Number 25, June 2002

COURTS TRIM STATE'S RIGHT TO KILL

[¶25.1] *As we were preparing this issue of The Bridge, these four important decisions were announced.*

June 20, 2002. "Those mentally retarded persons who meet the law's requirements for criminal responsibility should be tried and punished when they commit crimes. Because of their disabilities in areas of reasoning, judgment and control of their impulses, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct. Moreover, their impairments can jeopardize the reliability and fairness of capital proceedings … Construing and applying the Eighth Amendment in the light of our 'evolving standards of decency,' we therefore conclude that such punishment is excessive and the Constitution 'places a significant restriction on the State's power to take the life' of a mentally retarded offender." [Atkins v. Virginia, 122 S. Ct. 2242 (2002), quoting Ford v. Wainwright, 477 U.S. 399, 405 (2000)] Justice Stevens delivered the opinion of a 6-3 majority, and in doing so, affirmed the role of courts in making determinations beyond the simple evidence in capital cases – "the punishment must be tailored to his personal responsibility and moral guilt." *[Atkins*, quoting Enmund v. Florida, 102 S. Ct. 3368 (1982)] The Court noted that 21 state legislatures had enacted or were considering laws forbidding the execution of the mentally retarded, and that the federal death penalty statute included such a prohibition – while no state had amended its statute to **allow** such executions. In recognizing the consensus against the execution of mentally retarded offenders, the Court observed that "clinical definitions of mental retardation require not only subaverage intellectual functioning but also significant limitations in adaptive skills such as communication, self-care and self-direction that become evident before age 18." The Justices left the specifics of how to determine whether an individual is mentally retarded to the states.

June 24, 2002. The Supreme Court decision in Apprendi v. New Jersey, [120 S.Ct. 2348 (2001)] (see *Bridge* ¶20.1) has resounded as state and federal courts deliberate about its implications. With

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O'Connor again writing in dissent, the U.S. Supreme Court extended the *Apprendi* jury trial mandate to Arizona's death penalty statute in a 7-2 decision. Arizona's law requires a finding by a judge (in a separate sentencing proceeding) of aggravating circumstances before the death penalty can be applied. Since the determination of the presence of aggravating factors is the "functional equivalent of an element of a greater offense" (*Apprendi*), the Sixth Amendment jury trial protections are necessary. The U.S. Supreme Court overruled its own 1990 decision in Walton v. Arizona [110 S. Ct. 3047 (1990)], and the present Arizona Supreme Court decision [State v. Ring, 200 Ariz. 267 (2001)] that had relied on it. Timothy Ring's case was sent back to the Arizona Supreme Court for reconsideration. [Ring v. Arizona, 122 S. Ct. 2428 (2002)]

July 1, 2002. U.S. District Court Judge Jed S. Rakoff (S.D.N.Y.) had issued an opinion in April warning that he would find the Federal Death Penalty Act to be unconstitutional for its procedural due process defects. The U.S. Government responded with three objections, but Judge Rackoff was not swayed, and granted Alan Quinones' motion to strike the death penalty aspects of his conviction.

Although the U.S. Supreme Court found the death penalty constitutionally acceptable, even in the face of the fallibility of human determinations, it has deplored the execution of the innocent. [Herrera v. Collins, 113 S.Ct 853 (1993)] Judge Rakoff cited the Death Penalty Information Center statistics and the recent study by Liebman, Fagan and West, *A Broken System: Error Rates in Capital Cases, 1973-1995*, to support his contention that innocent people are being condemned to death and that the federal statute cuts off the opportunity for a prisoner to prove his/her innocence, therefore depriving the condemned person of both procedural and substantive due process. In his opinion, Judge Rakoff argues that the U.S. Congress did not intend to execute innocent persons, that there is no constitutional support for such an act, and that the federal statute, by allowing the uncorroborated testimony of an accomplice, is more prone to error than the state statutes. He concluded that the Federal Death Penalty Act "is tantamount to foreseeable, state-sponsored murder of innocent human beings." [United States v. Quinones, et. al., 196 F.Supp. 2d 416 (S.D.N.Y. 2002)]

July 9, 2002. The New York Court of Appeals, faced with the case of Darrel Harris, the first capital appeal since the death penalty was reinstated in 1995, unanimously vacated the sentence because aspects of New York's death penalty statute had been found to be unconstitutional in IMO Hynes v. Tomei, 92 NY 2d 613 (1998). In United States v. Jackson [88 S.Ct.1209 (1968)], the U.S. Supreme Court struck down a federal kidnapping statute that allowed a death sentence only after a jury's deliberations. If a defendant pleaded guilty, s/he would receive a prison term. The Court found that this provision "needlessly penalized the assertion of a constitutional right" [*Jackson* at 583] - these rights being the Fifth Amendment prohibition of coerced pleas and the Sixth Amendment right to a jury trial.

The New York statute also allowed plea bargaining after the state had given notice that it would seek the death penalty and had the effect of "imposing death only on those who assert innocence and proceed to trial." *Hynes,* at 620. Darrel Harris's conviction was upheld by a 6-1 majority, despite 28 issues briefed, and his challenge to the constitutionality of the felony murder statute was rebuffed. [People v. Harris, 2002 NY Lexis 1993, July 9, 2002]

PLRA Exhaustion Requirement Notes

The Third Circuit ruled in April that prisoners do not have to document that they have exhausted their administrative remedies when they file a §1983 complaint. **The failure to exhaust is a positive defense, to be argued by defendants**. This excellent opinion, already cited by other circuit courts, will be covered in the next issue of *The Bridge*.

Ray v. Kertes, 285 F. 3d 287 (2002)

Unsurprisingly, the U.S. Supreme Court recently settled the question of whether exhaustion requirements apply to complaints arising from excessive use of force. Unanimously reversing a Second Circuit decision, the justices said: "The PLRA's exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong."

Porter v. Nussle, 122 S. Ct. 983 (2002)

Another Victory for Bayside Prisoners in Brutality Case

[¶25.2] In the latest decision in the ongoing saga of the Bayside Prison Litigation, District Court Judge Stephen M. Orlofsky denied, in large part, defendant state prison officials' motion to dismiss for failure to state a claim. [In re Bayside Prison Litigation, 190 F. Supp. 2d 755 (D.N.J. 2002)] The plaintiffs are hundreds of prisoners incarcerated at the Bayside State Prison in Leesburg, New Jersey between July 30, 1997 and November 1, 1997, who allege that in the aftermath of the fatal stabbing of C.O. Fred Baker by prisoner Steven Beverly, a lock-down occurred, during which they suffered a variety of constitutional violations, most important of which, was excessive use of force, at the hands of defendants.

