

Pro Se

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New York to End “Prisoner Gerrymandering”

The Governor last month signed a new law that will end a practice critics called “prisoner gerrymandering” – the practice of counting inmates in the districts in which they are incarcerated, rather than in their home districts, when drawing legislative districts.

The practice gave inflated political power to upstate communities where most prisons are located by allocating more residents to those communities than would be merited if prison populations were not counted. This caused additional legislators to be assigned to those communities while diminishing the number of legislators assigned to downstate communities.

Under the new law, inmates will be counted as residents of their home counties rather than of the areas where they are imprisoned when legislative districts are redrawn.

The measure will apply to the reapportionment of districts in the state Legislature starting with the 2012 elections.

The measure may have a significant affect on New York State politics. According to the Department of Correctional Services, of the almost 57,000 men and women currently committed to state prisons, 9,879 came from Manhattan, 7,623 from Brooklyn and 4,743 from Queens. Counting those mostly Black and Latino residents of New York City as residents of upstate prison towns gave disproportionate weight to the votes of those communities.

It is estimated, for instance, that as many as seven upstate New York senatorial districts exist only because inmates are counted as part of the population making up the district. Most of those districts are currently represented by Republicans. When districts are redrawn, following the 2010 census, at least one and perhaps two of those districts will be transferred to downstate, urban areas, which tend to elect Democrats. This could affect the balance of power in the State Senate, which is currently closely divided between Democrats and Republicans.

This, in turn, could directly affect issues of importance to inmates. Upstate legislators serve a more rural, white population, and are typically more

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***A Message From the Executive Director
Karen Murtagh-Monks***

Immigration Detainers, DOCS' Authority to Hold an Alleged Alien and Deportation & Removal from the United States - Clearing Up the Misconceptions

As many of you may know, NYS DOCS assists the United States Department of Homeland Security Immigration and Customs Enforcement Office (ICE) by identifying and detaining incarcerated individuals who are not U.S. citizens (noncitizens) and are therefore subject to removal from the United States. When an inmate is identified as a noncitizen, DOCS notifies ICE of his/her incarceration. Typically, ICE then lodges an "immigration detainer" on the noncitizen. The immigration detainer mandates that DOCS notify ICE authorities prior to the noncitizen's release from DOCS. This notification gives ICE an opportunity to determine whether it is necessary to apprehend the noncitizen, charge the noncitizen with an immigration violation and detain the noncitizen in civil immigration detention until a determination is made by an immigration judge as to whether the noncitizen should be removed from the United States.

Pursuant to 8 C.F.R. [Code of Federal Regulations] §287.7, the "immigration detainer" (also known as an "immigration hold") serves only to "advise another law enforcement agency that the Department [of Homeland Security] seeks custody of an alien [non-citizen] presently in the custody of that agency." Our readers should be aware that ICE often places immigration detainers on people who the agency believes may be removable from the U.S., regardless of an individual's actual immigration status. Thus, it is important to understand that ICE often does not make the actual determination to apprehend the individual from custody and to charge the individual with being removable from the U.S. until DOCS notifies the agency that DOCS is preparing to release the individual. For this reason, an immigration detainer should not be interpreted as a guarantee that a person will be removed from the U. S. The removal process is much more complicated and, unless an individual consents to the deportation, entails at a minimum, an appearance before an immigration judge, a fact-finding hearing, an opportunity to present a defense and the right to appeal an unfavorable decision.

Eight C.F.R. §287.7 also provides that "[u]pon a determination by the Department to issue a detainer for an alien not otherwise detained by a criminal justice agency, such agency shall maintain custody of the alien for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays in order to permit assumption of custody by the Department." See 8 C.F.R. § 287.7(d). This 48-hour period of detention is to allow ICE authorities the opportunity to arrange for transfer of custody from criminal incarceration to immigration civil detention. However, if ICE has not picked up the individual within 48 hours of the time he or she should have been released from custody, and the ICE detainer is the only basis for retaining custody, the federal regulation does not permit continued incarceration.

We have recently learned that on several occasions, DOCS, to accommodate ICE, has detained individuals beyond the 48 hour deadline. There is a strong argument that DOCS is not authorized to detain a person beyond the 48-hour period of a noncitizen's required release from DOCS custody. Thus, if you, or anyone you know is detained by DOCS beyond the 48-hour period (not including weekends and holidays), you should immediately contact PLS.

conservative than downstate legislators, who serve a more urban, mixed population. Downstate legislators have typically been more liberal and more likely to represent the interests of their incarcerated constituents and their families. Downstate legislators, for example, led recent efforts to reform the State's draconian Rockefeller-era drug laws. Many upstate legislators opposed these efforts.

Backers of the measure to eliminate prison gerrymandering say the counting of inmates in their prison communities rather than their home counties diluted the vote of downstate, urban dwellers and was contrary to the principle of "one person, one vote." They also argued that it violated at least two state laws, Article 2, §4 of the state Constitution, which dictates that for the purpose of voting, "no person shall be deemed to have gained or lost a residence... while confined in any public prison" and §5-104(1) of state Election Law, which directs that for voting purposes, "no person shall be deemed to have gained or lost a residence... while confined in any public prison."

In 2006, the U.S. Court of Appeals for the Second Circuit took notice of the "dilution" argument in Hayden v. Pataki, 449 F. 3d 305. In that case the court held that it was constitutional to deny felons the right to vote, but noted the possibility of a claim that inmates should be counted in their home counties. (A district judge later decided that the claim had not been squarely raised in the plaintiffs' complaint.)

Assemblyman Hakeem Jeffries, a Brooklyn Democrat, who sponsored the legislation in the Assembly, said, "The practice of inmate-based gerrymandering fundamentally undermines the principal of one person, one vote, by reallocating political power to a handful of upstate, rural communities."

Republican opponents of the measure accused Democrats of being purely motivated by the ballot box. Senator Elizabeth O'C. Little, a Republican from Queensbury whose upstate district is one of the seven that relied on prisoners to meet the minimum population required when it was

drawn in 2002, said Democrats were trying to use redistricting to increase their clout. Inmates in her district, Ms. Little added, use the same community resources as other residents, including the courts, hospitals and utilities. "To not count them there is absolutely absurd," she said. Others noted that other transients, such as students and military employees, are counted where they sleep, not where they come from.

