

A World of Good

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Thanks to everyone's great efforts in 2007, Dechert ranked #8 in *The American Lawyer's* annual pro bono rankings.

United States Supreme Court Agrees to Hear Challenge to the Constitutionality of Prohibiting Suits Against Prison Guards



by **Jason E. Murtagh** and **Jennifer L. Rellis**

On June 16, 2008, the United States Supreme Court granted certiorari in *Haywood v. Drown*,

agreeing to review the case and the lower court's decision. We are representing the plaintiff challenging the constitutionality of a New York statute preventing him from suing prison guards in New York state courts. We spent significant time and effort briefing the issues, with **Gary Mennitt**, summer associates **Justin Danilewitz** and **Jason Reefer**, and paralegal **Katarina Savoardo** working as part of the team. In addition, **Nory Miller**, a former clerk for U.S. Supreme Court Justice William Brennan, drafted the reply brief in the New York Court of Appeals and the eventual petition for certiorari.

Background

Our client filed two lawsuits in state court against several prison employees arguing that he was entitled to money damages under the federal civil rights statute, 42 U.S.C. § 1983, because the prison employees had violated his civil rights. The trial court dismissed his

cases, finding his lawsuits were barred by New York Correction Law §24, which prevents state trial courts from hearing claims against prison employees whether based on federal or state law. Any lawsuits for damages must be brought against the state in the New York Court of Claims. However, Section 1983 does not permit suits against the state; the plaintiff must sue individuals. Therefore, a plaintiff suing under Section 1983 cannot bring suit against the state in the Court of Claims.

Even if a litigant could bring a federal civil rights case in the New York Court of Claims, he would confront both different and steeper hurdles than those detailed in Section 1983. Most significantly, a litigant would face a shorter statute of limitations in which to file his claim, would have no opportunity to plead his or her case before a jury, and could not receive punitive damages or attorneys' fees awards.

After an intermediate New York appellate court affirmed the trial court's dismissals, the New York Court of Appeals sought counsel to represent our client in his appeal. Jason learned of the case from Karen Murtagh-Monks of Prisoners' Legal Services of New York, and the firm agreed to take the case pro bono.

Jason argued the case before the New York Court of Appeals in October 2007. In a narrow 4-3 decision, the Court of Appeals affirmed the lower courts' holdings, finding that Correction Law §24 did not violate the Supremacy Clause, which establishes the U.S. Constitution as the supreme law of the land. The court held the statute was

merely a “neutral jurisdictional rule” that removed jurisdiction from New York courts over *all* claims against prison officials, regardless of whether they were brought under state or federal law. The three dissenting justices vigorously disagreed, concluding that Correction Law §24 did violate the Supremacy Clause and could not constitutionally be applied to federal claims because it frustrated Congress’ determination that the best way to deter constitutional rights violations was by holding individuals accountable for their actions.

As the highest court in New York has affirmed the lower court’s decision, the United States Supreme Court is the last resort for our client. We prepared and filed a petition for a writ of certiorari urging the Court to hear the plaintiff’s petition for the following reasons.

While this case presents a novel legal issue, the decision of the New York court conflicts with several of the Supreme Court’s previous decisions on how to apply state procedural rules to federal claims. Without review, New York would have license to further immunize other subcategories of defendants from suit in state court because it viewed the suits as frivolous. In fact, a pending law would extend Correction Law §24’s grant of immunity to mental health professionals who work in prisons. Correction Law §24 and other similar statutes would be an effective template for states to close their courthouse doors to cases judged frivolous, as long as the ban applied to an identical subset of state and federal claims.

Correction Law §24 not only affects tens of thousands of inmates currently incarcerated in New York, but since the law bars *any* suit for damages against corrections employees, it also prohibits state correctional employees from suing their co-workers or supervisors for violations of *their* constitutional rights, such as employment discrimination.

Nory is currently drafting merits briefs to be filed with the Court, and Jason will argue our client’s case before the Court later this year.

