attorney, he stated, "I believe the lawyer threatened me. I believe that, you know, he caused me pain, humiliation; and, you know, he was treating me like a prostitute." He explained his behavior toward the patients and staff at Sunmount by stating that "[f]rom time to time we have a little argument; but when they put their hands on me physically I have to, you know, protect myself." He denied ever having any problem with alcohol or drugs or ever having experienced hallucinations.

The court noted that a jury verdict may be set aside "when the evidence preponderates so

greatly in the movant's favor that the jury could not have reached its conclusion on any fair interpretation of the evidence."

Here, the court held, "no fair interpretation of [the] evidence supports the conclusion…that respondent is not in need of in-patient care and treatment. In demonstrating petitioner's failure to accept his need for treatment and consistent refusal to take his medication, and his pattern of assaultive, threatening and abusive behavior toward others, we find that petitioner overwhelmingly met its burden of proving, by clear, convincing and uncontroverted evidence, that respondent is in need of in-patient care and treatment."

The court ordered that a new trial be held to evaluate the petitioner's current condition and eligibility for release.

Inmate Serving Definite Sentence in Local Jail Not Entitled to Parole Jail Time Credit Against Interrupted State Sentence

Matter of Davidson v. State Department of Correctional Services, 861 N.Y.S.2d 471 (3d Dep't 2008)

The petitioner was conditionally released from an indeterminate sentence of 6 to 18 years in 2003. He was then declared delinquent from parole on April 10, 2004, after his arrest for various charges of assault. Parole was revoked, and an administrative law judge recommended that he be returned to prison and held to the expiration of his maximum term.

Meanwhile, the petitioner was convicted of assault and sentenced to a one-year definite sentence to be served in a local jail. That sentence commenced on December 5, 2004. With credit for time served since his arrest, plus good time, it expired on January 6, 2005. On January 18, 2005, the petitioner was returned to DOCS' custody to resume serving the remainder of his State sentence. He received 11 days of jail time credit against the sentence, reflecting the period from January 6, 2005 to January 17, 2005.

The petitioner challenged the credit, arguing that he should get credit for all the time he was in local custody.

The court disagreed. The court noted that the declaration of delinquency interrupted the running of the 1993 sentence. See Penal Law 70.40(3)(a). Time served in local custody from a declaration of delinquency to the resumption of the interrupted sentence is considered "parole jail time" and may be credited against the maximum term of the interrupted sentence. See Penal Law 70.40(3(3). Where, however, as here, the local custody arose from an arrest and conviction on another charge, the credit is "limited to the portion of the time spent in custody that exceeds the...maximum term of imprisonment imposed for such conviction." Penal Law 70.40(3) (iii).

This means that a prisoner who has served a definite sentence in a local jail will only receive credit against an interrupted indeterminate sentence for time in custody that exceeds the length of the definite sentence. In this case, that time was 11 days.

***Practice pointer**: There is one exception to the rule stated in this case. A "time served" sentence is never technically "imposed." Therefore, local jail time that is credited to a "time served" sentence may also be credited to the interrupted state sentence. See Bridges v. Malcolm, 44 NY2d 875 (1978).*

Special Report

Two Decades in Solitary

The following article, by John Eligon, appeared in the September 22, 2008 edition of the New York Times.

He is one of New York's most isolated prisoners, spending 23 hours a day for the past two decades in a 9-by-6-foot cell. The only trimmings are a cot and a sink-toilet combination. His visitors — few as they are — must wedge into a nook outside his cell and speak to him through a 1-by-3-foot window of foggy plexiglass and iron bars.

In this static existence, Willie Bosket, 45, seems to have gone from defiant menace to subdued and empty inmate.

It was 30 years ago this month that a state law took effect allowing juveniles to be tried as adults, largely in response to Mr. Bosket's slaying of two people on a New York subway when he was 15. He served only five years in jail for that crime because he was a juvenile, sparking public outrage. But shortly after completing his sentence, Mr. Bosket was arrested for assaulting a 72-year-old man.

He once claimed to be at "war" with prison officials. He said he laughed at the system and claimed to have committed more than 2,000 crimes as a child. He set fire to his cell and attacked guards. Mr. Bosket was sentenced to 25 years to life for stabbing a guard in the visitors' room in 1988, along with other offenses, leading prison authorities to make him virtually the most restricted inmate in the state.

Now Mr. Bosket, who has gone 14 years without a disciplinary violation, does mainly three things: read, sleep and think.