Still, most observers saluted the new law. "It's a very significant step, righting a historical wrong," said Susan Lerner, Executive Director of Common Cause New York. "It's a first step to a fair, equitable and nonpolitical redistricting process this year."

Ironically, it remains the case that, wherever they are counted, convicted inmates still cannot vote in New York.

NEWS AND BRIEFS

State Appellate Court Dismisses Damages Claim For Illegal Post Release Supervision

Donald v. State, 73 A.D.3d 1465 (4th Dept. 2010)

In the last issue of *Pro Se* we reported on two federal cases which denied inmates' claims for damages as a result of having had a period of post release supervision (PRS) administratively added to their sentence – a practice declared illegal by the federal courts in 2006 and by the State courts in 2008. The federal courts held that the state correction officials/defendants could not have known that their conduct was illegal prior to 2008 and that they were therefore entitled to "qualified immunity."

In this case, a state appellate court reached a similar conclusion, applying a different form of immunity.

Inmate Donald sued the state in the State Court of Claims, rather than federal court, alleging that the administrative addition of PRS to his sentence resulted in his wrongful confinement for a period of 626 days. The lower court granted the inmate's motion for summary judgment on on liability and denied the state's cross

motion to dismiss claim. The Appellate Division, however, reversed the lower court.

The court noted that a claimant asserting a cause of action for wrongful confinement “must establish that the defendant intended to confine the [claimant], that the [claimant or] plaintiff was conscious of the confinement and did not consent to the confinement, and that the confinement was not otherwise privileged.” It is the last element, the court wrote, that claimants seeking damages as a result of unlawful imposition of PRS “will be unable to establish.” “A detention, otherwise unlawful,” the court continued, “is privileged where the confinement was by arrest under a valid process issued by a court having jurisdiction.” In other words, “where the illegal imprisonment is pursuant to legal process which is valid on its face, the State cannot be held liable in damages for wrongful detention . . . [unless] the court issuing the process lacked jurisdiction of the person or the subject matter.”

Here, the court found, “[t]here is no question that the legal process by which claimant was confined was valid on its face. The issue...is [only] whether the Division [of Parole] lacked jurisdiction to impose a period of PRS. [But] there is a distinction between acts performed in excess of jurisdiction and acts performed in the clear absence of any jurisdiction over the subject matter. The former is privileged, the latter is not”

Here, the issue was resolved by the Court of Appeals in Garner v. DOCS, 10 N.Y.3d 358 (2008) – the decision that held that administrative imposition of PRS was unlawful. In that case, the Court specifically held that in adding a period of PRS to a sentence, “DOCS was acting in a judicial capacity . . . [and that such] act was in *excess* of DOCS's jurisdiction” – but not *without* jurisdiction. The court noted that, “although the Court [of Appeals] held that the imposition of a period of PRS by DOCS was ‘solely within the province of the sentencing judge’ the Court used the phrase ‘in excess of DOCS's jurisdiction’ rather than stating that DOCS was ‘without’ jurisdiction. Indeed, the Court further characterized the

act of DOCS as ‘beyond [its] limited jurisdiction over inmates and correctional institutions,’ thus indicating that DOCS was not wholly without jurisdiction in the first instance.”

The court also noted that there are instances in which DOCS “has the power to calculate sentences in accordance with the relevant statutes, without direction from the sentencing court.” As an example, the court cited People ex rel. Gill v Greene, 12 NY3d 1 (2009), which established that DOCS has the authority to calculate the sentences of certain predicate offenders consecutively to time owed on their prior offenses, regardless of whether the sentencing court so-specified. Moreover, the court noted, caselaw prior to Garner had either approved of the practice of administratively adding PRS to a sentence where the judge neglected to do so, or were in conflict of the issue. Thus, the court reasoned, agencies such as DOCS and the Division of Parole were not “wholly without jurisdiction or without ‘some competence over the cause.’ [They] simply acted in excess of the jurisdiction [they] did have, and we thus conclude that [their] actions were privileged and that claimants are unable to establish a claim for unlawful imprisonment.”

Commission on Quality Care Issues Review of Mental Health Programs Within DOCS

The 2008 “Boot the SHU” law was intended to limit long SHU sentences for inmates with serious mental illness. The law also mandated that the State Commission on Quality Care (the CQC) monitor the quality of mental health care provided to inmates. In July, the CQC published its first report and recommendations under the new law. The report concerned the Residential Crisis Treatment Programs (RCTP) at eight prisons.

RCTPs are intended to provide immediate evaluation and treatment of inmates suffering a mental health “crisis.” According to DOCS, they are intended to provide brief but comprehensive mental health services until the crisis is resolved, or

psychiatric staff determines either the inmate is capable of meaningful participation in programming or needs in-patient treatment at CNYPC. Over 5,500 inmates are transferred to RCTPs annually. Most are held in observation cells with limited access to personal property.

For its report, the CQC reviewed mental health and correctional records in each of the facilities, conducted interviews with inmates housed in the RCTPs, reviewed the policies, procedures and training curricula for DOCS and OMH staff working in RCTP units, and also sent surveys to inmates, OMH and DOCS staff who work on mental health units.

The report concluded that a stay in the RCTP has been beneficial for many of the inmates transferred there, but it recommended that DOCS and OMH take additional steps to maximize the therapeutic nature of the RCTP and limit conditions that make RCTP seem punitive.

To do so, the report recommends that each inmate be individually assessed for the appropriate degree of restrictions to be imposed, and recommended that certain amenities, such as underwear, clothing, and eating utensils, be restored. It also recommends that the temperature of the observation cells be monitored to ensure that it is comfortable for inmates, especially those in smocks, and that fans not be used as a form of inmate management. The report further recommends that DOCS officers working in RCTPs, including the relief staff, receive mental health training.

In its response to the report, OMH stated that it will provide training for OMH staff to encourage them to increase amenities as early as is appropriate. It further stated that CNYPC staff will monitor this practice by reviewing a selection of records four times per year.

DOCS, in its reply, agreed to monitor and record temperatures in the RCTP. It further stated that fans are currently used for odors when there has been an unhygienic act on the unit and are never used to manage inmate behavior. DOCS directed Superintendents to remind staff that when a

fan is used, it should not be pointed directly into an inmate's cell.

