

# Pro Se

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## **Court of Appeals Reverses Decision in People ex rel. Gill v. Greene**

For the last year, we have been waiting to see whether the Court of Appeals would agree with the Third Department's decision in People ex rel. Gill v. Greene, 852 N.Y.S.2d 457 (3d Dep't 2008). In Gill, the Third Department held that when a court sentences an individual whom the court has found to be a predicate felon (second felony offender, second violent felony offender, persistent felony offender and persistent violent felony offender), unless the court expressly states that the new sentence is to run consecutively to a prior undischarged sentence, DOCS may not run the sentences consecutively. The Third Department based its holding on the well established principle that only a court can impose a sentence. This is the principle that was the foundation for the Court of Appeals decisions in Matter of Garner v. N.Y.S. D.O.C.S., 859 N.Y.S.2d 590 (2008) and People v. Sparber, 859 N.Y.S.2d 852 (2008). In Garner and Sparber, the Court held that unless a sentencing court expressly imposed a period of post release supervision, DOCS cannot administratively add a period of post release supervision to an inmate's sentence. In Gill, the Third Department extended this principle to the question of whether a new sentence was to run consecutively or

concurrently to a previously imposed sentence that a defendant was serving when he committed another crime.

On February 12, 2009, the Court of Appeals reversed the Third Department's decision. The Court held that where a sentencing court determines that a defendant is a predicate felony offender, the sentence which the court imposes must, **by operation of law**, run consecutively to any previously imposed undischarged sentence. See decision re-printed in full, below. The Court based its decision on an analysis of the statute that controls whether sentences run concurrently or consecutively: Penal Law §70.25, paragraphs 1 and 2-a.

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## **A Message From the Executive Director**

**Karen L. Murtagh-Monks**

Since the last issue of *Pro Se* was published, our country elected a new President and the people of New York State elected new leadership to the New York State Senate. President Obama is our first African American President and a new majority has taken control of the NYS Senate for the first time in over forty years. The election of President Obama and the election of a majority of democrats to the NYS Senate signify a movement in a different direction for this country and for this State. The questions now are, in what direction will that movement be, and on what factors will our new leaders rely to influence that movement?

I do not need to belabor the point that the economy will be one of the most, if not *the* most, influential factors for lawmakers in deciding how we should move forward. With significantly less money to spend, President Obama, Governor Paterson and the New York State Legislature will be forced to make extremely difficult choices when deciding what goals to set, what laws to pass and what programs to fund. Often when faced with decisions of this kind, there is a rush to judgment. But short term promises need to be weighed against their long term results.

We must urge our lawmakers to reject a myopic approach to problem solving. One need only review the history of the Rockefeller Drug Laws to realize that they were a short-sighted response to the drug issue in New York State and an abysmal failure. Governor Paterson acknowledged as much in his State of the State address when he said: “Few public safety initiatives have failed as badly and for as long as the Rockefeller Drug Laws. These laws did not work when I was elected Senator in 1985, and they do not work today.”

The question is, how do we, as a society, make wise decisions with respect to issues such as criminal justice policy? How do we stay focused on long term results when it is so easy to be appeased by short term fixes? The Penal Law in New York gives us helpful guidance in this area. The Penal Law states that one of its general purposes is “[t]o insure the public safety by preventing the commission of offenses through the deterrent influence of the sentences authorized, the rehabilitation of those convicted, the promotion of their successful and productive reentry and reintegration into society, and their confinement when required in the interests of public protection.” In short, we have established four prongs: deterrence, rehabilitation, reintegration and, when necessary, confinement, to achieve the stated criminal justice goal of public safety.

Interestingly however, the Penal Law, as written, mandates that to insure public safety we must always focus on deterrence, rehabilitation and reintegration. Only when necessary to serve the interests of public protection, should we resort to confinement. In light of this, it seems as if our past approach to criminal justice issues has been backwards. In many circumstances, we have determined that public protection requires confinement and our analysis has ended there. The Rockefeller Drug Laws vividly demonstrate this as well as the more recent enactment of various sex offender laws. But experience has shown us what happens when we fail to engage in the proper analysis and enact legislation that focuses initially and only on one prong (confinement) at the expense of all others (deterrence, rehabilitation and reintegration).

As a country and as a state, we are embarking upon an exciting but challenging time. In considering how to respond to criminal justice concerns, let us be constantly reminded that our Penal Law identifies public safety as a priority of this State and gives us wise guidance on how to attain it.

Paragraph 1 of P.L. §70.25 states that **except as provided in paragraph 2-a**, when a person who is subject to an undischarged sentence is sentenced to an additional term of imprisonment, the sentence imposed shall run concurrently or consecutively in such manner as the court directs at sentencing, however, if the court fails to state the relationship between the new sentence and the prior undischarged sentence, the sentences are to run concurrently.

Paragraph 2-a of §70.25 provides that **when a sentence is imposed on a defendant whom the court has found to be a predicate felon, and such person is subject to an undischarged sentence imposed prior to the date on which the present crime was committed**, the court must impose a sentence to run consecutively with the undischarged sentence.

The Court of Appeals held that Penal Law §70.25(2-a) – which states that with respect to defendants found to be predicate felony offenders, “the court must impose a sentence to run consecutive with respect to such undischarged sentence” – requires that the new sentence run consecutively to any undischarged sentence, even when the sentencing court is silent as to the relationship between the two sentences. The Court distinguished a period of post release supervision – which the court found to be a part of the sentence that must be imposed at sentencing – from the relationship between a prior imposed sentence and a newly imposed sentence. This relationship, the Court said, is controlled by statute and neither for constitutional nor for statutory reasons does the court have to announce the relationship.

### **People ex rel. Gill v. Greene Decision**

People ex rel. Gill v. Greene, Ct. Apps. Feb. 12, 2008, Smith, J. (Ciparick, Graffeo, Read, Piggott and Smith, concurring).

We hold that, when a court is required by statute to impose a sentence that is consecutive to another, and the court does not

say whether its sentence is consecutive or concurrent, it is deemed to have imposed the consecutive sentence the law requires.