As the court pointed out, almost four and a half years after the first complaint was filed in October 1997, this § 1983 prison litigation is, incredibly, still in its initial [discovery] phase. Since that time, numerous amended complaints have been filed and numerous motions to dismiss have been defeated. The situation has been further complicated by the fact that plaintiffs' motion for class certification was denied and it was difficult for counsel to stay in touch with the hundreds of individual plaintiffs, many of whom have been released since the litigation began. The applicable law has also changed significantly. [*See, e.g.,* Nyhuis v. Reno, 204 F.3d 65 (3d Cir. 2000), holding that there is no "futility exception" to the Prison Litigation Refrom Act's ("PLRA") administrative exhaustion requirement, affirmed in Porter v. Nussle, 122 S. Ct. 983 (2002), and Booth v. Churner, 206 F.3d 289 (3d Cir. 2000), affirmed, 121 S. Ct. 1819, 1825 (2001), holding that the PLRA's exhaustion requirement applies to claims of excessive force.]

Legal questions. The court was faced with two novel questions: 1) whether plaintiff prisoners are required to meet a pleading standard more demanding than the one outlined in Federal Rule of Civil Procedure 8(a) for § 1983 claims against individual government officials; and, 2) whether the "grievance procedure" described in the Bayside Prison Inmate Handbook could and actually did constitute an "available administrative remedy" for purposes of the exhaustion requirement of the Prison Litigation Reform Act

Relying on the U.S. Supreme Court's recent reiteration of the purpose of the simplified pleading system contained in the Federal Rules of Civil Procedure, Judge Orlofsky first held that plaintiffs could not be held to a "heightened pleading standard" for their sec. 1983 claims. In *L*eatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, [507 U.S. 162, 168 (1993)], the Court held that federal courts may not apply a heightened pleading standard more stringent than the "liberal standard" of Rule 8(a) to civil rights claims alleging municipal liability under § 1983. Prior to *Leatherman*, the Third Circuit Court of Appeals required a heightened pleading standard for all § 1983 claims. However, Judge Orlofsky concluded that the general rule that district courts are bound by *stare decisis* to apply the last statement of their courts of appeal until either that court or the Supreme Court addresses the issue does not mandate the application of a heightened pleading standard here because of the Supreme Court's recent reiteration, in Swierkiewicz v. Sorema N.A., 122 S.Ct 992 (2002) that "Rule 8(a)'s simplified pleading standard applies to all civil actions, with limited exceptions." The Supreme Court thus established the principle that all civil actions are governed by Rule 8(a)'s liberal pleading requirement, unless specifically delineated in Rule 9(b).

Having decided that the liberal pleading standard was all that plaintiffs must meet, the district court refused to dismiss the approximately 380 plaintiffs who have made no specific factual allegations in the Sixth Amended Complaint to support their claims, because it found that those plaintiffs were included in the general allegations of the complaint common to all plaintiffs. The court concluded that the proper time to weed out claims that lack specificity is after discovery has been completed, on a motion for summary judgment, not on a motion to dismiss.

Conspiracy claim continues. For the same reason, the court found that plaintiffs pled sufficient facts to support their claim of conspiracy under § 1983. Plaintiffs alleged that defendant corrections officers and officials conspired to commit the specific unconstitutional acts and to maintain the atmosphere of intimidation described in the complaint. The object and purpose of the alleged conspiracy was to deprive plaintiff prisoners of various constitutional rights, including the right to be free of cruel and unusual punishment, the right to adequate medical care, and the right to

access administrative remedies and/or the courts for redress of their grievances. In so holding, the court noted that the complaint alleges wide-ranging and widespread illegal conduct throughout Bayside Prison, which went unremedied despite prisoner complaints that were corroborated by investigative reports from the Ombudsman and Internal Affairs.

However, to plead conspiracy pursuant to § 1985, it is necessary to allege, in addition to the allegations made in support of the §1983 conspiracy claims, that the conspiracy was motivated by racial or some other class-based discriminatory animus designed to deprive any persons or class or persons of the equal protection of the law. Since it is clear that prisoners are not a recognized class entitled to protection under sec. 1985(3), Judge Orlofsky dismissed the 1985(3) conspiracy claim of all prisoners, except those individuals who made specific claims concerning racial animus.

Bayside grievance procedures don't measure up. In answer to the second question, Judge Orlofsky held that administrative remedies outlined in internal prison documents, although not promulgated pursuant to a state administrative procedure act, could still conceivably constitute an "administrative remedy" under the PLRA. However, he concluded that the procedures actually codified in the Bayside Prison Inmate Handbook were not sufficiently clear or sufficiently respected by prison officials to constitute such an administrative remedy.

The PLRA requires prisoners to exhaust the administrative remedies made available to them by prison grievance procedures before filing suit in federal court. 42 U.S.C. § 1997e(a). Many Bayside prisoner plaintiffs failed to file Administrative Remedy Forms (ARFs) at all, and many others filed only days before their Fifth Amended Complaint was filed.

The district court concluded that although grievance procedures outlined in a prison handbook might be considered "administrative remedies" under the PLRA, the particular procedures at issue in this case are not the type of administrative remedies contemplated by either the Supreme Court or the Third Circuit in their analyses of the PLRA's exhaustion requirement. *Nyhuis*, *Booth* and *Nussle* all concerned situations in which the prisons had clearly enunciated and detailed grievance procedures enacted pursuant to a state or federal administrative procedure act. The New Jersey Department of Corrections ("NJDOC") has no such promulgated grievance procedure for state prisoners. *N.J.A.C.* 10A: 31-14.4 applies only to county jails, not to state prisons. The NJDOC has a history of failing to promulgate regulations (and getting away with it) until forced to do so by the courts. In 1986, the NJDOC was found to have failed for five years to comply with the state requirements for rule-making by failing to publish notice of proposed rule changes. But rather than invalidate years of procedurally defective disciplinary sanctions, the Superior Court of New Jersey Appellate Division gave then five months to correct the deficiencies. [Department of Corrections v. McNeil, 209 N.J. Super 120 (App.Div. 1986)]

Conflict with *Concepcion*. Judge Orlofsky's holding is in conflict with that of Magistrate Judge Wolfson who, in Concepcion v. Morton, [125 F.Supp.2d 111, 121 (D.N.J. 2000), see *Bridge* ¶21.03], a case which pre-dated the U.S. Supreme Court's interpretations of the PLRA's exhaustion requirement in *Booth* and *Nussle*, held that since the NJDOC had failed to promulgate rules and regulations dealing with administrative remedies, a prison handbook which had not gone through the notice and comment procedure outlined in New Jersey's Administrative Procedure Act could not constitute an "administrative remedy" under the PLRA.

Judge Orlofsky concluded that procedures contained in a prison handbook might constitute such an administrative remedy, but only if they are "understandable to the prisoner, expeditious and treated seriously" and enable prison authorities to take "some responsive action" to prisoner complaints. However, he found that the complaint procedures described in the Bayside Inmate Handbook could not be considered an administrative remedy for purposes of the PLRA's exhaustion requirement because they are neither sufficiently clear, nor expeditious.