The CQC expressed concern that many of the inmates utilizing RCTP services also had substance abuse diagnoses in addition to other mental health issues. Both DOCS and OMH pointed to existing DOCS programs for substance abuse treatment issues (such as ASAT) as well as the expansion of newer programs like the Integrated Dual Disorders Treatment for inmates coping with mental health issues as well as substance abuse.

The CQC report also noted that RCTPs are often used informally to house transfers from CNYPC or simply to provide for inmates in need of a break from environmental stressors. The report found that these uses should be included in OMH policies and procedures and stated that inmates housed in an RCTP under those circumstances should not be deprived of amenities.

Further recommendations included the improvement of documentation in certain OMH and DOCS records. The report noted that it was important for OMH staff to consult with CNYPC staff anytime an inmate is under RCTP observation for seven days or more to evaluate for inpatient hospitalization, and that this discussion must be documented. The report also found that a few inmates were diagnosed with psychiatric conditions specifically designated as "serious mental illnesses" but were not flagged as inmates requiring heightened care. In response, OMH will review diagnoses of inmates on the caseload once per month to ensure that inmates with the enumerated diagnoses are flagged for heightened care.

Practice pointer: A copy of the CQC report can be obtained by writing to NYS Commission on Quality of Care and Advocacy for Persons with Disabilities, 401 State Street, Schenectady, NY 12305-2397.

FEDERAL CASES

Federal District Courts Rule On Exhaustion of Harassment Grievance Process

The Prison Litigation Reform Act of 1995 (“PLRA”) states, in part, that “[n]o action shall be brought with respect to prison conditions under [federal law] by a prisoner confined in any jail, prison, or other facility until such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e (a).

This so-called “exhaustion requirement” has proved to be a formidable barrier to the federal courts as prisoners are often unable to comply with the tight deadlines and baffling, sometimes arbitrary rules for prison grievance procedures; and a single misstep may forever bar even the most meritorious claim from entering the judicial system.

A case in point concerns DOCS’ “harassment” grievance regulations, codified at 7 NYCRR 701.8 and DOCS Directive # 4040, subsection 701.8.

Under the harassment grievance regulations, grievances involving “employee misconduct meant to annoy, intimidate or harm an inmate” – including assault by staff – must be filed with the IGRC like normal grievances, generally within 21 days of the incident being complained about. They are then removed from the normal grievance process, however, and referred directly to the superintendent. If the superintendent determines that the complaint, if true, would represent a “bona fide” case of harassment, he must either, 1) refer it to higher-ranking supervisory personnel for an in-house investigation; or 2) refer it to the Inspector General’s Office for investigation, or 3) refer it to the State Police for criminal investigation. The regulations further states that the superintendent “must” address the grievance and “render a decision” within 25 days. If the superintendent fails to render a decision within 25 days, or if the inmate is

dissatisfied with the superintendent’s response, the inmate may appeal to CORC.

A typical situation is that which recently occurred in Andrews v. Cruz, 2010 WL 1141182 (S.D.N.Y., March 24, 2010) (Crotty, J.) (unreported). In Andrews, the plaintiff alleged that officers Padilla and Cruz assaulted him while escorting him to SHU. After receiving treatment for his injuries in a hospital, he filed a formal grievance against the officers. The grievance was forwarded to the facility superintendent, who personally interviewed Andrews and conducted a walk-through of the area where the alleged assault took place. After an additional internal investigation was conducted, the superintendent asked the Inspector General to investigate further. Days later, Andrews was transferred to Sing Sing Correctional Facility where he was interviewed by the IG. Shortly afterwards, officer Padilla left DOCS and officer Cruz was terminated. Andrews believes that the two officers left DOCS because of the investigation into his assault. Ultimately, however, he never received a written decision on his grievance from the superintendent or anyone else.

In 2003, Andrews filed a lawsuit against the two officers. The defendants replied, however, that Andrews’ lawsuit was barred by the PLRA because Andrews had failed to exhaust his administrative remedies. Specifically, they argued, since the superintendent never issued a written decision, Andrews was required to appeal to CORC. Since he failed to do so, he failed to “exhaust” his administrative remedies.

Fortunately, the court rejected this defense. It noted that the Second Circuit Court of Appeals has held that an inmate need not appeal a *favorable* grievance decision in order to exhaust administrative remedies. See Abney v. McGinnis, 380 F.3d 663 (2d Cir.2004). The court then analyzed the text of the harassment grievance process to determine what would constitute a “favorable” harassment grievance. It noted that the only relief the superintendent can grant in response to a harassment grievance is to refer it outside authorities – security

staff, the Inspector General or the State Police. It therefore concluded that an inmate has obtained a “favorable” harassment grievance. It noted that the only relief the superintendent can grant in response to a harassment grievance is to refer it outside authorities – security staff, the Inspector General or the State Police. It therefore concluded that an inmate has obtained a “favorable” reply if the superintendent asks that an investigation be conducted. “Since an investigation was the only relief available,” the court wrote, “Plaintiff had no reason to believe he needed to appeal the superintendent's failure to respond to the CORC.” Defendants, the court continued, were requiring Andrews “to be a sore winner and to appeal because he never received a writing from McElroy regarding what he knew to be true about the outcome of his grievance” (i.e., that he had obtained an investigation.)

A similar scenario was presented in Lawyer v. Gatto 2007 WL 549440 (S.D.N.Y., February 23, 2007) (Patterson, J.) (unreported). In that case, an inmate sent a letter to his facility superintendent alleging that he had been assaulted by staff. The superintendent referred the letter to the Inspector General for further investigation. The Inspector General conducted an investigation which included an interview with the inmate, but neither the superintendent nor the IG ever advised the inmate of their findings. Defendants moved to dismiss, arguing, among other things, that the inmate’s failure to appeal to CORC after receiving no reply to his letter meant that he had failed to “exhaust” his administrative remedies. The court found that the inmate’s letter to the superintendent constituted a grievance under the regulations as they were written at the time of the incident. (At the time of this incident, the regulations contained some ambiguity as to whether a harassment complaint had to be filed with the IGRC to be considered a grievance; they have since been revised to remove the ambiguity.) The court then found that the inmate was not required to appeal where his grievance had resulted in an investigation:

[W]hen Plaintiff filed his Amended Complaint on October 23, 2003, he was aware that the superintendent had taken action on his grievance; he knew it had been forwarded to the Inspector General's office, having been told so by Captain Schneider on July 7, 2003, and interviewed by Inspector Bigit on July 8, 2003. Since an investigation was the only relief available from the superintendent under the [Inmate Grievance Procedure] Plaintiff had no reason to believe he needed to appeal the superintendent's failure to respond to the CORC.