Jason E. Murtagh

Philadelphia
+1 215 994 2683
jason.murtagh@dechert.com

Jennifer L. Rellis

Philadelphia
+1 215 994 2926
jennifer.rellis@dechert.com

What Difference Can an Afternoon Make?

by **Lynn M. Terrebbonne**



It’s a Wednesday afternoon at the San Francisco Superior Courthouse. What do the immigrant couple with a baby in a stroller, the kitchen worker with a substance abuse problem, and the elderly

woman with a cane sitting anxiously in the courthouse hallway have in common? Each one has missed a rent payment. As a result of a rent-control scheme encouraging evictions for non-payment of rent and a weakening economy, an increasing number of San Francisco’s low-income tenants are facing eviction proceedings. For these tenants, their last chance to avoid a trial—and the certain eviction that will follow—is the mandatory mediation they are waiting to attend. The chances of an unrepresented tenant negotiating a favorable settlement are little to none, but their odds are increased when they participate in the Courthouse Landlord/Tenant Project, a joint venture of the Voluntary Legal Services Program of Northern California, the Eviction Defense Collaborative, and the San Francisco Superior Court. Through this program, myself and other Dechert attorneys have provided limited scope representation to tenants facing eviction.

What difference can an afternoon make? For those of us that volunteer, an afternoon gives us a chance to get into the trenches, testing our communication and negotiation skills and, more importantly, our ability to think on our feet both literally (since the mediations occur in the hallways of the courthouse) and figuratively. A sense of urgency governs the proceedings since much must be accomplished during one short afternoon. Each volunteer attorney is assigned between one and three cases, with approximately thirty minutes to review case files, meet with clients, and develop a mediation strategy before being assigned to a Judge Pro Tem. The clients’ goals and the landlords’ motivations must be explored, positions must be presented to opposing counsel and the Judge Pro Tem, and the pros and cons of offers must be explained to the client. An attempt must be made to persuade the landlord and their counsel that it is in their best interest to allow the tenant more time in their residence. A social worker must evaluate the client to establish a contingency plan if the mediation is unsuccessful. If all goes well, the process ends with the drafting of a settlement.

A World of Good

This Dechert pro bono update is a publication of the firm's Pro Bono Committee. If you have items you would like included in the next edition, please forward them to Erin Martell at erin.martell@dechert.com.

What difference can an afternoon make? For the tenants, an afternoon can mean they are able to reach an agreement allowing them time to find new, more affordable accommodations or, occasionally, work out a payment schedule permitting them to remain in their homes.

What difference can an afternoon make? For the legal profession, an afternoon provides an opportunity to change negative impressions. Many tenants arrive at the mediation with a cynical view of the attorney instituting the eviction proceedings and blaming the judicial system for their situation. Once the tenants understand that attorneys are willing to take the time to listen to their story and help them through very troubling times, they realize that the legal system can work for them, too.

Dechert attorneys that have participated in this program include **Jonathan Baker, Chris Burdett, Patricia GoPaul, Daniel London, Connie Merriett, Brent Rafferty, Angus Rose,** and **Michelle Yang.**

Lynn M. Terrebonne

Silicon Valley
+1 650 813 4877
lynn.terrebonne@dechert.com

A Win for Prisoner Civil Rights



by **Kenneth L. Topping**

For over a decade, an active prisoner civil rights practice has flourished in the Philadelphia office under the leadership of Steve Brown. During the past five years, the office has handled over 30 prisoner cases, most of which are referrals from the United States District Court for the Eastern District of Pennsylvania. The cases vary but usually involve prisoners challenging conditions of confinement or treatment by prison personnel. The program has provided great trial experience for our attorneys as well as a much needed and appreciated service to our clients and to the court system.

On May 30, 2007, the Honorable Juan R. Sanchez appointed **Steve Brown, Joshua Schiller,** and me to represent a prisoner in an action filed against a State Corrections Officer pursuant to 42 U.S.C. Section 1983. In April 2008, we won a jury verdict in the case.