Moreover, it appeared to the court that Bayside prisoners' ARF complaints were not taken seriously. Of special note is the court's comment that "many of the recommendations made by the Ombudsman were falling on deaf ears at Bayside." In fact, investigations by the Ombudsman's Office were met with resistance, both from prison administrators and top NJDOC officials, as is evident from the following deposition testimony by Maggie Aguero: "I was suggesting to [Assistant Commissioner] Hilton that I was

going to do an evaluation as to my observations, my findings, my recommendations… I don't recall his exact words, but I recall he was not of the opinion that such a report be written." Because the court found that there was no administrative remedy available to plaintiffs, it held that they were not required to exhaust their administrative remedies before filing suit.

<<Note>> *Soon after this decision, plaintiffs' attorneys sent out letters to all of the over 600 plaintiffs to update them on the status of the case and to attempt to locate those plaintiffs whose claims would be dismissed if the attorneys were unable to establish contact and obtain necessary information from them.* ***Contrary to rumors, the case has not yet been settled.*** *Discovery is now taking place and must be completed promptly. Counsel is in the process of trying to categorize all of the claims into minor, moderate and severe for settlement purposes. Minor is defined as someone whose rights were violated, but did not suffer significant physical injury as a result; moderate means a person who suffered significant, but not permanent physical injury; and serious means that the claimant was beaten and suffered permanent physical injury. Counsel is hopeful that settlement discussions will begin shortly.*

Any plaintiff who has not answered interrogatories (written questions sent by defendants) will be dismissed from the case shortly. The same will happen with plaintiffs who have failed to certify (swear to) their interrogatory answers. ***If you are one of those persons, or you know one of those persons, contact counsel ASAP at: Loughry & Lindsay, LLC, 309 Market St., Camden, NJ 08102. (Collect calls will not be accepted.)***

§1983 Challenge to Three-Year Confinement in R.A.P. Proceeds

[¶25.3] In April of 2002, the Court of Appeals for the Third Circuit reversed a district court's dismissal and remanded the civil rights case of Charles Leamer, a prisoner at the Adult Diagnostic and Treatment Center in Avenel ("Avenel") against the Commissioner of the New Jersey Department of Corrections and twenty-one present and former employees of Avenel. Charles Leamer originally filed suit after being held for almost three years in a cell and on the wing used for the Restricted Activities Program ("R.A.P."). His 2A sentence of indeterminate length requires that he receive therapy and that he not be released unless he has progressed in therapy. He was only allowed to attend therapy a few times during his years in R.A.P., and his progress was evaluated without his participation. He sued under § 1983 for violations of his Fourteenth Amendment Due Process and Equal Protection rights and the Eighth Amendment proscription of cruel and unusual punishment, for an ex post facto increase in his punishment, and a violation of the state statutory provisions guaranteeing him mental health treatment under a non-punitive scheme. In his appeal however, Leamer did not pursue the ex-post facto, equal protection or state-law claims. Leamer's suit asks for injunctive and declaratory relief as well as damages. [Leamer v. Fauver, et. al., 288 F.3d 532 (3d Cir. 2002)]

Facts. In 1978, Charles Leamer was sentenced under *N.J.S.A.* 2A: to an indeterminate term of up to 42 years at Avenel after pleading guilty to rape and a charge of assault with intent to rape. He was due to receive regular therapy including both individual and group therapy and was to be released only when found to be capable of making an acceptable adjustment to society. (This statute has been repealed).

In 1983, Leamer was transferred to R.A.P. and placed in the Close Custody Unit because he exhibited "unstable mental or physical behavior which suggests probable harm to inmate, to others or to property." He was brought before the Institutional Classification Committee and told that he was placed on R.A.P. status for allegedly attempting to hire a hit man and for a letter he had written but not sent to a therapist. He was not given a hearing on the allegations. Leamer was stripped of his job as a therapy clerk, denied outside recreation, and not allowed participation in group therapy or any programs. He was present at only four of his thirty status reviews and represented by counsel substitute at two others. Leamer alleges that all written reviews of the sessions failed to detail the reasons for the decisions to maintain his R.A.P. status, and that he was never given a chance to respond.

In May 1993, Leamer was assigned to "self-directed group therapy," a novel form of therapy involving writing in a diary without any individual or group therapeutic contact. Leamer made eleven sepa-

rate appeals to the Superintendent or Director of Psychology to reinstate his ability to attend group therapy. After his protests, he was permitted to attend therapy sessions with a two-officer escort. Of his sixteen scheduled sessions, he was only allowed to attend two. Subsequent reviews concluded that Leamer needed to remain at his Phase I status due to "insufficient progress in therapy."

District court decision. The district court granted defendants' motion to dismiss under F.R.C.P. Rule 12(c), relying on the Supreme Court decision in Edwards v. Balisok [117 S. Ct. 1562 (1997)] that challenges to the validity of a conviction or the fact and length of a sentence may not be brought under 42 U.S.C. § 1983. The district court reasoned that because Leamer was complaining of the lack of therapy and its impact on his R.A.P. status, he was implying his sentence was longer than it should have been, and that such a claim should have been brought on a writ of habeas corpus. The district court, although not required to do so after finding a habeas action required, and without benefit of an evidentiary hearing, went on to reject Leamer's claims on the merits.

Third Circuit reverses. In its opinion, Third Circuit declared the lower court's *Balisok* analysis to be in error and criticized the justices' reading of Leamer's complaint. In resolving the threshold issue of whether Leamer's complaint could (and therefore should) be brought as a habeas action, the Third Circuit reversed the district court, finding that the claim did not challenge the fact or length of the sentence directly, and that the success of the claim would not necessarily imply the unlawfulness of his detention. When the challenge is to a condition of confinement such that a finding in the plaintiff's favor would not necessarily alter the sentence or undo the plaintiff's conviction, a §1983 action is proper. Although release from R.A.P. might allow Leamer to see the parole panel, it would, in no way dictate the outcome of the panel's deliberations. The circuit justices also disagreed with the district court's conclusion that the *possibility* of delay of Leamer's parole, as a result of the R.A.P. confinement, was sufficient to trigger a *Balisok* analysis. Thus, because Leamer's success in a § 1983 action would not necessarily imply the impropriety or the fact and length of his detention, the § 1983 claim was properly brought and was not foreclosed by any potential overlapping habeas action.

The court stated that the operative test under Preiser v. Rodriguez [93 S. Ct. 1827 (1973)] is whether the plaintiff's challenge would necessarily imply that he would serve a shorter sentence. The court found that the resolution of Leamer's §1983 claim would not have a direct impact on his release date. The circuit court noted that the only way for Leamer to shorten his sentence is *to be evaluated as being successful in therapy*, otherwise he is automatically subjected to the maximum incarceration.