Practice pointer: In Hairston v. LaMarche, 2006 WL 2309592 (S.D.N.Y. August 10, 2006) (Peck, Magistrate J.) (unreported), the court noted that “DOCS procedures as to an administrative appeal are unclear to this Court where, as here, the Superintendent has directed that the complaint be investigated by the Inspector General's Office. 7 N.Y.C.R.R. § 701.11(b)(4) (ii). At that stage, the inmate has obtained at least partial favorable relief, and as the Second Circuit has held, where the inmate receives favorable relief there is no basis for administrative appeal.” (Citing Abney supra.)

Taken together, these three cases go some way to clarifying what constitutes exhaustion of a harassment grievance under New York State regulations. Under the decisions, simply obtaining an investigation should be considered exhaustion: It constitutes a “favorable” result of the grievance – regardless of the outcome of the investigation or whether the inmate was informed of the outcome of the investigation. No further appeal should be required. This makes sense, given that investigations referred to the Inspector or the State Police often take far more than the 25 days the regulation gives to the superintendent to respond to the grievance and that the results of such investigations are rarely reported to inmates.

Unreported decisions of the federal court for the Southern District of New York can be obtained by writing to the Records Management Office, United States District Court, Southern District of New York, United

States Courthouse, 500 Pearl Street, New York, NY 10007-1312. Include the name and citation of the case, the date of the decisions and the name of the judge who issued the decision.

**Second Circuit Court of Appeals
Dismisses Claim for Damages Resulting
From TB Hold**

Redd v. Wright, 597 F.3d 532 (2d Cir. 2010)

Plaintiff Kevin Redd claimed violations of his First, Eighth, and Fourteenth Amendment rights, as well as the Religious Land Use and Institutionalized Persons Act of 2000 (“RLUIPA”), 42 U.S.C. § 2000cc, arising out of his confinement by DOCS under its tuberculosis (“TB”) hold policy.

Under DOCS policy, established in 1996, all inmates are administered a “purified protein derivative” (“PPD”) test to detect “latent” TB infections. If an inmate refuses the PPD test, the inmate is counseled about the importance of the test, and then, if he or she continues to refuse, is placed in TB hold – essentially, keeplock status. The inmate is then offered the PPD test daily for one week, weekly for one month and monthly thereafter. An inmate refusing these offers can be kept in TB hold for up to a year during which three chest x-rays are taken at the beginning, middle, and end of the year. After one year and three negative chest x-rays, the inmate could be released into the general population, and thereafter would be evaluated each year by physical examination.

Inmates in keeplock status under TB hold are permitted one hour of exercise per day and three showers per week. Although not allowed telephone use or personal visits, they are permitted legal visits. Inmates’ contact with other inmates and correctional personnel is limited, which, according to DOCS, “reduces the possibility of the spread of [active TB].” Inmates in TB hold are not placed in respiratory isolation, however; they remain part of the general prison population, though confined to their cells.

In April, 2001, DOCS placed Redd in TB

hold after he refused to undergo a PPD test on religious grounds and after rejecting his offer to submit to sputum testing. It, instead, applied the TB hold policy. After all three of Redd’s x-rays came back negative, he was released from TB hold in May of 2002.

In his lawsuit, Redd claimed various DOCS officials had violated: 1) the First Amendment and the Religious Freedom Restoration Act of 1993 (“RFRA”) by requiring him to submit to a PPD test over his religious objection; 2) the Eighth Amendment, by implementing a policy that authorized a potentially indefinite period of confinement in TB hold; and 3) the Fourteenth Amendment, by denying him release from the TB hold after one year. After his case was dismissed by the district court, he appealed.

The Second Circuit Court of Appeals affirmed the district court. It found, first, that at the time Redd was confined in TB hold, it had not been “clearly established” by either the Supreme Court or this court that the 1996 Policy, or a substantially equivalent policy, was not “reasonably related to a legitimate penological interest” nor that such terms were not the “least restrictive means of furthering a compelling governmental interest” – the standard Redd would have to meet to establish a First Amendment violation. Therefore, the court concluded, the defendants were entitled to “qualified immunity” with respect to Redd’s First Amendment and RLUIPA claims. Although, the court noted, there are other prisoners’ rights cases which have held that a prisoner is guaranteed “freedom from discriminatory punishment inflicted solely because of his beliefs, whether religious or secular” in this case, unlike those cases, the inmate was not being punished “for engaging in a religious practice” or “solely because of his belief.” On the contrary, the court found, the TB hold was imposed for a legitimate public health concern.

The court also rejected Redd’s Eighth Amendment claim premised on his claim that the 1996 policy did not permit sufficient exercise or shower opportunities. In response to prior litigation, DOCS had

revised its policy to specify that inmates subject to a TB hold were entitled to 1 hour of exercise per day and 3 showers per week. The Court of Appeals had previously stated that whether the revised policy was sufficient “presented an interesting constitutional question” – but had never decided the question. Here, the court ruled, since the prior question had never been answered, the defendants could not be held liable for violating any of Redd’s “clearly established” constitutional rights.

Finally, the court dismissed Redd’s argument that defendants violated his Fourteenth Amendment rights by confining him in TB hold “without sufficient procedural safeguards.” The court found that no prior caselaw “clearly established” that Redd was entitled to some kind of notice that religious objectors could be exempt from the 1996 Policy or that the defendants’ failure to advise Redd of a potential exemption from the PPD test was a violation of his due process rights.. Therefore, the court found, the defendants could not be found liable for having failed to do so.

***Practice pointer:** DOCS revised policy, issued in 2004, contains a religious objector exception. Under the religious objector exception to the TB hold policy, an inmate who claims that he or she objects to a PPD skin test on religious grounds will be placed in a TB hold for up to 60 days while the Director of Ministerial Services investigates the religious objection. If it is found that the inmate has a sincerely held religious belief that forbids PPD testing, DOCS may order, as an accommodation to the religious belief, that the inmate take a blood test in conjunction with a chest x-ray and physical exam for the presence of tuberculosis instead of the skin test. DOCS’ tuberculosis control policies are outlined in DOCS’ Health Services Policy Manual § 1.18; the religious objector exception is outlined in section VII of that document.*

STATE CASES

Parole

Court Reverses Denial of Parole to “Model Prisoner”

Matter of Winchell v. Evans 27 Misc.3d 1232(A) (Sup. Ct., Sullivan Co., June 9, 2010) (LaBuda, J.)