Background

Our client was incarcerated in 2005 at State Correctional Institution—Graterford (SCIG). He alleged that a corrections officer (CO) entered his cell and assaulted him in retribution for words exchanged during an argument the day before. As a result of the attack, our client suffered a broken hand.

Initially, our client claimed he injured his hand falling from his bunk. After the defendant CO was rotated to a new assignment, he changed his story and filed a grievance, explaining that “fear of retaliation” motivated him to lie about the cause of his injury. SCIG investigated, obtaining statements from his cellmate, another inmate claiming to have heard a commotion, and from other COs on duty during the alleged assault. The investigator concluded the grievance was unfounded and the matter was closed. Our client appealed those findings.

Discovery

Through pretrial discovery, we confirmed the CO was on duty the day of the incident and that his normal duties would place him at the inmate's cell. The CO denied the allegation, adding that prison procedures would not allow him to be alone in an inmate's cell at any time. Our client's changing story and falsehoods were confirmed,

as was his refusal to fully cooperate in the investigation. His cellmate refused to speak about the matter. In addition, the inmate claiming to have heard the commotion subsequently refused to testify at his deposition, stating, “You can do jumping jacks for all I care, Chief, I don’t have anything to say.”

Just prior to the close of discovery, the Commonwealth identified two additional witnesses: the treating nurse and

a fellow inmate incarcerated with our client years after the incident. The nurse testified that our client told her he fell from his bunk. The fellow inmate said our client told him he concocted the story after injuring his hand during horseplay in his cell. In a newly acquired spirit of civic duty, this inmate had written the Assistant Attorney General handling the case notifying him that he “had information” that might be of interest in the matter.

Recent Awards & Recognition

- The National Legal Aid & Defender Association presented the **2008 Beacon of Justice Award** to the firm. The 2008 Beacon of Justice Award was presented to law firms that have provided significant pro bono representation to people on death row.
- David Zybala was selected by the North Carolina Bar Association and Business Leader Media as one of their **Pro Bono Award** winners. David’s profile was featured in *Business Leader Magazine* and he was also recognized at the groups’ luncheon.
- The Charlotte office received the **Mecklenburg County Bar Large Firm Pro Bono Award** recognizing the extraordinary efforts of Mecklenburg County lawyers who have contributed a significant amount of time and energy toward pro bono work over the past year. David Zybala accepted the award on behalf of the Charlotte office.
- The London office was shortlisted with four other firms for a **2008 LawWorks Award** in the category “Best Contribution by a Law Firm.”
- Jennings Durand and Ethan Fogel were awarded a **2008 Pennsylvania Bar Association Pro Bono Award** by the Pennsylvania Bar Association.
- Community Legal Services of Philadelphia presented the **2008 Equal Justice Award** to the Philadelphia Landlord Tenant Team. The award is given annually to recognize those who have “made extraordinary efforts to ensure equal access to justice.” The team of Ethan Fogel, Ryan Chase, Aly Oswald, Steve Ferenchick, Jennifer Kates, Bob Limbacher, Brian Kabosius, and Danielle Torrice was recognized for its pioneering role in providing legal services to low-income tenants.
- Dechert was awarded the **2007 Pro Bono Law Firm of the Year** award by Equality Advocates Pennsylvania. This honor was awarded in appreciation of Dechert’s role in creating new and innovative resources for the legal clinic at Equality Advocates Pennsylvania.
- The Princeton office received the New Jersey State Bar Association’s **2008 Pro Bono Special Recognition Award**. The state bar presents this award annually to one law firm or other organization in recognition of exemplary pro bono service.
- The **Equal Justice Medal** was awarded to the Princeton office by Legal Services of New Jersey. The Medal honors “those who have made extraordinary contributions to the cause of equal justice for all.” The Princeton office was honored for its “very considerable pro bono efforts on behalf of low-income clients of Central Jersey Legal Services” and, in particular, the “extraordinary outreach project at the Trenton Area Soup Kitchen.”