## I

In 1994, Anthony Gill was sentenced as a second felony offender to an indeterminate term of 2½ to 5 years for criminal possession of stolen property. Before then, he had been convicted and sentenced twice for earlier crimes, for manslaughter in 1982 and for several larceny-related offenses in 1993. Neither of Gill's previous sentences had been discharged by 1994; he had been paroled on the first, and had absconded from a temporary release program while serving the second.

It is undisputed that the court that sentenced Gill in 1994 was required by Penal Law §70.25(2-a) to impose a prison term to run consecutively to his previous, undischarged sentences. It is also undisputed, however, that that court did not say, orally or in any document, that the sentence it imposed was either consecutive to or concurrent with the previous ones. The court was simply silent on that subject. The Department of Correctional Services (DOCS) calculated Gill's release date on the assumption that the 1982, 1993 and 1994 sentences were consecutive to each other.

In 2006, Gill, pro se, began this proceeding against the Superintendent of the prison where he was held, seeking a writ of habeas corpus. He asserted that his 1994 sentence was, as a matter of law, concurrent with his earlier ones, because the sentencing court had not said otherwise. Supreme Court dismissed the petition without reaching the merits of this claim, on the ground that even if Gill were correct he would not have been entitled to habeas corpus.

Gill appealed to the Appellate Division, which converted his proceeding to one under CPLR article 78, reversed Supreme Court and annulled DOCS's determination that Gill's sentences ran consecutively (People ex rel. Gill v. Greene, 48 A.D. 3d 1003 [3d Dep't

2008]). The Appellate Division agreed with Gill “that DOCS had no authority to calculate his sentences consecutively where the court did not do so” (*id.* at 1005). The Appellate Division granted the Superintendent permission to appeal to this Court, and we now reverse.

## II

There is no question that, as the Appellate Division acknowledged and as Gill concedes, the sentencing court was required in 1994 to impose a consecutive sentence. Gill was sentenced under the second felony offender statute, Penal Law §70.06, and his sentence was therefore governed by Penal Law §70.25(2-a), which says: “When an indeterminate ... sentence of imprisonment is imposed pursuant to section ... 70.06 ... and such person is subject to an undischarged indeterminate or determinate sentence of imprisonment imposed prior to the date on which the present crime was committed, the court must impose a sentence to run consecutively with respect to such undischarged sentence.” But Gill argues, and the Appellate Division held, that though the court was required to impose a consecutive sentence it did not do so, and that DOCS cannot correct the court's error.

Gill relies on Matter of Garner v. New York State Dept. of Correctional Servs., (10 N.Y.3d 358 [2008]), in which we held that, where a court omits to impose a required term of post-release supervision (PRS), the error can be corrected only by a court, not by correctional authorities. He also relies on Earley v. Murray, (451 F.3d 71 [2d Cir. 2006]), in which the Court of Appeals for the Second Circuit held that it violated due process for DOCS to correct a sentencing court's error in failing to impose a term of PRS. But the analogy Gill draws between consecutive sentencing and PRS is flawed.

The problem in Garner and Earley was that a part of the sentence - the PRS term was never imposed. In each case, the court imposed a term of imprisonment, and said

nothing about PRS. That was indeed an error that only a court could correct. But here, the sentence at issue—a term of imprisonment for 2½ to 5 years—was imposed. All that was omitted was the characterization of the sentence as either concurrent or consecutive.

That characterization is provided by the statute, Penal Law §70.25(2-a), which says the sentence must be consecutive. Nothing in the statute and nothing in the Constitution requires the sentencing court to say the word “consecutive,” either orally or in writing. Nothing in the statute even requires that the sentencing court be made aware that the prior sentences are undischarged. Unlike the petitioners in Garner and Earley, who were told nothing about PRS by the courts that sentenced them, Gill was told in plain terms that he was being sentenced to 2½ to 5 years in prison. He was never given any reason to think that part or all of that sentence would be effectively nullified, by running simultaneously with sentences he had already received. Indeed, nothing in the record here shows the court knew that previous undischarged sentences existed.

We read the words of Penal Law §70.25(2-a) – “the court must impose a sentence to run consecutively with respect to such undischarged sentence” – to mean that any sentence imposed by the court shall run consecutively to the undischarged sentence, whether the sentencing court says so or not. This reading is supported by subdivision 1 of Penal Law §70.25, in which the Legislature provided rules for interpreting sentences that might otherwise be thought either consecutive or concurrent. Section 70.25(1) says that as a general rule—with exceptions that include cases subject, as this one is, to section 70.25(2-a)—sentences “shall run either concurrently or consecutively ... in such manner as the court directs at the time of sentence.” The statute goes on to provide a default rule: “If the court does not specify the manner in which a sentence imposed by it is to run,” the sentences shall run concurrently in certain classes of cases, and consecutively in others (Penal Law §70.25[1][a], [b]). But

where, as in this case, the court has no choice about which kind of sentence to impose, no default rule for interpreting the court's silence is provided by statute, because none is necessary. The court is simply deemed to have complied with the statute.

In short, the sentencing court here committed no error and there was none for DOCS to correct. DOCS properly interpreted Gill's 1994 sentence as being consecutive to his previous undischarged sentences, as Penal Law §70.25(2-a) requires.

Accordingly, the order of the Appellate Division should be reversed without costs and the petition dismissed.

***News and Briefs***

## **DLRA: Resentencing of Defendants Convicted of A-II Drug Offenses**

In People v. Mills, and its companion case, People v. Then, 11 N.Y.3d 527 (2008), the Court of Appeals laid to rest the argument that the Drug Law Reform Act of 2005 (2005 DLRA) permits a court to resentence a defendant convicted of an A-II drug felony when he or she is less than three years from his or her parole eligibility date. Defendant Mills, after being convicted of an A-II drug felony in 1995, received a sentence of 3 years to life. He was turned down for parole five times after which he moved to be resentenced under 2005 DLRA. Both the sentencing court and the appellate court found that he was not eligible for resentencing.

In 2003, Defendant Then, who had been convicted of an A-II drug felony in 1999 and released to parole supervision, was arrested, convicted of a second A-II drug felony and sentenced to 6 years to life. In 2005, Then moved for resentencing on both convictions, arguing that he was more than 3 years from

his parole eligibility date. The Supreme Court ruled in Then's favor, but the Appellate Division reversed that decision and reinstated the original sentence for the 1999 conviction.