Petitioner in this case was a 45 year old man who had been imprisoned for 27 years pursuant to an 18-to-life sentence following his conviction for Murder in the Second Degree. After being denied parole for the seventh time, he challenged the decision in an article 78 proceeding.

The court noted that petitioner has been a “model prisoner” whose “impressive and substantial educational achievements and earned program certificates while in prison for almost three decades are examples of his efforts for rehabilitation and reform.” These included a two year college degree along with numerous certificates of achievement and appreciation as well as letters of support. In addition, the court noted, he had been offered a full-time position at a local construction company and a part-time position in a financial service company, upon his release.

In denying parole, the Board said that its decision was based on the petitioner’s “failure to show remorse for the victim or her family and not appearing to understand the seriousness of his crime.”

The court reversed the Board’s decision. Executive Law 259-i(2)(a), the court noted, requires the Parole Board, upon a denial of parole, to issue a written determination of the factors and reasons for such denial in detail and in non-conclusory terms. In this case, the court concluded, the Board “failed to follow its obligation under the law and its parole denial seems ...to have been predetermined.”

Although the parole determination alluded to both the seriousness of the crime and the petitioner’s alleged failure to show

remorse or acceptance of responsibility for the crime, the court noted that “the board failed to ask the petitioner about the seriousness of the crime or if he had any remorse at the parole hearing.” Moreover, the court continued, “the commissioners made reference to the prior parole hearing where the petitioner *had* demonstrated remorse and acceptance of responsibility for the homicide he had committed.” Consequently, the court concluded that the board contradicted its own determination on these two issues.

In addition, the court pointed out, “it cannot be disputed by anyone that petitioner is well trusted by the Department of Corrections. The petitioner's family lives in close proximity to the correctional institution in which petitioner is housed. Petitioner has been granted day passes to dispose of environmental waste. Usually, day passes are not granted when loved ones live in such close proximity to the prisoner's institution because of the temptation of escape. Petitioner has had passes for an extended period of time and has a devoted family.”

The court cited the case of Matter of Coaxum v. New York State Board of Parole, 827 N.Y.S.2d 489 (Sup. Ct., Bronx Co., September 8, 2006). In that case, the petitioner had been incarcerated for 21 years for murder in the second degree and robbery in the first degree. Her institutional record was exemplary, as were her psychological insights of her guilt and shame as well as her remorse for her criminal actions. The court took note of the petitioner's devoted family, her elderly mother, children and grandchildren. Yet, the petitioner was denied parole four times since her minimum 15 year sentence elapsed. The parole board's decision cited only the brutality of the murder. The court reversed the Board, holding that while parole is not to be granted merely as a reward for positive conduct and rehabilitative achievements, these factors must be considered and the Board's decision “accorded no weight and no emphasis whatsoever to any factor apart from the seriousness of the petitioner's offense.”

As in Coaxum, the court found, the

Board here “[made its] determinations in violation of lawful procedure, [its] determination [was] arbitrary and capricious and [it has] abused its discretion. The Petitioner has been deprived of his entitlement under the Constitution of this State of the United States to due process of law in the instant parole hearing.” The court therefore ordered that the petitioner be granted a new parole hearing.

Conditions of Release Which Prevented Release Conflicted With Civil Commitment Law

Perry v. NYS Board of Parole, 27 Misc.3d 1236(A) (Sup. Ct., Albany Co., June 18, 2010) (McGrath, J.)

Petitioner, who was convicted of a sex offense, was scheduled to be conditionally released on February 4, 2010. On January 29, 2010, the N.Y. Attorney General applied to have the petitioner civilly committed pursuant to Mental Health Law Article 10 – the new civil commitment law which became effective in 2007. The petitioner's release from the DOCS was stayed pending a hearing on probable cause. On February 3, 2010 a member of the New York State Board of Parole imposed a special condition on the petitioner's release from DOCS that he not be released until he obtained a residence “approved...by the Division of Parole in light of any determination made by a Court of competent jurisdiction pursuant to Article 10 of the Mental Hygiene Law.” On February 10, 2010, the Supreme Court for Washington County conducted a probable cause hearing and found probable cause to believe that petitioner was a sex offender requiring either civil management or civil commitment and scheduled a trial. In the meantime, petitioner's custody in DOCS was continued.

Petitioner commenced an Article 78 proceeding seeking to annul the special condition of parole. In it, he claimed that the condition violated the requirement of Penal Law § 70.40(1)(b), (2) and MHL § 10.06(k), mandating petitioner's conditional release

from DOCS and placement in an Office of Mental Health (OMH) secure treatment facility, pending an Article 10 trial. He also claimed that the Parole Board's special condition was arbitrary and capricious and violated the petitioner's constitutional rights.

The court noted that parole release and conditional release are distinct. "Parole release," the court wrote, "is discretionary with the Board of Parole. Conditional release...is mandatory" when an inmate has earned sufficient good time. Whether or not "good time" is allowed is a decision made by DOCS, not the Board of Parole. The Board, therefore, has no control over *when* an inmate is released on conditional release. It is required, however, to set the *conditions* for such release and supervise each person upon release. See, Penal Law, § 70.40(1)(b). And many courts, the court noted, have upheld the Board's authority to impose a requirement of a suitable residence as a condition of a prisoner's conditional release – even if the condition effectively prevents release. See e.g. Breeden v. Donnelly, 26 A.D.3d 660 (3d Dep't. 2006)

The new civil commitment law, however, specifically provides that once a court has determined probable cause to believe a respondent is a sex offender requiring civil management the court "shall order that the respondent be committed to a secure treatment facility designated by the commissioner for care, treatment and control" and shall not be released until completion of the Article 10 trial.

The court held that, under these circumstances, the special condition was invalid. "When the special condition...was imposed on February 3, 2010, it was legal and valid based upon [prior court decisions]. However, on February 10, 2010, when the Supreme Court made a finding of probable cause under Article 10 of the MHL a clear conflict arose between the special condition imposed by parole and the express statutory language of MHL § 10.06(k)." In that case, the court ruled, "the statute must prevail." Therefore, it continued, "the petitioner's request to annul the special condition imposed by Parole on February 3, 2010, is

granted, and respondent New York State Department of Correction, is hereby directed to commit the petitioner to a secure treatment facility designated by the Commissioner of the New York State Office of Mental Health...."