During deposition, we learned that this inmate had also filed a lawsuit against the Department of Corrections and, coincidentally, the same Assistant Attorney General was handling his case. We also learned that during ten years of incarceration, this was the only time this inmate had ever contacted any official in any capacity regarding inmate misconduct, though by his own admission, he witnessed it almost daily.

The Trial

After one day of jury selection, I made opening remarks outlining the facts and issues, and Josh followed with a direct examination and redirect of the client. The Commonwealth called the defendant CO, his partner CO, the nurse, and the inmate from the adjoining cell, all of whom testified that our client stated he injured himself falling off his bunk. The COs adamantly clung to their procedures, the nurse to her entries in the medical records, and the inmate to his recollection of the conversation.

The Verdict

In Josh's impassioned closing argument, he pointed out the inconsistencies in the testimony, the motivations behind the testimony, and the selective memories of the witnesses. He wrapped up his closing by humanizing our client as not just an inmate number, but as a citizen whose Constitutional rights had been violated.

The jury deliberated for more than three hours and returned a verdict that awarded our client \$12,500 in compensatory damages and \$5,000 in punitive damages.

Kenneth L. Topping

Philadelphia
+1 215 994 2593
kenneth.topping@dechert.com

Challenging Voter Registration Law Compliance in Ohio



by **Neil A. Steiner**

In a case challenging the State of Ohio's refusal to comply with federal law and provide voter registration to public assistance applicants, **Elliot Gardner, Bill Gibson, Robert Topp**, and I are

acting as lead counsel along with co-counsel from the Lawyers' Committee for Civil Rights Under Law and the public policy research and advocacy organization Demos. We are representing two Ohio residents who were not offered voter registration applications when they applied for public assistance benefits. Joining the action is the Association of Community Organizations for Reform Now, the country's largest organization of low- and moderate-income families working for social justice and stronger communities. The group is deeply involved in voter registration in Ohio and across the country.

Background

The National Voter Registration Act of 1993 (NVRA) was passed by a bipartisan Congress to increase voter participation by making registration more readily available. Commonly known as the "motor-voter" law, it requires all drivers' license bureaus to offer voter registration to license applicants. In addition to the motor-voter provisions in Section 5 of the NVRA, Congress also sought to ensure registration of "the poor and persons with disabilities who do not have drivers' licenses and will not come into contact with the other principal place to register under this Act [motor vehicle agencies]." *NVRA Conference Report* (H.Rept. 103-66). Section 7 of the NVRA requires states to "designate as voter registration agencies . . . all offices in the State that provide public assistance," including programs for food stamps, Medicaid, and Temporary Assistance to Needy

Pro Bono Section of Dechert's Intranet Site

Remember, the firm's intranet site has a separate section on pro bono including sample forms, a directory of pro bono referral organizations, and a listing of training opportunities.

<http://intranet.dechert.com/dechertapps/probono>

Families administered by Ohio's Department of Job and Family Services (DJFS). Thus, each DJFS office is required by federal law to: (1) distribute a voter registration application with each application for service or renewal of service; (2) ask applicants in writing if they want to register to vote; (3) distribute voter registration application forms by mail; (4) help applicants complete the forms; (5) accept completed forms; and (6) forward those forms to the appropriate State election official. The NVRA further requires each State to appoint an employee or official to coordinate State responsibilities under the Act.