The 2005 DLRA eligibility requirements for resentencing of defendants convicted of A-II drug felonies are:

1. The defendant must have been convicted of an A-II drug felony for an offense that was committed prior to the effective date of the law;
2. The defendant must be serving an indeterminate sentence with a minimum term of at least 3 years;
3. The defendant must be in DOCS custody;
4. The defendant must be more than 12 months from being "an eligible inmate" as that term is defined in Correction Law §851(2).

Corrections Law §851(2) defines eligible inmate as:

An inmate who is eligible for release on parole **or who will become eligible for release on parole or conditional release within two years.**

The Court held that reading these two sections together, "in order to qualify for resentencing under the 2005 DLRA, class A-II felony drug offenders must not be eligible for parole within three years of their resentencing applications." Based on this analysis, the Court affirmed the Appellate Division decisions in Mills's and Then's cases.

## Appellate Division Concludes That Surcharge On Collect Calls Is Legal

In *Walton v. N.Y.S. DOCS*, 869 N.Y.S.2d 661 (3d Dep't 2008), the Appellate Division, Third Department, considered the question of whether the MCI charges for collect calls made from prisons were an illegal tax where the charges were not related to the company's cost of providing phone service to state prisoners. MCI gave almost 60% of the charges – \$.16 a minute and \$3.00 per phone call – to DOCS. DOCS used this money to pay for inmate programs, including medical care and the family reunion program. The court concluded that the “commissions” paid to DOCS were identical to the money paid to business owners who agree to have pay phones installed and maintained in their businesses. Such commissions have been treated as legitimate business expenses paid to gain access to telephone users. In 2005, DOCS received \$16,000,000 through the commission arrangement with MCI.

The court also rejected the petitioners' First Amendment claims, ruling that while inmates must be provided with a reasonable means to communicate with the outside world, inmates are not entitled to pay a certain rate for their calls. The court noted that the petitioners did not claim that the rates were so high that they were denied the ability to communicate with their imprisoned friends and relatives, only that they could not do so as often as they liked. Thus, the court ruled, there is no indication that the petitioners' constitutional rights had been violated.

Finally the court ruled, because the inmates were in control of whether they made calls, the charges were not a “taking,” much less an unconstitutional taking.

*The petitioners have filed a motion for leave to appeal in the Court of Appeals.*

In January 2007, then-Governor Spitzer cut the phone charge rate by more than half and signed legislation prohibiting the Department of Corrections from collecting revenue in excess of its reasonable operating costs.

## New Parole Board Chairman Appointed

State Parole Board Chairman George B. Alexander resigned after an investigation by the State Inspector General revealed that Alexander had taken a computer when he left the Erie County Probation Department to join the Division of Parole. Governor David A. Paterson has nominated Felix M. Rosa, Jr. formerly Executive Director of the Division of Parole, to serve as a Member and Chair of the State Board of Parole. Shortly after the nomination, Mr. Rosa, who has served the Division of Parole for more than 20 years, announced that he had taken his name out of consideration for unspecified personal reasons.

Following Mr. Rosa's withdrawal, Governor Paterson appointed Henry Lemons, Jr. as interim State Parole Board Chairman. Mr. Lemons, 63, has been on the parole board since 2007. From 2004 to 2007, Mr. Lemons was deputy chief investigator for the state Attorney General's Office. Previously, he was an investigator in the Brooklyn District Attorney's Office and sergeant and detective with the New York City Police Department.

### **The Albany Office of PLS has moved.**

See the section entitled, “PLS Offices and The Facilities Served,” on Page 19 for the new address.

## Court Finds Punitive Damages Award Excessive

As was reported in the Fall 2008 issue of *Pro Se*, a jury in the Northern District of New York recently awarded an inmate \$500,000 in compensatory and \$900,000 in punitive damages for injuries he received during an excessive use of force by prison guards. The defendants then moved for a judgment notwithstanding the verdict. In Martinez v. Thompson, 2008 WL 5157395 (Dec. 8, 2008 N.D.N.Y.), the court ruled that the jury's findings of liability and compensatory damages were well supported by the trial evidence, but found that the punitive damage awards were "shockingly excessive." Based on this finding, the court ruled that it would grant the defendants' motion for a new trial unless the plaintiff agreed to reduced punitive damages in the amount of \$200,000.00 (a reduction of \$700,000.00).

Punitive damages may be awarded in a Section 1983 action when the defendants' conduct is shown to be motivated by evil motive or intent or when it involves reckless or callous indifference to the federally protected rights of others. When in the context of a motion for a new trial, a court considers whether such an award is excessive, the court must decide whether the award is so high as to shock the judicial conscience and constitute a denial of justice. If the court decides that the award meets this standard, it can order a new trial, or condition a denial of a motion for a new trial on the plaintiff's agreement to accept a lower award. To determine whether an award is excessive, the court reviews the reprehensibility [how deserving of punishment] of the conduct, the ratio of the punitive damages to the compensatory damages and the amount of punitive damages awarded in comparable cases.

In Martinez, the court found that the jury's awards of punitive damages were justified by the reprehensibility of the defendants' use of force or their failure to protect the plaintiff. It found that the ratio of punitive damages to compensatory damages was "not breathtaking." The ratio between compensatory and punitive damages for the four defendants were: 5:2, 1:1, and 2:1 [the ratios were the same for two defendants]. The court found that these ratios were not unduly disproportionate.

The court did find that the award was far greater than the punitive damage award in comparable cases. In similar cases, the punitive damages awarded were: \$100,000, \$50,000, \$75,000, and \$150,000. Based on these awards, the court reduced the awards against the four defendants to a total of \$200,000.

The plaintiff in Martinez must accept the reduction in punitive damages or the court will set aside the verdict and conduct a new trial.

### *State Cases*

## *Sentencing Decisions*

## Post Release Supervision

Last year's Court of Appeals decisions in Matter of Garner v. NYS DOCS, 859 N.Y.S.2d 590 (2008) and People v. Sparber, 859 N.Y.S.2d 852 (2008), and the passage of Correction Law §601-d, left several issues unresolved. This issue of *Pro Se* addresses

some of the questions these decisions left unanswered. In addition, we use the latest cases as vehicles for educating our newer readers about some basic sentencing principles.