Court Rejects Inmates' Novel Theory Of Entitlement to Parole Release

People ex rel Germenis v. Cunningham, 73 A.D.3d 1297 (3d Dep't. 2010)

People ex rel St. Pierre v. Cunningham, 73 A.D.3d 1310 (3d Dep't. 2010)

Petitioners in these two cases had an interesting claim for release: After being denied parole, they brought habeas corpus actions arguing that they were entitled to immediate release because the Division of Parole had breached an implied agreement that they would be granted parole if they participated in recommended programs while incarcerated.

The claims were premised upon form 3617 of the DOCS, or "Program Refusal Notification," which was signed by both the inmates and a DOCS representative. It advised, among other things, that "refusal to participate in recommended programming may result in the denial of [p]arole." Petitioners asserted that, by implication, this notification amounted to a contractual obligation to release them on parole in the event that they participated in recommended programming, which they apparently did.

The court found petitioners' argument was without merit. "The document in question discloses no basis upon which to conclude that it created a contractual obligation," wrote the court. "Parole release decisions, which are made by the Board of Parole, not DOCS, are discretionary and must be based upon a consideration of the statutorily enumerated factors set forth in Executive Law § 259-I." That statute, the court further noted, specifically states that "parole need not be granted as a reward for good conduct nor as a quid pro quo for participation in recommended DOCS programs." See Executive Law § 259-i(2)(c)

programs.” See Executive Law § 259-i(2)(c) (A).

Sentencing Cases

Court Finds Defendant Eligible For Drug Law Re-sentencing: Ten Year “Exclusion” Period Runs From Date Re-sentencing Application is Submitted, Not Date Offense Was Committed

People v. Arroyo, 28 Misc.3d 1205(A), (Bronx County, June 25, 2010) (Price, J.)

The Drug Law Reform Act of 2009 (“DLRA 3”) extended the re-sentencing provisions of earlier laws passed in 2004 and 2005 (the DLRA 1 and 2, respectively) by allowing certain class B drug offenders whose offenses were committed prior to January 13, 2005, to apply to be re-sentenced from their indeterminate sentences to lesser determinate sentences. The new law prohibited re-sentencing, however, for anyone who was previously convicted of a crime within the preceding ten years (excluding any time during which the offender was incarcerated for any reason between the time of commission of the previous felony and the time of commission of the present felony) which was either a violent felony offense or any other offense which would make the offender ineligible for merit time.

Defendant Arroyo was sentenced to two consecutive terms of 10 to 20 years for criminal possession of a controlled substance in the third degree for offenses allegedly committed in 2003. In 2009, after the DLRA 3 was passed, he applied for re-sentencing. The People, however, argued that Arroyo’s prior conviction, in 1993, for criminal possession of a weapon in the third degree, a violent offense, made him ineligible for re-sentencing. They argued that the exclusion period ran backward from the date the current offense was committed, in 2003 – in which case it would encompass the 1993 conviction. Arroyo, however, argued that the exclusion period ran backward from the date the sentencing application was submitted – in this case, not until 2009.

The court sided with Arroyo. It noted that DLRA was intended to ameliorate the harsh punishments handed out to low-level drug offenders under New York’s “Rockefeller Drug Laws” and that the Legislature enacted the reforms because of its belief that low-level drug offenders’ punishments outweighed their crimes and that research suggested better, more humane, less costly alternatives to incarceration existed. Therefore, the court found, “it is appropriate to resolve any ambiguity [in the language of the statute] in favor of the more ameliorative, rather than the more punitive, construction.” In the DLRA 3 context, the court held, “[a]dopting an interpretation of the statute which permits defendants to age into eligibility for resentencing is more in keeping with the overall purposes of the DLRA 3 (as well as with those of the DLRA and DLRA 2), allowing prisoners to distance themselves from their past misbehaviors and demonstrate progress in rehabilitation.”

Under this ruling, inmates who are not presently eligible for DLRA re-sentencing because of a prior felony committed within 10 years, may “age” into eligibility by waiting to file their re-sentencing petitions until after the 10 year “exclusion” period has passed.

Petitioner Not Entitled to Jail Time For Time Spent Serving Misdemeanor Sentence

McDowell v. New York City Department of Corrections, 74 A.D.3d 672 (1st Dep’t. 2010)

On April 2, 1991, while in custody awaiting trial on a charge of second-degree murder, petitioner pleaded guilty to third-degree criminal possession of a weapon and received a misdemeanor sentence that he completed some 2 and ½ months later, on June 27, 1991. Subsequently, petitioner was convicted of the second-degree murder and received a sentence of 22 years to life.

In this case, he contended that the New York City Department of Corrections had failed to properly credit his sentence with all of the jail time he served before

he began serving the sentence for murder. Specifically, he argued, the city had erroneously omitted the period from April 2, 1991 to June 27, 1991, the period during which he was serving the misdemeanor.

The court disagreed. It noted that Penal Law 70.30(3), the jail time statute, provides that the jail-time credit for a given charge “shall not include any time that is credited against the term or maximum term of any previously imposed sentence.” Thus, the court found, in determining the amount of time petitioner was in custody before the murder sentence was commenced, the city correctly excluded the period during which petitioner was serving the sentence that had been imposed for the weapon conviction.

Practice pointer: *Jail time is governed by Penal Law § 70.30(3). It is a mandatory credit against a sentence for time served in a local jail on the charges that resulted in the sentence. It does not, however, include time served which was credited to another sentence imposed prior to the sentence for which the credit is sought. So, time that is credited to a prior parole sentence or, as here, a misdemeanor sentence, will not be credited to a new state sentence.*

Disciplinary Cases

Inmate Found Guilty Based on Confidential Information

Matter of Washington v. Fischer, 74 A.D.3d 1659 (3d Dep’t. 2010)

Petitioner Washington was charged with numerous prison disciplinary violations after an investigation obtained information suggesting that he and another inmate were conducting an illicit drug business in the correctional facility. As a result of the investigation it was also alleged he had conspired with other inmates to have a third inmate, who owed him money, assaulted and that this inmate was later attacked, sustaining a serious cut to his face that required hospitalization. Additional confidential information received during the investigation

suggested that the inmate who carried out the attack gave the weapon to petitioner who, in turn, gave it to another inmate for disposal.