Ohio's Current Administration of the Law

Our clients are far from the only low-income Ohio citizens visiting DJFS offices who were not offered the opportunity to register to vote. A survey of 103 individuals leaving

DJFS facilities found that only three had been asked if they wanted to register. Similarly, spot checks at DJFS offices in six of Ohio's largest counties revealed that voter registration forms were not available in five counties, and in the sixth county, they were under a stack of other forms. Perhaps the most compelling evidence for widespread violations was the actual number of voter registrations during the 2002-2004 reporting period, the most recent records available for the biennial reporting period prior to litigation. Specifically, more than two-thirds of Ohio's 88 counties registered fewer than 100 individuals during the entire two-year period. Ten counties did not register a single person. Four of Ohio's most populated counties registered just 1,686 voters at DJFS offices, though each county (Franklin, Hamilton, Montgomery, and Summit) has more than 500,000 residents. By contrast, Athens and Marion

Pro Bono Highlight: New York

Small Business Legal Clinic in the Bronx a Success

Under the leadership of **Jonathan Silverblatt** and **Derek Winokur**, the New York office has developed a small business clinic hosted by the South Bronx Overall Economic Development Corporation (SoBRO). Among the Dechert attorneys participating in the clinics are **Kira Brereton, Kristopher Brown, Catherine Capeless, Laura Ciabarra, Elizabeth Dylke, Nicholas George, Brooke Hasenauer, James Ho, Thien Vu Hoang, Eric Iversen, Samuel Katz, Jonathan Kim, Ethan McLaughlin, Alicia Mioli, Thomas Rayski, William Stefko, Alexander Swirnoff, Andrew Weprin, and Inga-Kerstin Wilder**. Summer associates participating include **Eric Becker, Ellaine Gelman, Kristen Grauer, and Kenneth Wang**.

SoBRO is an organization that is "dedicated to enhancing the quality of life in the South Bronx by generating effective economic, housing, educational and career development programs for youth and adults." We became involved with SoBRO through our relationship with the City Bar Justice Center's Neighborhood Entrepreneur Law Project (NELP). NELP provides free legal assistance to low-income micro-entrepreneurs who are either just starting out or are hoping to strengthen an existing business. NELP matched Dechert with SoBRO after they received a number of requests for small business legal aid from microentrepreneurs in the Bronx and asked for law firm assistance creating a legal clinic.

Attorneys from a variety of practice groups have attended each clinic, providing guidance on a wide range of topics, including issues related to business structure, tax matters, commercial contracts, commercial lease negotiations, employment, and consulting arrangements as well as trademark and copyright law questions. Our attorneys were organized in small groups, each meeting three to five clients. Some clients presented specific legal issues—for example, advice regarding whether a corporation, LLC, or partnership form best suited their business needs or how to protect their intellectual property rights. In many instances, the clients just needed assistance in developing business strategies and with other basic questions regarding the organization of their business. We have now participated in three clinics and are looking forward to more in the future.

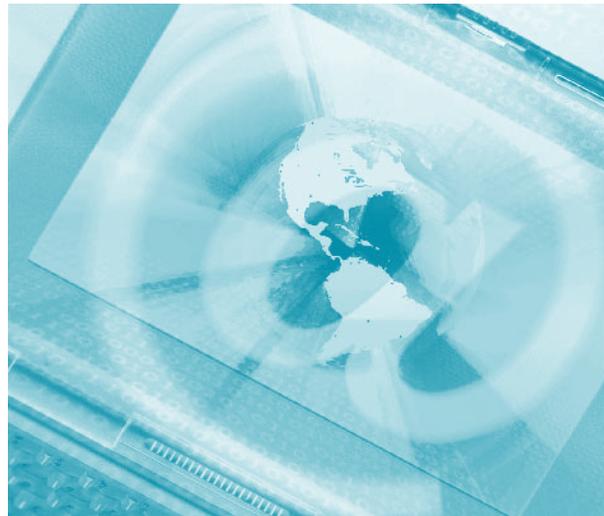
counties registered more than 2,000 voters during the same period, even though residents number only about 125,000 for both counties.