Due Process claims. Leamer argued that he was denied procedural due process while being kept in R.A.P. and not given therapy and denied substantive due process by the prolonged absence of treatment. Leamer's due process claims required an initial, or threshold, finding that he does indeed have a liberty interest in receiving mental health treatment. The circuit court applied Sandin v. Conner [115 S. Ct. 2293 (1995) and New Jersey law interpreting the relevant sections of *N.J.S.A*. 2A to hold that the state had created a mandatory and fundamental scheme for treatment. The court found that the Commissioner has a duty to treat Leamer and if unable to do so, the Commissioner must formulate a policy to provide treatment. The justices ruled: "Here, the state has created a scheme in which therapy is both mandated and promised, and the Department of Corrections is without discretion to decline the obligation."

As for Leamer's procedural due process claim, the state changed its position, first arguing before the district court that he was properly denied treatment, then arguing to the circuit justices that R.A.P. was a form of therapy. The circuit justices reminded the district court that "pro forma reviews that were not based on actual evaluations of Leamer's clinical condition and process would be violations of procedural due process."

In reviewing Leamer's substantive due process claim, the court observed that defendants had had time to make "unhurried judgments" about his care and treatment, and if he was deprived of their reflection as well as a course of treatment, their indifference could be "truly shocking," under the standard announced in Lewis v. Sacramento. [118 S.Ct. 1708 (1998)] The case was returned to the district court for reconsideration.

Although this decision applies directly only to those who were sentenced under N.J.S.A. 2A, the circuit court's extended analysis of when a prisoner can use 42 U.S.C. § 1983 to challenge a disciplinary conviction makes it recommended reading for many prisoner paralegals.

Only "Reasonable Suspicion" Required for Search of Probationers

[¶25.4] In December of 2001, the United States Supreme Court held that the warrantless search of a probationer, supported by reasonable suspicion and authorized by a probation condition, was lawful within the meaning of the Fourth Amendment, thereby reversing a District Court order suppressing evidence. [United States v. Knights, 122 S.Ct. 587 (2001)]

Facts. A California state court sentenced Mark James Knights to probation for a drug offense and, as a condition thereof, required that Knights "submit his ... person, property, place of residence, vehicle, personal effects, to search at anytime, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer." Knights signed the probation order which, immediately above his signature, stated: "I have received a copy, read and understand the above terms and condition of probation and agree to abide by same." Three days after Knights was placed on probation, a Pacific Gas & Electric ("PG&E") power transformer and adjacent Pacific Bell telecommunications vault near the Napa County Airport were pried open and set on fire, causing an estimated $1.5 million in damage. This incident was the latest in more than 30 recent acts of vandalism against PG&E facilities in Napa County and suspicion had long focused on Knights and a friend of his.

Detective Todd Hancock of the Napa County Sheriff's Department conducted a surveillance of Knights and eventually decided to conduct a search of Knights' apartment. The search revealed a detonation cord, ammunition, liquid chemicals, instruction manuals on chemistry and electrical circuitry, bolt cutters, telephone pole-climbing spurs, drug paraphernalia, and a brass padlock stamped "PG&E." Based in part on the items seized pursuant to the search of Knights' apartment, Knights was arrested and a federal grand jury indicted him for conspiracy to commit arson, possession of an unregistered destructive device, and being a felon in possession of ammunition. Subsequently, Knights successfully moved before the district court to suppress the evidence seized from his apartment.

The district court held that the detective had "reasonable suspicion" to believe that Knights was involved with incendiary materials; but, the court nonetheless granted Knights' motion on the ground that the search was for "investigatory" rather than "probationary" purposes. On appeal, the Court of Appeals for the Ninth Circuit affirmed; relying on its earlier decisions that the search condition in Knights' probation order "must be seen as limited to probation searches, and must stop short of investigative searches." [219 F.3d 1138, 1142 (2000)] The United States Supreme Court granted certiorari to assess the constitutionality of such searches.

Reasoning. The Court began its constitutional analysis from the standpoint that the touchstone of the Fourth Amendment is reasonableness and that the reasonableness of a search is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests. In conducting such an assessment, the Court considered that a probationer's reasonable expectation of privacy is significantly diminished where, just as any other punishment for criminal convictions curtail an offender's freedoms, the probation order clearly expresses a search condition and unambiguously informs the probationer of it.

As well, the Court also considered that the State's interest in apprehending violators of the criminal law, thereby protecting potential victims of criminal enterprise, may therefore justifiably focus on probationers in a way that it does not on the ordinary citizen. The balance of such considerations led the Court to conclude that no more than reasonable suspicion was required to conduct a search of Knights' apartment. According to the Court, the degree of individualized suspicion required of a search is a determination of when there is a sufficiently high probability that criminal conduct is occurring to make the intrusion on the individual's privacy interest reasonable. [United States v. Cortez, 101 S.ct. 690 (1981)] Although the Fourth Amendment ordinarily requires the degree of probability embodied in the term "probable cause," the Court held that a lesser degree satisfies the Constitution when the balance of governmental and private interests makes such a standard reasonable.

In sum, the Court concluded that, where, as the district court found and Knights concedes, an officer has reasonable suspicion that a probationer subject to a search condition is engaged in criminal activity, there is enough likelihood that criminal conduct is occurring that an intrusion on the probationer's significantly diminished privacy interests is reasonable.

Federal Habeas Update

Prosecutor's Race-based Arguments Poisoned Trial

[¶25.5] After a 13-year period of denials and failure, the United States Court of Appeals for the Third Circuit granted Clarence Moore's petition for federal habeas corpus relief. Accordingly, the court reversed the most recent district court ruling and remanded with instructions to grant the writ where improper race based arguments by the state prosecutor were not effectively addressed by the trial judge's curative instructions, thereby depriving petitioner of his right to a fair trial. The court also held that the State of New Jersey could retry Moore, and that the writ would be issued conditioned upon a retrial within 180 days from the date on which the district court enters its order. [Moore v. Morton, et.al., 255 F.3d 95 (3d Cir. 2001)]

Facts. On March 5, 1987, Clarence Moore was convicted of second degree burglary, second degree robbery, robbery with intent to commit aggravated sexual assault, and three counts of aggravated sexual assault. He was sentenced as a "persistent offender" and sentenced to life imprisonment with 25 years parole ineligibility. The principal issue at trial was the identity of the rapist. There was no physical evidence introduced at trial, and the victim's testimony was the entire case. Initially, as a consequence of the stress of the situation and poor lighting, the victim, M.A., was unable to make a positive identification of the her assailant. Nevertheless, after undergoing hypnosis therapy, an admissible practice in a criminal trial in the state of New Jersey, the victim was able to relive the event, and all memories of the rapist's face became clearer. She was able to identify Moore three times following the hypnosis session .

While Moore did not take the stand in his own defense, his wife testified that the rapist could not have been Moore because they lived forty-five minutes from the victim's home and she would have noticed if he had been absent for an extended period during the night. She also testified that she was nursing a sick infant and was not in good health. Although the victim seemed identified clothing as that of her attackers, and although physical samples were taken, the , DNA results showed an insufficient amount of high molecular DNA weight and so no conclusion was possible. In his closing remarks, the prosecution argued that the fact that Moore's wife was Caucasian, as was M.A., combined with his wife's illness, made it likely that Moore was guilty. He also told the jury that failing to find Moore guilty would be an "worse assault" on the victim. Defense Counsel requested a mistrial several times, but was denied.