To review: In Garner v. NYS DOCS, the Court of Appeals held that DOCS could not add PRS to a determinate sentence, even though PRS is a required part of most determinate sentences, if the sentencing court had failed to pronounce the PRS period at sentencing. The court also held that such periods could not be imposed by either DOCS or the Division of Parole. In the companion case, People v. Sparber, however, the Court held that a sentencing court's failure to pronounce a period of PRS in its sentence was a mere "clerical error," which could, in most cases, be remedied by resentencing the defendant.

In response to Sparber and Garner, the Legislature last summer passed Correction Law §601-d which requires that most persons sentenced to determinate terms without PRS be returned to their sentencing courts for resentencing to new sentences including PRS, although it also contained provisions which, under certain circumstances, allowed the sentencing court to resentence the defendant to a determinate term without PRS. As the resentencing proceedings mandated by the statute began, however, many defense attorneys argued that, notwithstanding Sparber, a new sentence *with* PRS, where the prior sentence had not included PRS, would be unconstitutional – in violation of the double jeopardy clause – in the case of an inmate who had already served the underlying period of incarceration. (None of the several defendants whose cases were heard together in the Sparber case had fully served the underlying period of incarceration.) Questions have also been raised about the effects of a resentence. What, for instance, should happen to a PRS violation that occurred *prior* to resentencing, when under Garner, the PRS period was illegally imposed. Is the violation – and all of its consequences – rehabilitated by the resentencing? Or is the violation null and

void, entitling persons being held on such violations to be released? And hovering over all the resentencing proceedings is a 2005 case from the Court of Appeals, People v. Catu, 792 N.Y.S.2d 887 (2005), which held that if a defendant was not advised of PRS at the time of the plea agreement, the plea could be revoked. In many cases, defendants who were not properly sentenced to PRS were also never told that PRS would be a part of their sentence when they took their plea – meaning that at the resentencing hearings mandated by section 601-d they had the additional option of withdrawing the plea under Catu, instead of simply being resented.

In People ex rel. Pamblanco, People v. Peer, and People v. Noor, the courts addressed questions which arise during the resentencing of persons who have already served their underlying periods of incarceration.

In People ex rel. Pamblanco v. Warden of Rikers Island, 868 N.Y.S.2d 505 (Sup. Ct. Bronx Co. 2008), after pleading guilty, the petitioner was sentenced in 2001 to 6 years. No period of PRS was imposed by the sentencing court. In 2008, after petitioner's arrest for a violation of administratively imposed PRS, the court resented him, *nunc pro tunc*, to 2½ years of PRS. He then filed a habeas petition, asking that the court release him from custody and reconsider its decision to resentence him.

Petitioner argued that the court did not have the authority to resentence him more than a year after he had completely served the determinate sentence which the sentencing court had imposed. Doing so, petitioner argued, violated his reasonable expectation of finality, his due process right and the prohibition against double jeopardy under the federal and state constitutions. The respondent argued that resentencing was permissible because a court retains the authority to correct an illegal sentence and that neither due process nor double jeopardy were violated by resentencing the petitioner.

## GETTING THE BENEFIT OF YOUR HABEAS VICTORY!

When you win a habeas action, even though the Superintendent of the prison was the respondent, and even though the assistant attorney general who represented the Superintendent was sent a copy of the court's decision ordering your release, you may need to send a certified copy of the decision and order to DOCS Counsel's Office. To maximize the chances for a speedy release, and to be prepared if there are problems, PLS suggests that as soon as you learn of your victory, you request a certified copy of the decision and order from the County Clerk of the county in which the Supreme Court that issued the decision is located. When it arrives, send it to the Department of Correctional Services, Counsel's Office, State Office Campus, Building 2, Albany, NY 12224, with a cover letter asking that DOCS release you from custody.

The court agreed with the petitioner. The court noted that in People v. Sparber, the defendants were still serving their determinate sentences. Thus, the Court of Appeals decision stating that Sparber could be resentenced, the court found, did not support an argument for resentencing the petitioner. In contrast, the Court of Appeals did not state that Petitioner Garner, who had completely served his determinate sentence, could be resentenced. Rather, in Garner, the Court said, its holding was without prejudice to any ability that either the People or DOCS *might have* to seek the appropriate resentencing in the proper forum.

Here the court found that because Petitioner Pamblanco had completely served his actually imposed sentence, the court did not have the authority to resentence him. The court found that resentencing the petitioner after his sentence had expired violated the petitioner's constitutional right against double jeopardy (prohibiting multiple punishments for the same offenses) and of due process. Double jeopardy, the court wrote, is violated when resentencing violates a reasonable expectation of finality. The court found that petitioner had every expectation of finality that his sentence was completed upon the serving of his six year determinate sentence. In reaching this decision, the court noted that Correction Law §601-d had not been enacted at the time that petitioner was resentenced.

Courts have reached the same result in several other cases. These include, People v. Albergottie, Index No. 6805/01, (Sup. Ct. N.Y. Co. Aug. 4, 2008), People v. Washington, Ind. No. 0163/00 (Sup. Ct. NY Co. July 24, 2008), and Ramos v. Barbary, et al., Ind. No. 2008-3563 (Sup. Ct. Erie Co. Aug. 13, 2008). It noted one decision reaching the opposite result: People v. Anderson, Ind. No. 8093/98 (Sup. Ct. N.Y. Co. June 27, 2008).

In People v. Peer, Ind. No. 4302 (Sup. Ct. Essex Co. Dec. 2, 2008), and People v. Noor, Ind. No. 1285/99 (Sup. Ct. Queens Co. Dec. 9, 2008), by contrast, the courts agreed with the district attorney's argument that completion of the determinate sentence of incarceration **does not** divest the courts of authority to resentence defendants upon who illegal sentences were initially imposed, including the authority to add a period of PRS. In Peer, for example, the defendant pled guilty and was sentenced to a 7 year determinate sentence. He had completely served his determinate sentence when he was released to PRS that had been imposed by DOCS. While he was serving PRS, pursuant to the requirements of Corrections Law

§601-d, he was brought before the sentencing court for resentencing. At resentencing, Mr. Peer made the same arguments that Petitioner Pamblanco had made.