Our notice of non-compliance to Ohio's Secretary of State, providing a 60-day period to cure violations, was met with a response that Ohio's voter registration rate was about 92% and that curing violations was not the Secretary's responsibility. In September 2006, we commenced action in the Northern District of Ohio. Defendants moved to dismiss on the grounds that they were not responsible for enforcing the NVRA and that under Ohio law, individual counties are responsible for making voter registration available in that county's DJFS office. The District Court accepted the argument and dismissed the action with prejudice. We appealed to the Sixth Circuit Court of Appeals.

The appeal raises an issue of first impression at the Circuit level, namely, whether the NVRA imposes obligations at the State level, or whether a State can delegate NVRA administrative responsibility to local governments, thereby avoiding responsibility for noncompliance. Our argument is that the plain language of the NVRA places responsibility on State officials for compliance, as does Ohio law. The Department of Justice also submitted an amicus brief supporting the plaintiffs and urging reversal of the District Court's opinion. The Sixth Circuit heard arguments on June 12, 2008, and we are cautiously optimistic that we will win a reversal.

Neil A. Steiner

New York
+1 212 698 3822
neil.steiner@dechert.com



Pro Bono Net

www.probono.net is an internet based pro bono resource. The site has some national practice areas as well as practice areas that are specific to certain cities/states. The site contains an online library of training materials and model pleadings, postings of volunteer opportunities, descriptions of legal services organizations, and a calendar of pro bono training events.

Dechert's Pro Bono Committee

If you are interested in getting involved in pro bono work, please contact any member of the firm-wide Pro Bono Committee or a member of your local office Pro Bono Committee.

Kevin Babikian
Newport Beach
+1 949 442 6040
kevin.babikian@dechert.com

Anthony L. Bolzan
Boston
+1 617 728 7178
anthony.bolzan@dechert.com

Julia Braun
Munich
+49 89 21 21 63 20
julia.braun@dechert.com

Katherine A. Burroughs
Hartford
+1 860 524 3953
katherine.burroughs@dechert.com

Daphne D. Chisolm
Charlotte
+1 704 339 3153
daphne.chisolm@dechert.com

Steven R. Daniels
Austin
+1 512 394 3015
steven.daniels@dechert.com

Matthew V. DeDuca
Princeton
+1 609 620 3202
matthew.delduca@dechert.com

Susan C. Ervin
Washington, D.C.
+1 202 261 3325
susan.ervin@dechert.com

Ethan D. Fogel
Philadelphia
+1 215 994 2965
ethan.fogel@dechert.com

Jean-Louis Frognet
Luxembourg
+352 45 62 62 29
jean-louis.frogner@dechert.com

Patricia E. GoPaul
Philadelphia
+1 415 262 4543
patricia.gopaul@dechert.com

Thierry Hudson
Brussels
+32 2 535 5465
thierry.hudson@dechert.com

Christopher G. Karras
Philadelphia
+1 215 994 2412
christopher.karras@dechert.com

Jessica E. King
Hartford
+1 860 524 3914
jessica.king@dechert.com

Glyndwr P. Lobo
New York
+1 212 698 3567
glyndwr.lobo@dechert.com

Connie E. Merriett
Silicon Valley
+1 650 813 4817
connie.merriett@dechert.com

Charles I. Poret
New York
+1.212.698.3532
charles.poret@dechert.com

Keith T. Robinson
Hong Kong
1 852 3518 4705
keith.robinson@dechert.com

Andrew Thomases
Silicon Valley
+1 650 813 4844
andrew.thomases@dechert.com

Suzanne E. Turner (Chair)
Washington, D.C.
+1 202 261 3361
suzanne.turner@dechert.com

Tracey Wright
London
+44 20 7184 7359
tracey.wright@dechert.com

David A. Zybala
Charlotte
+1 704 339 3127
david.zybala@dechert.com

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With more than 1,000 lawyers in the United States, Europe and Asia, Dechert LLP is an international law firm focused on corporate and securities, business restructuring and reorganization, complex litigation and international arbitration, real estate finance, financial services and asset management, intellectual property, labor and employment, and tax law.

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