Procedural history. Moore's direct appeal to the Appellate Division was denied; the justices ruled that, within the context of the trial, the judge's forceful instructions to the jury cured the harm caused by the prosecutor's words. Moore then received new counsel and filed a petition for certification to the New Jersey Supreme Court; the court declined review. In 1992, Moore filed a motion for state post conviction review, claiming, inter alia, that he was denied his Sixth Amendment right to effective assistance of counsel on direct appeal because of the prosecutorial misconduct. He based his argument on: 1) improper reference to matters outside the evidence; 2) misstating the law and diluting the burden of proof; and 3) disparaging and ridiculing the defense and defense counsel. Without holding an evidentiary hearing, the trial court denied the petition as procedurally barred, and without merit. On appeal, the Appellate Division again rejected Moore's claim on the merits, ruling that he was not denied effective assistance of counsel. The New Jersey Supreme Court denied his petition for cer tification once again.

In 1997, Moore filed a timely habeas corpus

petitition under 28 *USC* § 2254 in the U.S.District Court for the District of New Jersey, arguing that the race-based arguments and prosecutorial misconduct were both deliberate and continuous, thereby preventing the defendant from having a fair trial. Again, the district court denied defendant's petition but certified the decision for appeal.

Analysis. In order to have jurisdiction over a state prisoner's claim that has been fully adjudicated at the state level, the federal court must find that the proceedings resulted in a decision that was contrary to or an unreasonable application of federal law. The Third Circuit found the decision not to be contrary, but to be an unreasonable application of the law. The circuit judges went on to grant the habeas petition after applying the Supreme Court standard which provides that "the reviewing court must examine the prosecutor's offensive actions in context and in light of the entire trial, assessing the severity of the conduct, the effect of the curative instructions, and the quantum of evidence against the defendant." [*Moore,* quoting Darden v. Wainwright, 106 S.Ct. 2464 (1986)]

Specifically, the prosecution made three offensive arguments: 1) that since his wife and the victim were Caucasian, Moore's "preference" for white women was probative evidence of whether he raped the victim; 2) Moore raped the victim because his wife was ill and he was most in need of sexual release; and 3) urging the jury not to "assault" the victim again (by acquitting Moore. After each of these remarks, the judge ordered the jury to disregard the remark as improper.

After examining the Appellate Division's judgment concerning the aforementioned points in light of the entire trial, assessing the severity of the prosecutor's conduct, evaluating the effect of the curative instructions, and reviewing the quantum of evidence against the defendant, the court followed the Supreme Court precedent and held that the strength of the evidence and judge's curative instructions were not strong enough to cure the prosecution's improper and prejudicial arguments. Accordingly the court reversed the district court's judgment and remanded the matter with directions to grant the writ of habeas corpus; it noted that the writ would be issued conditioned upon a retrial within 180 days from the date on which the district court enters its order.

<<NOTE>> This decision is a useful review of the standard for federal review of a state court post-conviction proceeding.

3d Cir. Denies Habeas Petition; Clarifies Attorney Conflict, Ineffective Assistance & Defective Jury Instructions

[¶25.6] In his habeas petition, Edward Duncan argued that his murder conviction was invalid because his attorney had a conflict of interest, failed to call witnesses in his defense, and failed to challenge defective jury instructions. The District Court for the District of New Jersey denied his petition for a writ of habeas corpus, and the Third Circuit Court of Appeals granted the Certificate of Appealability, rejected the state's request for reconsideration. The circuit court, after consideration of the issues, affirmed the district court's denial of Duncan's habeas petition. [Duncan v. Morton, 256 F.3d 189 (3d Cir. 2001)]

Facts. Edward Duncan is serving a life sentence with 30 years of parole ineligibility for murder. Duncan and Anthony Norman both had weapons and both fired their weapons in an incident in which one man (Holmes) was killed and another sustained a hand injury (Henderson). In the state court proceedings, Duncan was indicted for the purposeful or knowing murder of Holmes, aggravated assault on Henderson, and two weapons-possession offenses. Duncan hired attorney Richard Roberts to represent him and agreed to pay the lawyer from his $25,000 bail. Duncan told Roberts that Norman also needed an attorney. Roberts recommended Michael Pedicini. Pedicini and Roberts shared office space at the time, but had separate secretaries, phone, trust and expense accounts. The two attorneys agreed to split Duncan's bail money evenly.

During trial, Richards called neither Duncan nor any other witness to the stand. Jury instructions were given in detail on the murder and weapon counts and on the lesser included offenses of aggravated and reckless manslaughter. The jury found Duncan guilty of murder and the weapon possession offenses. The court sentenced Duncan to the lengthy prison term for the murder and imposed a concurrent four-year sentence for the first gun-possession offense but vacated the second gun-possession verdict as having merged with the murder conviction. Duncan and Norman were represented on direct appeal by their trial attorneys (now formal business partners) and both

convictions were upheld.

Duncan then filed a post-conviction relief (PCR) petition based on ineffective assistance of counsel and his attorney's conflict of interest. An evidentiary hearing was held and new evidence was introduced. Alvin Norman testified that his brother Anthony had admitted to shooting Holmes. Nonetheless, the PCR petition was denied by the trial court. Duncan appealed and the New Jersey Superior Court Appellate Division reversed, finding impermissible attorney conflict, only to be itself reversed by the New Jersey Supreme Court. Undaunted, Duncan then petitioned for a writ of habeas corpus.

Standard of review. The circuit court applies a plenary standard of review when a district court dismisses a habeas petition without an evidentiary hearing. The U.S. Supreme Court has determined that a federal habeas court may grant the writ if the state court decision on the merits is contrary to or an "unreasonable application of" settled law. Unreasonableness is judged objectively and an application of law may be incorrect, but still not unreasonable. [Williams v. Taylor. 120 S.Ct. 1495 (2000)] In factual determinations, state courts are given a presumption of correctness that can only be overcome by clear and convincing evidence. [Dickerson v. Vaughn, 90 F3d 87 (3d Cir. 1996)] The Third Circuit went on to assess the reasonableness of the trial and appellate courts' decisions with respect to:

(1) Conflict of Interest
(2) Ineffective Assistance of Counsel
(3) Defective Jury Instructions

Conflict of interest. For Duncan to prove a conflict of interest now, he must demonstrate that an actual conflict of interest adversely affected his lawyer's performance as there was no conflict objection at trial. [Cuyler v. Sullivan, 100 S.Ct. 1708 (1980); United States v. Gambino, 864 F.2d 1064 (3d Cir. 1988)] To prevail, Duncan must "demonstrate that some plausible alternative defense strategy or tactic might have been pursued ... [s]econd, ... establish that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests." [*Duncan*, quoting *Gambino*]

The New Jersey Supreme Court found no multiple representation in this case either by Roberts individually or through his association with Pedicini. The fact Robert's filling in for Pedicini for Norman's arraignment lasted only a couple of minutes, and there was no exchange of confidential information. The attorney fee agreement (that Pedicini's compensation would be paid from Duncan's bail money) created a conflict of interest for Pedicini with a significant likelihood of prejudice to Norman, but no corresponding risk of prejudice to Duncan. That the attorneys were not technically partners during Duncan's trial was well documented and subject to a presumption of correctness. The court found that it was not unreasonable to interpret that they were not "partners" for the purpose of multiple representation.