"Just blank" is how Mr. Bosket described his existence during a recent interview at Woodbourne Correctional Facility, about 75 miles north of Manhattan. "Everything is the same every day. This is hell. Always has been."

He is scheduled to remain isolated from the general prison population until 2046.

Mr. Bosket's seclusion is part of a bigger debate over the confinement of troublesome inmates and the role of the prison system. Some say that Mr. Bosket's level of seclusion is draconian, that he should be given an opportunity to rejoin the general population.

"He is a very dangerous person; he's killed people," said Jo Allison Henn, a lawyer who helped represent Mr. Bosket roughly 20 years ago when he fought unsuccessfully to have some of his restrictions removed. "I'm not saying he should be released from custody entirely, just the custody that he is in. It is beyond inhumane. I don't think that too many civilized countries do that."

But proponents of Mr. Bosket's restrictions say he has proved to be something of an incorrigible danger to prison guards and other inmates and cannot be trusted in the general population. He is evaluated periodically, meaning he could rejoin the general prison population before 2046, said Erik Kriss, a spokesman for the State Department of Correctional Services.

"This guy was violent or threatening violence practically every day," Mr. Kriss said. "Granted, it has been a while, but there are consequences for being violent in prison. We have zero tolerance for that."

From 1985 to 1994, Mr. Bosket was written up nearly 250 times for disciplinary violations that included spitting on guards, throwing food and swallowing the handle of a spoon, according to prison reports.

Few, if any, of the state's current inmates have been in disciplinary housing longer than Mr. Bosket, said Linda Foglia, a spokeswoman for the corrections department.

Mr. Bosket says he wakes up at 7:15 every morning and gets a visit from a counselor at 8. At 9, he gets his first of three doses of medication for asthma and high cholesterol, he said. Lunch comes at 11:30, followed by more medication at 1 p.m. and 5 p.m.

He is entitled to three showers a week. Other than one hour of recreation a day, also solitary, he may leave his cell only for medical visits and haircuts. The recreation area measures 34 feet by 17 feet, surrounded

by nearly 9-foot-high walls with bars on the top. Mr. Bosket said he was chained to a door during his recreation time and could not walk more than six feet, but corrections officials disputed that account, saying he was allowed to roam freely during his hour like other inmates.

And while other prisoners in isolation are escorted to a visiting room when they have guests, he must stay in his cell, speaking through the plexiglass.

Most of his waking hours, he said, are spent reading books, magazines, newspapers and anything else he can get his hands on. His favorite magazine, he said, was Elle.

"It's very colorful," he said. "It keeps me up to date on technology and the world."

Mr. Bosket has long been known as a paradox, a man of charm and extraordinary intelligence but also of inexplicable fits of rage.

"It was like a terrifying metamorphosis when this spark within him went off, and you could see the rage in him building," said Robert Silbering, a former prosecutor who tried Mr. Bosket for the subway murders. "I never have seen anything like that before or afterward."

The killings led Gov. Hugh L. Carey to sign a law allowing people as young as 13 to be tried as adults for murder. Mr. Bosket said he saw it as something of an honor that he could drastically change a justice system that he said made him a "monster."

"If I'm the perfect example, then I've been taught well," he said.

At the sight of a recent visitor, Mr. Bosket cheerfully nodded and, revealing a small gap between his front teeth, gave a friendly, "Hi, how's it going?"

He spoke with the aura of a professor, using deliberate gestures and emphasizing the ends of many words. He often spoke in metaphors and used stories and quotations to explain his philosophies.

As he contemplated his words, Mr. Bosket often folded his right arm across his bulging stomach and lay the fingers of his left hand across his mouth and nose. He sometimes rocked in his chair.

Despite his bleak situation, Mr. Bosket refused to concede defeat: "I'm not broken down and never will be."

His life has always been empty, he said.

"I grew up with nothing," he said. "I was born with nothing. I still have nothing. I will never have nothing. Forty-five years of living the way I have lived, I like 'nothing.' No one can take 'nothing' from you."

Mr. Bosket, who has spent all but two years in some form of lockup since he was 9, also said he had formed a "breastplate" from a lifetime of incarceration.

"I've become so callous to the poking of the sword that, literally, instead of bleeding to death, the blood was drained and I became absent of concern, void of emotions, cold — plain cold to the degree that not much affects me anymore," he said.

Yet Mr. Bosket did hint at something of a life of suffering.

"If somebody came to me with a lethal injection, I'd take it," he said. "I'd rather be dead."