The court found that after the passage of Corrections Law §601-d, a defendant has only three options: s/he can allow the courts to resentence him/her; s/he can move pursuant to CPL §440.10 to vacate his/her guilty plea; or s/he can move to set aside the sentence pursuant to CPL §440.20. The court found that having exercised neither of the other two options, by default defendant had opted for resentencing.

In People v. Noor, the defendant had also completely served his determinate term of incarceration and was serving an administratively imposed period of PRS when he was produced for resentencing. The court found that it had the authority to resentence Defendant Noor because 1) a period of PRS is a mandatory part of a determinate sentence, 2) if between September 1, 1998 and June 30, 2008, a determinate sentence was imposed without a period of PRS, the court was authorized to re-impose a determinate sentence without PRS only with the consent of the district attorney, and 3) in the absence of consent from the D.A., the court is authorized to resentence the defendant by adding a period of PRS to correct the illegal sentence that it had originally imposed. It rejected the argument that resentencing after a defendant has completely served his or her actually imposed sentence violates double jeopardy, concluding that the double jeopardy analysis only applies to successive prosecutions and not to successive impositions of punishment. The court also distinguished Noor's case from those where defendants who had pled guilty successfully avoided the imposition of PRS at resentencing, on the ground that Noor had not pled guilty but had instead been found guilty after trial. The court commented that while defendants who pled guilty have a reasonable

expectation of finality in a bargained for sentence, a defendant convicted after trial does not.

People ex rel. Harper v. Warden, Rikers Island, 91 Misc.3d 906 (Sup. Ct. Bronx Co. 2008), involved a case in which an inmate was serving concurrent determinate and indeterminate sentences. He had been paroled to an administratively imposed term of Post Release Supervision after completion of his determinate term but while still owing time to his indeterminate term. He was then served with a warrant alleging a violation of PRS. The State argued that because the defendant was still serving an indeterminate sentence at the time of the violation, the warrant was still valid, despite the fact that no period of PRS had been imposed by the sentencing court.

The court rejected this argument, noting that when DOCS releases a person serving concurrent determinate and indeterminate sentences, it releases them to the period of *post release supervision*, and not to parole supervision. See Penal Law §70.45(5)(a). While the people in these two programs are supervised by the Division of Parole, there are, the court found, significant differences between the two. Since the petitioner in this case was clearly serving a period of PRS, not regular parole, and, because no PRS had been imposed by a sentencing court, the parole violation was invalid and had to be vacated.

In People ex rel. Henderson v. NYS DOCS, 864 N.Y.S.2d 621 (4<sup>th</sup> Dep't 2008), the petitioner filed a habeas corpus petition to challenge an administratively imposed PRS period. By the time the case reached the Appellate Division, he had already been released to the illegally imposed PRS. Rather than dismissing the petition, the Court converted it to an Article 78 proceeding and decided the issue raised by Petitioner Henderson on the merits. Citing Matter of Garner v. NYS DOCS, the Court ruled that because only a judge can impose PRS, the respondent had illegally imposed PRS on the petitioner, and granted the petition.

## Several Sentences Are Combined to Form One Aggregate Sentence

It is not unusual to hear from inmates who were arrested for new crimes while they were on parole from sentences relating to prior convictions. If they are convicted, they often view themselves as having two sentences: the old sentence on which they owe time, and the new sentence. They sometimes ask when they will complete the old sentence and start serving the new sentence. In New York, when a person on parole is convicted and sentenced for a crime committed while on parole, the old sentence and the new sentence are combined into one aggregate sentence.

The New York Court of Appeals reiterated this point in a recent decision, People v. Buss, 11 N.Y.3d 553 (2008), when it rejected Mr. Buss's argument that he should not have to register as a sex offender because his 1983 sentence for a sex offense had expired before the sex offender registration law was enacted.

In 1983, Mr. Buss pled guilty to sex abuse in the first degree and was sentenced to 2 to 6 years. In 1987, while on parole from this sentence, he pled guilty to attempted murder, and was sentenced to 10 to 20 years to be served consecutively to the undischarged portion of the 1983 sentence. When Mr. Buss was released on parole in 2002, citing the 1983 sexual abuse conviction, the Board of Examiners of Sexual Offenders (the Board) informed him that he would have to register as a sex offender. Mr. Buss filed an objection to the Board's recommended risk assessment. Among the arguments he raised was that the Sex Offender Registration Act (SORA) does not apply to him because his sentence for the sexual abuse conviction was due to expire before SORA became effective in 1996. He argued that because the undischarged portion

of the 1983 sentence was completed in 1989, when he was released to parole, he was no longer serving a sentence for a sex crime.

Penal Law §70.30 provides that terms of imprisonment are calculated by merging concurrent sentences and adding consecutive sentences. The Court found it reasonable to apply §70.30 to the question of whether a prisoner who has been given multiple sentences is subject to all sentences for the duration of his sentence. The Court wrote, "Practically, the difference in prison term may be very significant to a defendant depending on whether he was sentenced to consecutive or concurrent sentences. Nevertheless, in both cases, the Penal Law provides for a method whereby two or more sentences are made into one . . ." Underlying P.L. §70.30, the court reasoned, is the proposition that concurrent and consecutive sentences yield single sentences, either by merger or addition.

The Court therefore rejected the defendant's argument that SORA did not apply to him. It concluded that for SORA purposes, "a prisoner serving multiple sentences is subject to all the sentences, whether concurrent or consecutive, that make up the merged or aggregate sentence he is serving.

## DLRA: Resentencing Denied For Violent Offender and Offender with Multiple Disciplinary Hearings

The Drug Law Reform Act of 2005 (2005 DLRA) allows certain inmates convicted of A-II drug felonies under the Rockefeller Drug Laws to be resentenced to the more reasonable sentences adopted in the 2004 revision of those laws. In order to be eligible

for resentencing, an inmate must – in addition to being more than three years from his or her earliest release date (see article on People v. Mills and People v. Then, above under heading News and Briefs) – also meet the eligibility criteria of Correction Law §803 for a merit time allowance. Correction Law §803(1)(d)(ii) provides that merit time allowance is not available to any person serving a sentence for, among others things, a violent felony offense as defined by Penal Law §70.02.