The decision not to call Alvin Norman as a witness was not improper even if motivated of conflict of interest: the Third Circuit justices did not think Alvin Norman's testimony could have rebutted Clarence Moody's eyewitness account and therefore, would not have affected the overwhelming evidence that Duncan was at least an accomplice in the murder. They concluded that Richards' decision not to call Alvin Norman to testify is protected under the rules of professional responsibility; as a decision made on the basis of legal strategy. The court noted that Duncan failed to provide any evidence that Robert's decision not to call Alvin was made as a result of the attorney's loyalties to others.

Duncan also argued that the trial court erred in not conducting a *sue sponte* hearing about the apparent conflict of interest after Roberts had introduced himself as Pedicini's partner. Under *Cuyler,* the court found nothing to indicate the trial court had a duty to inquire into potential conflicts of interest where the codefendants' trials were severed; and where there was no objection. In *Cuyler* the lawyers worked together on the codefendants' cases, here neither Roberts nor Pedicini were seen at the other's trial. Therefore Duncan's trial judge may not have suspected any multiple representation in Duncan's case, much less the special circumstances that would trigger a conflict inquiry into an otherwise permissible representation. Alvin Norman has been listed as a potential witness, although he was not called.

Failure to call witnesses.. Duncan argues that Robert's representation of him was ineffective because the attorney failed to call Alvin as a defense witness, declined to interview Douglas Sherman or call him as a witness, and failed to object to the trial

court's defective jury instructions. In order to show ineffective assistance of counsel, the petitioner must establish both that his counsel's performance was deficient and that the deficient performance prejudiced his trial to the extent that it undermined confidence in the trial's outcome. [Strickland v. Washington, 104 S.Ct.2052 (1984)]

The court reviews the actions taken by an attorney from the attorney's point of view, where possible. [*Strickland*] The court concluded that the ineffective assistance claim for failure to call Alvin Norman had been rejected by the App.Div., on remand, that the state court decision was not unreasonable, since Alvin's testimony would have been more damaging than helpful to Duncan.

Similarly, the App.Div. rejected the claim that Roberts' failure to interview Douglas Sherman or call him as a witness, was an unreasonable lapse and prejudiced his trial. The circuit court did not find the App.Div. application of *Strickland* unreasonable because Duncan had not shown any prejudice stemming from Roberts' decision.. As a habeas petitioner, Duncan must establish a reasonable probability that the jury's verdict would have been different if not for counsel's errors. [*Strickland*]. Duncan's failure to present any sworn testimony by Sherman that would demonstrate his value as a witness and establish prejudice doomed his claim.

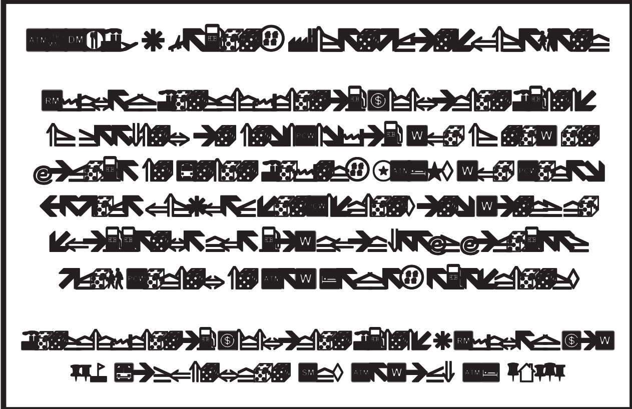
Failure to object to defective instructions. After lengthy jury instructions and during deliberations, the jury requested clarification of the difference between murder and manslaughter and of "guilt by association." The court the re-read the full original instructions for murder, manslaughter, weapons counts and accomplice liability. Under New Jersey law, "an accomplice-liability charge must include an instruction that a defendant can be found guilty as an accomplice of a lesser included offense even though the principal is found guilty of the more serious offense." [State v. Bielkiewicz, 267 N.J. Super. 520, 632 (1993)] The New Jersey Supreme Court had found that the trial court instructions violated this requirement and were clearly deficient, but that Roberts's failure to object to the defective charge did not constitute deficient performance under *Strickland.*

The state supreme court noted in its decision that there is no general duty on the part of the defense counsel to anticipate changes in the law. The sole case in finding that the instructions were defective the decision came after Duncan's 1990 trial, thus Roberts' failure to raise an objection did not rise to the level of ineffectiveness and the state court finding is not an unreasonable application of the U.S. Supreme Court precedent.

Due process challenge to jury instructions. Duncan contends that the trial court's defective accomplice-liability instruction deprived him of due process. Specifically, that the instruction created a misimpression that if the jury found the principal (Anthony Norman) guilty of murder, they also had to convict the accomplice (Duncan) of murder and effectively this withdrew the lesser manslaughter charges from the jury's consideration. The circuit court found that the Duncan's trial was not so infected with unfairness that due process rights were violated. The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal.

In *Bielkiewicz,* in which the defendants were tried jointly, the court did not inform that jury that the defendants could be convicted of lesser manslaughter offenses on an accomplice theory and did not even mention accomplice liability in instructing the jury with respect to the lesser-included offenses. By contrast, the trial court in Duncan's case began its instructions with a very detailed charge describing the elements of the manslaughter offenses, murder, and only then did the court refer to the state's accomplice theory, giving the jury the opportunity to consider manslaughter charges under both direct and accomplice-liability theories.

The these reasons, the Third Circuit affirmed the denial of Edward Duncan's habeas petition.



NEW JERSEY DECISIONS

DOC Is Not Immune to the Requirement to Provide Court with Adequate Explanations

[¶25.7] Emotion Blackwell appealed from a final decision of the New Jersey Department of Corrections ("DOC") which disposed of his administrative appeal from a decision of a Disciplinary Hearing O£ficer by upholding the decision and purporting to explain the rationale for such disposition with the same type of boiler-plate language that is used whenever the decision of a Hearing Officer is upheld. This time, the New Jersey Superior Court, Appellate Division reversed the DOC; holding that, although not traditionally required to provide elaborate written decisions, the DOC is not immune from the obligation of all administrative agencies to adequately set forth its rationale for a decision, and that the explanation in the instant case was inadequate. [Blackwell vs. DOC, 348 N.J.Super. 117 (App. Div. 2002)]

Facts. On November 30, 2000, prisoners participated in a prayer service in the south compound visit hall at New Jersey State Prison. At the end of the service, the prisoners were released back to their living areas based upon geographic designation. Emotion Blackwell, one of those present who lived in the south compound, did not leave when the south compound was called. Blackwell asserts that he and another prisoner were putting prayer rugs away and did not hear the call for the south compound. Apparently, he returned to the south compound without incident after he realized that he had missed the call and exited with inmates from the north and west compounds. Based solely upon the conduct described above, Blackwell was charged with committing two prohibited acts, .256 refusing to obey an order of any staff member and *.306 conduct that disrupts or interferes with the security or orderly running of the correctional facility, in violation of *N.J.A.C.* 10A:4-4.1 (a).