His change from vicious to quiescent, Mr. Bosket said, was a calculated move. Growing up in Harlem, Mr. Bosket said, his heroes were revolutionaries like Huey Newton and Assata Shakur. He said he believed blacks needed to use violence to survive in the 1970s and '80s.

But in 1994, he said, he sensed a change in society. "Blacks don't need to go and attack to get their message across," he recalled thinking.

He said that he also wanted young people to see positive in his life, and that continued violence could be counterproductive.

"I don't believe at this point it's strategic for me to be aggressive or violent," he said. "I've made my point."

"I'm not proud of a lot of the things I've done," he added.

Mr. Bosket's sister, Cheryl Stewart, 51, said her brother had expressed remorse in letters.

"What was done was wrong, and if he could redo it, he wouldn't do it again," she said. "He knows what was done was wrong and is just sorry for what all has went down."

Though she corresponds with her brother, Ms. Stewart said she had not visited him in 23 years because it was difficult to see him so confined. Mr. Bosket is lucky to receive more than two visits a year.

Adam Mesinger, a television and movie producer, said he had visited Mr. Bosket seven times over the past four years and is shopping a script for a movie about Mr. Bosket's life. He said that Mr. Bosket had always been warm and open with him and that he would consider him a friend.

"I have no fear of him," Mr. Mesinger said. "I don't think he would ever harm me. I don't think he ever really wants to harm anybody."

But not even Mr. Bosket would say that his days of violence are behind him.

"When you're in hell," he said, "you can't predict the future."

Pro Se Practice

The Law of "Jail Time"

On its face, it sounds like a simple proposition. A prisoner should receive credit for "jail time," the time spent in custody before beginning to serve his or her sentence.

In practice, however, the application of the principle can become complicated, particularly where there are multiple sentences involved, or the prisoner was on parole when the sentence was imposed.

A proper understanding of the rules of jail time may assist you in obtaining credit for the maximum time permissible by law.

Correction Law 600-a places the responsibility for certifying "jail time" with the county sheriff in the county in which you were incarcerated, or with the New York City Department of Correction, if you were incarcerated in New York City. If you think you are missing jail time, your initial inquiry should go to those offices.

The principle statute governing the granting of jail time is Penal Law 70.30(3). This statute reads as follows:

> The term of a definite sentence, a determinate sentence, or the maximum term of an indeterminate sentence imposed on a person shall be credited with and diminished by the amount of time the person spent in custody prior to the commencement of such sentence as a result of the charge that culminated in the sentence. In the case of an indeterminate sentence, if the minimum period of imprisonment has been fixed by the court or by the board of parole, the credit shall also be applied against the minimum period. The credit herein provided shall be calculated from the date custody under the charge commenced to the date the sentence commences and shall not include any time that is credited against the term or maximum term of any previously imposed sentence or period of post-release supervision to which the person is subject. Where the charge or charges culminate in more than one sentence, the credit shall be applied as follows:
>
> (a) If the sentences run concurrently, the credit shall be applied against each such sentence;

> (b) If the sentences run consecutively, the credit shall be applied against the aggregate term or aggregate maximum term of the sentences and against the aggregate minimum period of imprisonment.
>
> In any case where a person has been in custody due to a charge that culminated in a dismissal or an acquittal, the amount of time that would have been credited against a sentence for such charge, had one been imposed, shall be credited against any sentence that is based on a charge for which a warrant or commitment was lodged during the pendency of such custody.

The statute, although densely worded, contains all of the basic rules for jail time. They can be summarized as follows:

Rule 1: You are entitled to have all time spent in custody on a criminal charge, prior to the commencement of the sentence received for the charge, credited to the sentence received for that charge. (An indeterminate or determinate sentence commences "when the prisoner is received in an institution under the jurisdiction of the state department of correctional services.")

Example: You are arrested on June 1 on Charge A. You are sentenced on Charge A on July 1. You were received by DOCS on September 1. You are entitled to have all the time in local custody from June 1 until August 1 credited to the sentence that resulted from Charge A .

Rule 2: You are <u>not</u> entitled to receive jail time credit for time served <u>after</u> the commencement of a sentence.

Example: You are arrested on June 1 on Charge A. While in jail, a second charge, Charge B, is filed against you. You are sentenced on Charge A on July 1. You are sent to DOCS on September 1. On October 1, you are returned to local custody to face Charge B. After sentencing on Charge B, you are returned to DOCS on December 1.

You are entitled to receive jail time credit for the period in custody from June 1 until August 31, but not from September 1 through November 30. Once you were received by DOCS, the sentence received for Charge A commenced, and any time served thereafter--including the time served in local custody--is not "jail time."(You may nevertheless receive credit for this time if your sentence on Charge B is run concurrently with that for Charge A. However, this would be considered a prior time credit, not jail time, and it might not be credited in the same way.)