After a disciplinary hearing, petitioner was found guilty of the disciplinary charges. After most of the charges were affirmed on his administrative appeal, he commenced an Article 78 proceeding.

The court confirmed the charges. It found that the misbehavior report, together with the testimony adduced at the hearing and the confidential information considered by the Hearing Officer in camera, provide substantial evidence supporting the determination of guilt and that, contrary to the petitioner’s claim, the confidential information was sufficiently detailed to enable the Hearing Officer to independently assess its reliability and credibility.

Practice pointer: *DOCS routinely relies on confidential informants to bring disciplinary charges against inmates. Courts have held that DOCS may refuse to disclose confidential information at a disciplinary hearing if it can show that the information, if disclosed, would jeopardize institutional security. They have also held that hearing officers may rely on such information, so long as 1) it is corroborated by other information in the record; or 2) the hearing officer personally interviews the informant to assess his credibility and reliability; or, as here, 3) it is “sufficiently detailed” that the hearing officer could independently assess its credibility and reliability.*

Petitioner Obtains Evidence Relevant to Disciplinary Case Through FOIL

Matter of Gomez v. Fischer 74 A.D.3d 1399 (3d Dep’t. 2010)

Petitioner Gomez was observed reaching into his pants during a prison visit with his fiancée. The visit was terminated and a search of Gomez’s fiancée revealed that she possessed pills that she did not have upon entering the visiting room. As a result, petitioner was charged in a misbehavior report with smuggling, providing medication

to another person and violating visiting procedures. Following a tier III disciplinary hearing, he was found guilty of all charges.

After the hearing, petitioner filed several requests pursuant to the Freedom of Information Law seeking numerous documents and videotapes related to the hearing, many of which were denied. Petitioner commenced an Article 78 proceeding to challenge both the determination of his guilt and the denial of his FOIL (Freedom of Information Law) requests.

The court confirmed the hearing officer's determination finding petitioner guilty of violating prison disciplinary rules. The misbehavior report, the court ruled, as well as related documentary evidence and hearing testimony provided substantial evidence to support the hearing officer's determination. The fact that his fiancée testified at the hearing contrary to the admission she previously made to investigators – that petitioner did not give her the pills – the court found, merely presented a credibility issue to be resolved by the Hearing Officer, not the court.

The court also rejected petitioner's procedural objections. It rejected, first, his claim that he was denied documentary evidence when the hearing officer refused the admission of letters written by his fiancée, on the ground that they would have been redundant to testimony presented at the hearing. It also rejected his claim that the hearing should be dismissed because there were several gaps in the audio tape of the hearing, concluding that they were "relatively minor" and did not "[preclude] meaningful judicial review."

With respect to petitioner's post-hearing FOIL requests, however, the court was more generous. It noted that the FOIL creates "a presumption that government documents are available for inspection, and the burden rests on the agency resisting disclosure to demonstrate that they are exempt under Public Officers Law § 87(2) by articulating a specific and particularized justification."

Applying that standard, the court found that petitioner's FOIL request for any statements made by his fiancée during her interview with investigators had been improperly denied. "Statements by a witness must be disclosed absent a showing that he or she was a confidential informant or requested or was promised anonymity, or that his or her life or safety would be endangered by disclosure," the court wrote. "No such showing was made here." The court also held that DOCS should have provided petitioner with copies of memoranda allegedly written by correction officers in relation to the incident that caused petitioner's misbehavior report: "Contrary to [DOCS] assertion that the documents do not exist because they were not found in petitioner's file," the court wrote, "the requested memoranda were specifically referenced in another document produced by respondents on August 26, 2008. Therefore, such memoranda should be provided to petitioner unless respondents certify to petitioner that a 'diligent search' reveals that they cannot be located. The court also expressed displeasure that DOCS personnel had interviewed petitioner prior to the denial of his FOIL request for a certain videotape to ascertain why he was making such a request, prior to denying it on the grounds that it did not exist. "Inasmuch as the applicant's status or purpose is irrelevant to the availability of records pursuant to FOIL," the court held, "we direct respondents to make a 'diligent search' for the videotapes, inform petitioner of their status and take appropriate action." The court further found that petitioner's request for "all communications from him received by 'the administration' between September 8, 2008 and September 19, 2008" had been improperly denied for lack of specificity. "Upon our review of the record," the court found, "the items were 'reasonably described' and should be provided to petitioner. Other FOIL requests mentioned by the petitioner in his petition were remitted to the Supreme Court to determine whether he had exhausted his administrative remedies and, if so, whether a sound basis for the denial of the requests existed.

Practice pointer: *This is an interesting case, suggesting that evidence that may not be admissible or obtainable in a prison disciplinary hearing – either because it is considered irrelevant or redundant – may be nevertheless be obtainable through FOIL. Whether such evidence would help in a legal challenge to a disciplinary hearing is debatable, since such challenges are generally limited to the record created at the hearing; it could, however, be helpful in further administrative appeals of the disciplinary sanction.*

Civil Confinement

Petitioner Subject to Civil Confinement Law Even Though Incarceration Was Illegal

People ex rel Joseph II v. Superintendent, Southport Correctional Facility, 15 N.Y.3d 126 (2010)

Article 10 of the Mental Hygiene Law, enacted in 2007, provides that certain imprisoned sex offenders may be transferred to mental hospitals, rather than being released, when their prison terms expire. The statute applies to “detained sex offenders” and sets out procedures for determining whether a such a person is a “sex offender requiring civil management” – i.e. one who needs to be intensely supervised while on parole – or is a “dangerous sex offender requiring confinement” – one who suffers from a mental abnormality causing “such a strong predisposition to commit sex offenses, and such an inability to control behavior, that the person is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility.” *See, generally*, Mental Hygiene Law Article 10.

Petitioner Joseph II was convicted of a sex offense and was serving a determinate term of incarceration to which DOCS had administratively added a period of post-release supervision (PRS). He completed the term of imprisonment and commenced service the PRS period of his sentence but was soon returned to DOCS based on an

alleged violation of the terms of the PRS.