It appears that, at an ensuing disciplinary hearing, Blackwell gave his version of events and it may be that either the charging officer, or perhaps an investigating officer, also gave a version of events and that the disciplinary reports were also reviewed. The report charging prohibited act .256 states that "on the above date and approx. time I/M Blackwell, ... was ordered to exit the S.C.V.H., said I/M refused and didn't exit the S.C.V.H. until the North and West compound was called out." The report charging prohibited act *.306 states that "Blackwell ... did refuse ... order to exit the s/c visit hall at the end of Islamic services. . . . I/M exited the visit hall with the North west compound. I/M action interfere with the security & orderly runing of the correctional facility." At the conclusion of the hearing, the Hearing Officer rendered separate decisions that Blackwell was guilty of committing both prohibited acts. With regard to the .256 charge, the Hearing Officer wrote: "body of charge is supported by officers report, I/m failed to comply with order to move with right compound, H/O notes I/m's witness is same as person who wrote the charge, no evidence to discredit the officers report, all relied on to to determine guilt." About the more serious *.306 charge, the Hearing Officer wrote: "body of charge is supported by officers report, officer has no reason to fabricate the charge, no evidence to discredit the officer report, support the I/m all relied on to determine guilt."

Boilerplate language from the administrator. Blackwell then submitted an administrative appeal to the facility administrator. As part of that appeal, Blackwell set forth a narrative of his position concerning both charges. On behalf of the Administrator, an Assistant Superintendent disposed of Blackwell's administrative appeal by summarily upholding the Hearing Officer's decisions and purported to explain the rationale for such dispostion with the following statements: "[t]here was compliance with the New Jersey Administrative Code on inmate discipline which prescribes procedural safeguards. The decision of the Hearing Officer was based upon substantial evidence." This exact language is used over and over again to deny administrative appeals. As usual, there was no recitation of what the "substantial evidence" was.

As such disposition represented the final decision of the Department of Corrections, Blackwell then

sought judicial review in the New Jersey Superior Court Appellate Division.

Reasoning. Initially noting that, although it is well-settled that prisoners do not enjoy the full spectrum of due process rights in disciplinary proceedings, such rights are to be abridged only to the extent necessary to accommodate the intitutional needs and objectives of prisons, the App.Div. held that prisoners remain entitled to certain basic due process protections which include a written statement of fact-finding and a statement of reasons for the disciplinary action taken. More broadly, the justices reiterated that an administrative agency's obligation to adequately set forth its rationale in support of a final determination is now beyond cavil. When an administrative agency renders a decision and fails to make adequate findings of fact and give an expression of reasoning which, when applied to the found facts, led to the conclusion below, the decision cannot stand. And the findings of facts in support of an administrative decision must be sufficiently specific under the circumstances of the particular case to enable the reviewing court to intelligently review the decision and ascertain if the facts upon which the order is based afford a reasonable basis for the order. A mere cataloging of evidence followed by an ultimate conclusion of liability in an administrative decision, without a reasoned explanation based on specific findings of basic facts, does not satisfy the requirements of the adjudicatory process because it does not enable an appellate court to properly perform its review function.

Requirements of law. The App.Div. held that the Department of Corrections is not immune from those requirements and emphasized that the court's appellate obligation requires more than a perfunctory review. Against this backdrop, the court went on to examine the record of the underlying disciplinary hearing. With regard to the .256 charge, the court observed that exactly what circumstances surrounded Blackwell's conduct on the day in question are never set forth by the Hearing Officer, even assuming there was sufficient evidence at the hearing to allow such findings. According to the court, one obvious question is whether Blackwell even heard the order he allegedly disobeyed and why the Hearing Officer found the report of the charging officer to be more persuasive than Blackwell's testimony is also unknown. Therefore, the court concluded that Blackwell should have been afforded the opportunity to confront and cross-examine the charging officer about his perceptions concerning the events surrounding his alleged disobedience of the order to leave and, thus, remanded the matter for further proceedings. With regard to the *.306 charge, the Court could not find any basis in the record for an assertion, much less a conclusion, that Blackwell's conduct had disrupted or interfered with prison security or the orderly running of the correctional facility. Therefore, the court dismissed the charge.

No Reasonable Factual Basis for Suspicion of Drug Use

[¶25.8] It is the recurring nightmare of life in prison – to be accused without reason of a disciplinary infraction, receive punishment, and then have to fight the charge from an isolation cell in another prison. In March of 2001, Maxwell Melvins was ordered, on a visit day and for no apparent reason, to submit to a urine analysis, along with three other prisoners at East Jersey State Prison. His test was reported to be positive for opiates and he was charged with a violation of *204, "Use of any narcotic paraphernalia, drugs or intoxicants not prescribed by the medical or dental staff." The disciplinary hearing was postponed three times while the DOC scrambled to find something that could be used as a 'reasonable factual basis" for making him submit to the urine test. After the second postponed hearing, when it was clear that Melvins would be active in defending himself against the charge, he alone (of the four who had been charged) was put in pre-hearing detention.

Confidential information? When the hearing was finally held twelve days later, the initial incident report submitted by Officer Pascucci, in which he said that he had advised the third shift officers to be on the lookout for a "large quantity of drugs" thought to be coming in from visitors, was replaced by a new report citing confidential information about Melvins' role in the drug activity. Despite Ion Scan and canine searches, no drugs were found on the unit. No "suspicious activity" involving Melvins was noted by any officer. Nonetheless, Melvins was found guilty and given 15 days of detention, 240 days of administra-

tive segregation, 240 days loss of commutation time, 180 days of urine monitoring and permanent loss of contact visits. With the help of paralegals and his wife, Melvins fought the charge from ACSU in Northern State.

ACSU to App.Div. He submitted a timely and detailed appeal to the EJSP administrator, highlighting the absence of probable cause – to no avail. Melvins then filed an appeal of the final decision with the New Jersey Superior Court Appellate Division. Over many months in ACSU, he was successful in having the appeal accepted late (nunc pro tunc), successful in his motion to compel discovery, and finally successful in his motion for a remand. A new disciplinary hearing was held in January 2002, and Maxwell Melvins was found Not Guilty.