Ricardo Grant pled guilty to criminal sale of a controlled substance in the second degree, a class A-II felony, and to two counts of assault in the second degree. He was sentenced to 7 years to life on the narcotics conviction and 5 years for each of the assault convictions. He moved to be resentenced pursuant to 2005 DLRA. In People v. Grant, 865 N.Y.S.2d 330 (2d Dep’t 2008), the Second Department held that because Mr. Grant had been convicted of assault in the second degree – an offense that Penal Law §70.02(1)(c) classifies a violent felony offense – he was not eligible for a merit time allowance and did not fall within the class of inmates eligible for resentencing pursuant to the 2005 DLRA.

## Resentencing Denied Where Inmate Had 17 Disciplinary Hearings In A 6 Year Period

Carlos Perez also sought to be resentenced pursuant to 2005 DLRA. Unlike Mr. Grant, he was statutorily eligible for resentencing. However, the 2005 DLRA authorizes a court to deny a resentencing motion on the grounds of substantial justice. In People v. Perez, 870 N.Y.S.2d 418 (2d Dep’t 2008), the court noted that Mr. Perez, in addition to having a criminal history dating back to 1987, had been found guilty at six Tier III and ten Tier II hearings, including hearings that involved charges of drug use and

possession, fighting, weapons and possession of gang related materials. The sentencing court concluded, and the appellate court agreed, that under these circumstances, substantial justice dictated denial of the motion to resentence.

## *Disciplinary Cases*

### Authorization for Mail Watch and Credibility Determinations

In Matter of Jimenez v. Fischer, 867 N.Y.S.2d 561 (3d Dep’t 008), the court confirmed a Tier III determination involving charges of smuggling, conspiring to introduce drugs into the facility, engaging in three-way calls, and package room violations, holding *inter alia* [among other holdings] that the hearing officer did not violate the petitioner’s rights to due process of law when he denied the inmate’s request for a copy of the superintendent’s mail watch authorization. The court reasoned that where the investigating officer’s testimony **established** [proved] that the mail watch was authorized, not only was it unnecessary for the hearing officer to produce the authorization, but the hearing officer’s denial of the petitioner’s request for the document was proper. The court found that the hearing officer properly found that the authorization itself was redundant to the investigator’s testimony.

The court also refused to second guess the hearing officer’s determination that a witness’s testimony was not **credible** [truthful, believable]. The misbehavior report alleged that petitioner **conspired** [planned

with other people] to get drugs into prison by having his mother send drugs concealed in food packages to inmates at different prisons who then paid her from their inmate accounts. In response to the charges, the petitioner called his mother as a witness. His mother testified that inmates sent her money as birthday gifts for her granddaughter. The court noted that it was the hearing officer's responsibility to decide whether her statement about the disbursements from inmate accounts was credible.

***Practice Note:*** Generally, a court will not disturb a hearing officer's assessment of credibility. The theory behind this principle is that because the hearing officer observed or, if the testimony was given over the phone, heard the witnesses' testimony, he or she is in the best position to assess the subtle signs from which people decide whether someone is telling the truth.

## **Wrong Incident Date in Misbehavior Report**

In Matter of Ponder v. Fischer, 864 N.Y.S.2d 572 (3d Dep't 2008), the court rejected the petitioner's claim that he had not received adequate notice of the charges (fighting and assault on an inmate). The petitioner pointed out that not only were there two different incident dates in the misbehavior report, but, it turned out, neither date was the actual date of the incident. The Third Department dismissed the petition, stating, "[W]hile each of the two incident dates listed . . . was apparently wrong by one day, the report, as a whole, was sufficiently detailed such that the petitioner had notice of the charges against him and was able to prepare a meaningful defense."

***Practice Note:*** It is possible that Petitioner Ponder was given other documents that had the correct incident date, or admitted

***to having a fight with the inmate named in the misbehavior report. Otherwise, we are at a loss as to how a misbehavior report that incorrectly states the incident date could be said to provide the accused with sufficient information to prepare a defense. When a misbehavior report sets forth an incorrect incident date, almost by definition the report provides an inadequate basis for preparing a defense; any alibi presented will be for a day other than the day upon which the incident actually occurred.***

## **Facility Mail Rules, Mail Watch and Unauthorized Organization**

In Matter of Harvey v. Woods, 867 N.Y.S.2d (3d Dep't 2008), as a result of a mail watch purportedly authorized by the superintendent, the petitioner was accused of violating facility correspondence rules by sending mail to other inmates, and of possessing unauthorized organizational materials. The charges came about after security staff opened out going mail intended to be forwarded to other inmates. The letters were said to contain references that were related to prohibited organizations.

Petitioner admitted to writing the letters. The court found that the charge of mail violation was established and that the absence of specific references to a prohibited organization did not undermine the sufficiency of the evidence because the determination of guilt was supported by the testimony of a correction officer who was well versed in identifying the terminology of prohibited organizations. The court further found that there was no need to get testimony from the superintendent as he had only authorized the mail watch and his testimony would be irrelevant to the charges at issue.

## Authorization for Mail Watch Was Not Required

According to the misbehavior report, when a mail clerk opened mail addressed to the petitioner, he recognized the handwriting of another inmate's relative on a money order and on a note saying that the mail order was actually from the other inmate, and not the receiver's relative. In Matter of Haden v. Selsky, 868 N.Y.S.2d 811(3d Dep't 2008), the court held that having recognized the handwriting of the other inmate's relative, the clerk was permitted to read the incoming mail that accompanied the money order. The court further ruled that under these circumstances, it was not necessary for the superintendent to authorize the clerk to read the letter by means of a mail watch.

## Urinalysis Test Procedures

In Matter of Scott v. Fischer, 868 N.Y.S.2d 816 (3d Dep't 2008), the petitioner challenged the results of a urinalysis test on the basis of the absence of evidence showing that the testing machine had been calibrated between the first positive test and the second. The court ruled that although such calibration had once been required by DOCS regulations, the current regulations require only that the machine be calibrated in accordance with manufacturer's instructions. The type of machinery used in this case did not require calibration between tests.