Rule 3. If you are held on multiple charges which culminate in more than one sentence, jail time must be credited against all of the sentences, so long as you have not begun service of any of the sentences.

Example: You are arrested on Charge A on June 1. You make bail on July 1. You are arrested on Charge B on August 1. You are sentenced on both charges on Setember 1 and are received by DOCS on October 1.

You are entitled to jail time credit for all time served in custody between June 1 and September 30.

If your sentences are <u>concurrent</u>, the credit is applied against each sentence. If your sentences are <u>consecutive</u>, your credit applies against the aggregate sentence.

Rule 4. Jail time does not include any time credited to any "previously imposed sentence."

Example: On June 1, you are arrested on Charge A. On July 1, a warrant is filed against you on Charge B. On August 1, you receive a 90-day misdemeanor sentence on Charge A. On September 1, you complete service of the misdemeanor service (90 days minus 60 days

jail time). On October 1, you are sentenced on Charge B to a term in State prison. You are received by DOCS on November 1.

You are entitled to jail time against the sentence imposed for Charge B from June 1 until July 31, and from October 1 until October 31.

You are not entitled to jail time for the period from August 1 until August 31, as this was "sentence time" credited to a "previously imposed sentence."

(Note, however, that you get the jail time credit for the period from June 1 until July 31 against both the misdemeanor and the State sentence [see Rule 3, above].)

(Note 2: A "time served" sentence is not a previously imposed sentence, since it is never technically imposed. Jail time credited to a "time served" sentence can also be credited to a state sentence based on charges pending at the time of the local sentence.)

Rule 5: The same rules that apply to in-state jail time also apply to out-of-state jail time.

Example: You are arrested in Florida on June 1. On July 1, New York serves a detainer on Florida. On September 1, you are sentenced in Florida. On October 1, your Florida sentence commences. On November 1, you are sent to New York. On December 1, you are sentenced in New York, concurrently to your Florida sentence. You are returned to Florida on January 1.

Your New York sentence commences on January 1. (See Penal Law § 70.20[3].) You are entitled to jail time credit against the New York sentence for all the time served in local custody in Florida from June 1 until September 30. You may also received "prior time credit" against the New York sentence for the time served on the Florida sentence from October 1 until December 31. (see Rules 1 and 2, above.)

The rules for jail time served while on parole are governed by Penal Law 70.40(3)(c). That statute states:

> Any time spent by a person in custody from the time of delinquency to the time service of the sentence resumes shall be credited against the term or maximum term of the interrupted sentence, provided:
> (i) that such custody was due to an arrest or surrender based upon the delinquency; or (ii) that such custody arose from an arrest on another charge which culminated in a dismissal or an acquittal; or (iii) that such custody arose from an arrest on another charge which culminated in a conviction, but in such case, if a sentence of imprisonment was imposed, the credit allowed shall be limited to the portion of the time spent in custody that exceeds the period, term or maximum term of imprisonment imposed for such conviction.

The rules of this statute can be summarized as follows:

Rule 1: Time served in local custody based on a parole warrant or a charge that results in a dismissal or acquittal should be credited to the interrupted sentence.

Example: On June 1, your parole officer arrests you for failing to report and you are declared delinquent on that date. On July 1, parole is revoked, and you are returned to State custody.

You are entitled to credit against the State sentence for time served in local custody from June 1 until July 1.

Rule 2. If you are arrested on new charges while on parole and receive a new sentence based on those charges, time served is jail time, credited against the new sentence, unless the time served exceeds the length of the sentence imposed on the new charge, in

which case the excess is credited to the prior sentence.

Example. You are on parole on a sentence imposed for Charge A. On June 1, while on parole, you are arrested on Charge B. You are sentenced to a three-year sentence on Charge B on July 1. On September 1, you are received in DOCS to begin the sentence on Charge B, and resume the sentence on Charge A.

The time served in local custody from June 1 until July 31 cannot be credited to the sentence you were serving for Charge A as "parole jail time" because none of that time exceeded the three-year term of imprisonment imposed for Charge B.You can, however, credit the time as "jail time" against the sentence imposed for Charge B. See Penal Law 70.30.

Jail time problems can be complicated, and this article cannot cover all possible situations. In general, however, a careful application of the above rules to your jail time situation should give at least a preliminary answer to the question: Am I entitled to additional jail time?

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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:

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