In 2008, however, the New York Court of Appeals held that the practice of administratively adding post release supervision to an inmate’s sentence was unlawful. *See Matter of Garner v. DOCS*, 10 N.Y.3d 358 (2008). DOCS, concerned that the Garner case would result in petitioner’s imminent release without *any* supervision (since he had already served his determinate term and the PRS portion of the sentence was now considered unlawful), commenced an Article 10 proceeding against him.

Petitioner objected, arguing that Article 10 did not apply to him. Specifically, he asserted that he was not a “*detained sex offender*,” because his PRS portion of his sentence, and thus his imprisonment resulting from violations of PRS conditions, were unlawful. The Appellate Division agreed with him, ruling that because petitioner had been “improperly and unlawfully in the custody of DOCS due to violating terms of a period of post release supervision that was not properly imposed” he was not a lawfully detained sex offender and was therefore not subject to an Article 10 proceeding. *See People ex rel. Joseph II v. Superintendent of Southport Correctional Facility*, 874 N.Y.S.2d 602 (3d Dep’t 2009).

The Court of Appeals reversed. The Court noted that Mental Hygiene Law § 10.03(g) defines a “detained sex offender” in part as “a person who is in the care, custody, control, or supervision of an agency with jurisdiction, with respect to a sex offense....” It found that, at the time the Article 10 proceeding commenced, petitioner met that definition, even though his detention was illegal.

“[T]he statute,” wrote the Court, “is best read as making no distinction between those properly and improperly confined... [T]he Legislature intended to draw a ...line between prisoners and non-prisoners when it enacted Article 10. The legality of the prisoners’ custody is irrelevant in both situations.” Moreover, the Court continued, “[t]here is no injustice” in this: “The point of the prisoner/non-prisoner distinction...is not that one group should be treated more or less

favorably than the other, but that different situations may call for different procedures.” The Legislature, the Court concluded, apparently thought that “detained” sex offenders should be subject to different procedures for civil commitment than those who were not detained, regardless of the legality of the distinction.

Practice pointer: *Three Judges on the Court of Appeals dissented from this opinion, writing: “An invalid term of PRS and a subsequent violation,” they wrote, “should not be permitted to serve as the basis for further proceedings under Article 10, especially because such proceedings may result in a significant curtailment of liberty.... Joseph II’s administratively imposed PRS terms are a nullity and, thus, [his] incarceration as a result of a ‘violation’ of an unlawfully imposed term of PRS was likewise illegal. In short, [he is] unlawfully in DOCS custody and thus DOCS may not be considered “an agency with jurisdiction” as contemplated by Article 10. That the majority views the legality of the custody ‘irrelevant’ is troubling; such a result encourages and rewards DOCS errors. For instance, if a DOCS inmate ‘slips through the cracks’ or DOCS ‘miscalculates’ a sentence to extend beyond the actually-imposed sentence, that illegal detention and custody could, under the majority’s rationale, serve as the basis for an Article 10 proceeding. That result would be untenable.”*

Visitation

Inmate Granted Visitation With His Children

Matter of Baker v. Blanchard, 74 A.D.3d 1427 (3d Dep’t. 2010)

Petitioner Blanchard, an inmate, is the father of two children born in 2000 and 2004, respectively. The relationship between the petitioner and the children’s mother ended when the petitioner was sentenced to prison. Although the mother had taken the children to visit him several times in the county jail

prior to sentencing, those visits ceased shortly after he commenced his prison sentence. He subsequently filed a petition with Family Court for visitation. Family Court granted the petition and the mother appealed.

The Appellate court found that the Family Court’s decision to grant prison visitation to the father was supported by a “sound basis” in the record. “Courts,” the court held, “presume that a child’s best interests are promoted by visitation with a noncustodial parent, even one who is incarcerated, although the presumption may be overcome by substantial evidence that visitation would be detrimental to the child’s welfare.” Here, although the parents disputed most aspects of their relationship and the father’s relationship with the children, he apparently lived with them for much of their lives prior to his incarceration and provided direct care for them at least some of the time. The children had a previous history of visiting the father while he was incarcerated. The father’s relatives agreed to drive the children to visits. While the father had not had contact with the children for more than two years, the mother had a confidential address and the father testified that he had unsuccessfully attempted to locate her. The father had committed acts of domestic violence against the mother in the past, sometimes in the presence of at least one of the children. However the visits, the court noted, would be supervised by correction officers as well as by the child’s grandparents and one of two paternal aunts – all whom were ordered to terminate visitation if anything inappropriate occurred. The father had also completed several parenting and fatherhood classes in prison. “Considering all of the circumstances,” the court concluded, “the record supports the court’s determination to grant supervised visits with the father in prison three times per year.”

Court of Claims

Inmate, Whose Parole Hold Was Extended Based on Erroneous Information, Not Entitled to Damages

Mertens v. State, 73 A.D.3d 1376 (3d Dep't. 2010)

Claimant was sentenced in 1982 to 8 1/3 to 25 years in prison. He was released twice to parole supervision, but had parole revoked both times for various violations. After his third release, in 1997, he was charged with several additional violations of parole and, following a hearing, an administrative law judge sustained both charges and recommended a time assessment of 12 months, which would have been in 1999. The Parole Board, however, modified the time assessment recommendation by ordering that he be held to his maximum term. In its decision, the Board erroneously stated that the most recent violation and a prior violation had both occurred near the victim's residence.

Claimant challenged the Board's decision in an Article 78 proceeding on the grounds that it had been based on incorrect information, however the Article 78 proceeding was dismissed as untimely. The Board's statement was eventually expunged from his record, however the claimant was not released until his conditional release date, in 2005. He then commenced an action for damages in the Court of Claims alleging, among other things, malicious prosecution and negligence by defendant that caused him to serve additional time in prison.

The court dismissed his claim.

Determining an appropriate time assessment for a parole violation, wrote the court, "involves the exercise of discretion of a quasi-judicial nature and, accordingly, is protected by absolute immunity. Allegations of improper motives and even malicious wrongdoing are insufficient to circumvent absolute immunity. Claimant's contentions that the [Board] made egregious factual errors and that the [Board's] determination was not supported by the record do not

provide a ground for liability. Those alleged errors are covered by absolute immunity and, since the [Board] had authority to act on the parole revocation application, this is not a case of 'clear absence of any jurisdiction over the subject matter'"



Injustice anywhere is a threat
to justice everywhere.
-Martin Luther King, Jr.

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