### *Parole Decisions*

## Monthly Parole Hearings

In 1960, Radislaw Blazic was convicted of murder in the first degree, a class A felony, and sentenced to 20 years to life. After he was released to parole supervision, in 1981 he

was convicted of murder in the second degree, and sentenced to 25 years to life. At sentencing, the court was silent as to whether the new sentence was consecutive or concurrent to the previously imposed sentence. Because a person with a life sentence has neither a conditional or maximum expiration date, whether the sentences were concurrent or consecutive affected only the date upon which Mr. Blazic would be parole eligible. That is, if the sentences were calculated as running concurrently, he would **receive credit for the time served on the prior sentence and be eligible for parole** approximately five years after the conviction, and if they ran consecutively, he would not be parole eligible for approximately 25 years.

When Mr. Blazic returned to DOCS custody, DOCS ran the sentences consecutively, resulting in a parole eligibility date of 2005. However, that year, apparently realizing that Mr. Blazic had not been sentenced as a predicate offender, DOCS recalculated Mr. Blazic's parole eligibility date to be 1986. In order to make up for the parole hearings that Mr. Blazic had missed, Parole began conducting hearings every month. Each month, Mr. Blazic received a new denial.

Mr. Blazic filed an Article 78 petition challenge to one of the monthly parole denials. In Matter of Blazic v. Dennison, 866 N.Y.S.2d 818 (3d Dep't 2008), the court held that because petitioner Blazic had already had another hearing before his petition was even filed, the Article 78 proceeding challenging the earlier hearing was moot. The court did not address the **propriety** [whether it was right] of holding hearings on a monthly basis to make up for hearings that had not been timely held over a 20 year period.

## *Miscellaneous State Cases*

### **Court Reverses Dismissal of Challenge to Grievance**

In Matter of Delgado v. Artus, 867 N.Y.S.2d 357 (3d Dep't 2008), the court considered whether the lower court's decision dismissing petitioner's claim that his grievance challenging the inclusion of an evaluation in his parole file was proper. The petitioner claimed that the evaluation was placed in the file for purely **retaliatory** [to attack in response to having been attacked] reasons. The lower court ruled that the proper mechanism for seeking the removal of the evaluation was a request to the custodian of the record, followed by an appeal to the Inspector General. The Third Department disagreed. The grievance process, the court ruled, can be used to pursue a complaint that a reprisal occurred. As the focus of the grievance was on the motive for placing the evaluation in petitioner's parole file – as opposed to the accuracy of the information in the evaluation – and petitioner had exhausted his administrative remedies, he was entitled to judicial review on the merits of his claim. The court reversed the lower court's decision and [sent back] the case to the lower court with instructions to decide whether the grievance decision (finding that the evaluation had not been placed in the parole file for retaliatory reasons) was arbitrary and capricious.

### **No Right to Visits in SHU**

In Matter of Mineo v. Fischer, 863 N.Y.S.2d 402 (3d Dep't Dec. 4, 2008), the petitioner challenged revocation of his visiting

rights. When Petitioner's wife came to visit him, security staff discovered that she was carrying drugs. Petitioner's wife admitted that she intended to pass the drugs to her husband. The superintendent then revoked petitioner's visiting rights, based on his wife's admissions that she had brought him drugs 10 times before and petitioner's numerous drug related disciplinary infractions. These events occurred when petitioner was in special housing. Petitioner appealed the Superintendent's revocation of visits, but his appeal was denied.

Seven N.Y.C.R.R. 302.2[i][1][ii] provides that the visits of an inmate in special housing may be revoked when the superintendent of the prison deems it necessary to maintain the safety, security or good order of the facility. In light of having a disciplinary history that indicated drug use in prison, and evidence that petitioner had received drugs from a visitor on 10 prior occasions, the court found that the superintendent had reasonable cause to conclude that petitioner's visiting privileges should be revoked in order to maintain the safety, security and good order of the facility.

### **Denial of Family Reunion Visit Was Not Arbitrary or Capricious**

In Matter of DeFeo v N.Y.S DOCS, 867 N.Y.S.2d 242 (3d Dep't 2008), the court considered whether DOCS's denial of the petitioner's application to participate in the family reunion program was arbitrary or capricious. The petitioner had been found guilty of a violent crime in which his parents and siblings were the victims. DOCS denied his application for a family reunion visit with his wife. Noting that participation in the program is "heavily discretionary;" and that one of the factors to be considered was whether the applicant had been convicted of

an especially heinous or unusual crime, the court found that the denial based upon this factor was rational.

## **Man Wrongfully Imprisoned Can Proceed Directly to Damages Phase of Trial**

In Brown v. State, Index No. 2008-009-029, Court of Claims Judge Nicholas Midey held the claimant, Roy “Kip” Brown had proved by clear and convincing evidence that he had been unjustly convicted and imprisoned within the meaning of the Court of Claims Act, §8-b(5). Mr. Brown had served 15 years in prison for a murder that he did not commit. He was exonerated based on DNA evidence. For this reason, the court ruled, a trial on liability was unnecessary. Instead, the court set the case down for trial on damages. On December 9, 2008, Mr. Brown settled his claim against the State for 2.6 million dollars. Following his release from prison, Mr. Brown nearly died of liver disease before receiving a transplant.

## **Article 78 Challenged to Grievance Decisions Fails**

Robert Davis filed two grievances; one alleging that he had been verbally harassed by a correction officer and the other alleging that the same officer, in retaliation for the grievance about verbal harassment, had filed a misbehavior report that led to disciplinary sanctions. Mr. Davis’s grievances were denied, and CORC affirmed the denials. Mr. Davis then filed an Article 78 challenge to the CORC decision. The supreme court dismissed the petition and Mr. Davis appealed. In Matter of Davis v. Burge, 866 N.Y.S.2d 428

(3d Dep’t 2008), the Third Department found that there had been a complete investigation into the harassment allegations, at the conclusion of which the IGRC had found that petitioner’s claims were unsubstantiated and that the IGRC decision had been affirmed on appeal. The court ruled that under those circumstances, it could not find that the grievance denial was “arbitrary and capricious, irrational, or otherwise affected by an error of law.”

The court also ruled the assertion that the misbehavior report was issued in retaliation for filing the harassment grievance was unpreserved because petitioner did not raise the claim at his disciplinary hearing or on administrative appeal, and stated, “Courts reviewing administrative determinations have no authority to review claims raised for the first time in a special proceeding.”