The Attorney General's brief tells the story: "Specifically, Melvins argues that there was not a reasonable factual basis to order him to void a urine specimen for the purpose of urine testing for controlled dangerous substances. Upon review and after a diligent search, the Department is unable to locate inmate Melvin's institutional file which contains the documentation that supports the hearing officer's decision. As such, the Department is unable to provide the court with documents necessary for an adequate review of the case." The App.Div. sent the case back to the DOC without comment. [Melvins v. Department of Corrections, Docket No. A-005506-00T3, filed December 10, 2001]

Jury Verdict Stands: Passaic County Jail Owes $400,000 for Negligence

[¶25.9] Christopher Simpson, who had suffered from epilepsy since childhood, filed a tort claim against the Passaic County, the Sheriff's Office, the jail and Barnert Hospital for injuries suffered when he was a prisoner at the jail in 1994. A jury found the County, the sheriff, and the jail liable for negligence, and dismissed the claim against the hospital. Simpson was awarded $300,000 in medical expenses and $100,000 to compensate for his injuries. The county defendants filed a motion for a judgment notwithstanding the verdict, or a directed verdict, and were denied by the trial judge. Defendants then filed an appeal with the New Jersey Superior Court Appellate Division to overturn the judge's decision. More than six years after the injury, the jury verdict and judgment in favor of Simpson were affirmed. [Simpson v. Passaic County, et. al., App.Div. Docket No. A-5651-99T5, filed October 1, 2001]

Facts Simpson was incarcerated in the Passaic County Jail in May 1994. The jail was informed that he needed to receive specific dosages of two drugs three times each day to control his epilepsy. The jail "consistently failed to provide plaintiff with adequate medication, with deficiencies ranging from no daily medication at all, to only two daily dosages instead of three. The cumulative effect of this undermedication was a reduction of drug levels, causing plaintiff to be prone to more frequent and more severe seizures." [Opinion, page 4] Less than a month later, Simpson had a seizure and was taken to the Barnert Hospital emergency room, where the doctors determined that his level of medication was very low. Consistent with accepted practice, he was then given twice the normal dose of the drug. Simpson was observed in the ER for several hours and then released to the jail guards. But rather than return him to the jail, the guards kept Simpson standing shackled at the hospital for several hours. Simpson suffered a grand mal seizure, fell to the floor and fractured his skull. The consequences for the plaintiff were both severe and permanent – loss of memory, loss of brain tissue, verbal impairment and worsened seizures. The jury was persuaded by the evidence and experts presented by the plaintiff.

Defendants, having failed in their effort to shift the responsibility to the hospital, argued these points to the justices of the App.Div. panel: that trial court should have granted the motion for directed verdict or a judgment n.o.s. because 1) the evidence did not establish proximate cause; 2) the plaintiff did not overcome guard immunity, 3) the verdict was inconsistent and 4) the plaintiff did not establish palpable negligence. The panel found the case against the jail to be compelling, Simpson's expert impeccable and that he had "far exceeded" his burden to defeat defendant immunity under *N.J.S.A*. 59:9-2d. They concluded that the jury verdict was not inconsistent, and that the jury was free to conclude as they did that the county defendants alone were liable for negligence.

PSHLC Resource Guides Project Update

For those who did not see the notice in Bridge #24, the PSHLC is preparing to publish a series of Resource Guides for people leaving prison in New Jersey. The short story is that we have a project team and expect to produce a ***North Jersey Guide*** by the end of the summer, and a ***Central Jersey Guide*** and website by early fall. We need your help! People who are getting out this summer can help us by reporting on their experiences, and we are asking the cooperation of as many ex-prisoners as are willing to make this important self help tool be the best it can be!

Background. When one of the PSHLC paralegals brought a copy of ***Connections 2000***, the resource guide published by the New York City Public Library for people coming back to the City from prison, we knew we had to do one for New Jersey. But Jersey is big, so we decided to do three: one for North Jersey, one for Central Jersey and one for South Jersey. We have been collecting information about programs, services and resources all over the state that would be of use to those coming home, or if not 'home,' then back to the street after being in prison and jail. The Guide starts with what you can do before you get out, goes on to chapters on Financial Assistance, Food, Clothing, Housing, Health & Fitness, Education, Employment and much more. With an extended Job Search section, the Guides will run to almost 200 pages.

Program Evaluation We did not just want to take the programs at face value, we wanted to check them out, so we could report on actual experiences. So we are doing that now with teams of evaluators (who are themselves ex-prisoners) in the Newark and Trenton metropolitan areas. If you are getting out this summer, you can help by sharing your experiences with getting set up – what worked for you and what didn't. If you want to help, please contact Elijah Muhammad, Director for North Jersey and Charles (Deano) Holman, Director for Central New Jersey. We are looking for South Jersey partners, too!

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We want to keep the information in the Guides up-to-date both by monitoring the programs and agencies and by having regular reports from those who are getting out.

Website Directory It would not make sense to just put the information in a paperback book when we can put it on the internet, too. So we are now raising money for a website that would have a directory of programs, and would be searchable by County, Municipality or Type of Program.

Individual Requests. We are trying to make this happen over the summer, as well as keep up with the regular pile of PSHLC mail. This means that we do not have volunteers to answer individual questions about what is in the Guides right now. We will have a student intern on board in the fall to help those who are getting out use the Guides. If you are getting out this summer, and want information, write to us and tell us where you will be living and what kind of resources you need. We will do the best we can to send information back to you.

LEGISLATION NEWS

[¶25.10] Voting Rights for Ex-Felons

The federal legislation, sponsored by Sens. Reid and Spector, to restore the right to vote in presidential elections to ex-felons after the completion of probation and parole, was defeated 31 to 63 in the Unites States Senate in early February. From our region, Senators Clinton (NY), Corzine (NJ), Lieberman (CT), Santorum (PA) and Spector (PA) voted for the passage of the bill.

New Jersey prisoners who complete their sentences can regain the right to vote in state elections. To do so, it is only necessary to complete a voter registration form and affirm that you are not in prison, on probation or parole, or otherwise serving a sentence for an indictable offense. You do not have to provide proof of your status.

Forms are available online at
http://www.state.nj.us/lps/elections/votereg.gif or from the **ACLU-NJ** at 35 Halsey Street, Suite 4B, Newark, NJ 07012

Making Prisoners Pay for Incarceration

Three New Jersey state senators have introduced a bill (SENATE, No. 373) to make prisoners responsible for the costs of their incarceration. The bill authorizes the state to place a lien against the property and income of each prisoner for the total cost of the "care and maintenance" while in prison in New Jersey. Senators Sacco [Bergen & Hudson], Adler [Camden] and Bucco [Morris] seem oblivious to the substantial negative impact this bill would have their own communities (assuming, of course, that the legislation is meant to be more than a publicity stunt).

We urge all New Jersey readers to write to family members and encourage letters and phone calls (expressing outrage about the bill) to local state senators and representatives. Family members can also call and encourage local organizations to take a stand against this racist legislation and push community newspapers to publish editorials and articles that outline the disastrous practical consequences of the bill.

Prisoners Self Help Legal Clinic
35 Halsey Street, 4B
Newark, NJ 07012