## **Was the State’s Conduct the Proximate Cause of the Injury?**

In Lapidus v. State, 866 N.Y.S.2d 711 (2d Dep’t 2008), the Second Department considered the issue of whether the State can be held liable for the allegedly negligent acts committed by court employees in the course of performing their **ministerial duties** (acts which do not involve the use of judgment; clerical duties). Plaintiff Lapidus alleged that negligent acts by court employees had caused her to be wrongfully found to be, and sentenced as, a second felony offender based on a non-existent assault conviction, and had caused DOCS to run her conviction consecutively to a sentence for the non-existent conviction. The State argued that the claimant’s failure to controvert the predicate felony statement filed against her was the **superseding** (takes the place of the original) cause of her injuries.

In 1987, Plaintiff Lapidus and a co-defendant were arrested for assault. Ms. Lapidus **absconded** (ran away to avoid prosecution), but her co-defendant went to trial and was convicted and sentenced. Mistakenly, a clerk recorded on the file jacket that Ms. Lapidus had also been convicted and sentenced, and the information was erroneously transferred into the DCJS system whereupon it became a part of Ms. Lapidus's criminal record.

In 1997, Ms. Lapidus was convicted of a felony. Prior to sentencing, the People filed a predicate felony statement alleging that in 1987, Ms. Lapidus had been convicted of felony assault. Ms. Lapidus did not contest the predicate felony offender statement, whereupon she was sentenced to 4½ to 9 years on the 1997 felony conviction. When DOCS requested a sentence and commitment order for the 1987 conviction, a clerk prepared and sent a "duplicate" sentence and commitment order, showing a term of 1½ to 4½ years which Ms. Lapidus had not yet served, and giving Ms. Lapidus an aggregate term of 6 to 13½.

In 2003, due to Ms. Lapidus's efforts to find out whether the sentences should be run concurrently or consecutively, a clerk realized that Ms. Lapidus had never been arraigned, convicted or sentenced for the 1987 assault charge. Ms. Lapidus pled guilty to the assault charge and was sentenced to 10 days, following which she was resentenced on the 1997 charges to a sentence of 1 to 3 years, and released the same day.

In her lawsuit for damages, Ms. Lapidus alleged that as a result of the erroneous entry of the non-existent conviction, she had spent at least 3 years in prison that she otherwise would not have served. The State of New York argued that the additional period of incarceration was the result of Ms. Lapidus's failure to contest the predicate felony statement.

Pre-trial discovery revealed the following. Both the clerk who entered the erroneous information and the clerk who prepared the duplicate commitment order admitted that they had mistakenly done so. The sentencing clerk testified that normally she reviewed the court file before she prepared a duplicate commitment order, but acknowledged she had not done so in this instance. Ms. Lapidus testified that she thought that she might have been tried in absentia on the 1987 charges, and that in 1997, during the criminal proceedings, she was too sick from the effects of long term drug addiction to participate in a meaningful way. There was also deposition testimony indicating that Ms. Lapidus thought it might be to her disadvantage to controvert the predicate felony statement.

Both sides moved for summary judgment, alleging that the other was the "proximate cause" of the injury suffered by Ms. Lapidus. The trial court found that as a matter of law, although both court clerks had been negligent, Ms. Lapidus's failure to controvert the predicate felony statement was an intervening and superseding act that severed the causal chain between the state's negligence and her injuries. Had she controverted the predicate felony statement, the court noted, a hearing would have been held at which the burden of proof would have been on the People to prove the conviction beyond a reasonable doubt.

The appellate court disagreed with the trial court's ruling that uncontested facts established at the depositions proved, "as a matter of law," that Ms. Lapidus's failure to controvert was an intervening cause of her injuries. In its decision, the Second Department noted that previous decisions have established that the State can be held liable for the injuries that result from a clerk's negligent performance of ministerial acts. Here, the Court found, the primary acts of negligence were the court clerks' failure to

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exercise due care in the performance of their jobs. The critical question, the Court found, was whether Ms. Lapidus's failure to controvert the predicate felony statement was, as a matter of law, an intervening and superseding cause of her injury.

To meet its burden in a negligence-based claim, a plaintiff must show that the defendant's negligence was a substantial cause of the events which produced the injury. Underlying the concept of proximate cause, the Court noted, are "policy considerations that serve to place manageable limits on the liability that flows from negligent conduct." In order for conduct to be negligent, and risks

foreseeable, the defendant must owe a duty to the plaintiff.

Foreseeability also plays a role in the doctrine of superseding causation. An intervening act by the plaintiff, in some circumstances, will sever the causal connection between the defendant's conduct and the plaintiff's injury, thereby relieving the defendant of liability. In order to break the causal **nexus** [link] between the defendant's conduct and the plaintiff's injury, the plaintiff's intervening conduct must be extraordinary, not foreseeable in the normal course of events, or independent of and far removed from the defendant's conduct. To constitute a superseding event severing the causal connection, the intervening act must be a new and independent force which was not set in motion by the defendant's own wrongful acts, and the plaintiff's conduct, must rise to such a level of culpability as to replace the defendant's negligence as the legal cause of the accident.

Applying these principles to the Lapidus case, the Appellate Division held that the court below had erroneously found that as a matter of law, the plaintiff's conduct was an intervening cause of her injury. In fact, the court held, Plaintiff Lapidus's failure to controvert her status as a second felony offender was not independent of and divorced from the original negligence; Ms. Lapidus would never have been placed in the position of having to admit or deny that she was a predicate felon had not a court employee erroneously mistakenly recorded on her court file that she had been convicted of assault.

The Court also found that lower court had failed to consider whether the negligently prepared commitment order was the cause of Ms. Lapidus's injury, noting that an argument can be made that the causal link between the alleged negligence of the clerk who prepared the duplicate commitment order and Lapidus's service of the increased period of

imprisonment could not have been severed by Lapidus's failure to controvert the predicate felony statement, as that act occurred prior to the negligent preparation of the commitment order.

Because the plaintiff's deposition testimony did not definitively resolve the question of why she failed to controvert the

second felony offender statement, and because the lower court did not address the role that the negligently prepared commitment order had in causing plaintiff's injury, the Court of Appeals reversed the trial court's order granting summary judgment to the State of New York.

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