GERONIMO PRATT AND INMATE RECORDS: AVOIDING INJUSTICE BY CHANGING INMATE RECORD-KEEPING IN NEW YORK STATE PRISONS

Christopher W. Michaels[*]

[*] J.D., Albany Law School, 2010; B.A. Colgate University, 2004. Special thanks to Professor Anthony Paul Farley for his encouragement and guidance, without which this paper would not have been possible. I gratefully acknowledge the editorial assistance of the Board and Staff of the *Albany Government Law Review*. All errors, omissions, and opinions are my own. I would also like to thank my family and friends for their love and support.

> [P]unishment as administered by the penal law system is the conscious inflicting of pain. Those who are punished are supposed to suffer. If they by and large enjoyed it, we would change the method. It is intended within penal institutions that those at the receiving end shall get something that makes them unhappy, something that hurts.[1]

> Blackness is a prison. The existence of colorline means that we are all 'hunted and penned in an inglorious spot.' Blacks in prison are imprisoned within a prison that is itself imprisoned ('hunted *and* penned').[2]

> I thought it was going to be fair . . . I was naïve.[3]

INTRODUCTION

Elmer Gerard "Geronimo" Pratt spent eight years imprisoned within a prison within the imprisoned prison as a black man in solitary confinement.[4] For the first eight years of his unjustified twenty-seven-year term, he was subject to the worst hurt the American penal system could inflict upon him.[5] He was not subject to this hurt solely because of the crimes for which he was convicted; but, rather, he was subject to this hurt because of his political ideology.[6] This paper will not focus on Pratt's political views or the governmental efforts to bring down the Black Panther Party (BPP or "Panthers") by framing Pratt.[7] It will

---

[1] NILS CHRISTIE, LIMITS TO PAIN 16 (1981).

[2] Anthony Paul Farley, *Johnnie Cochran's Panther: An Essay on Time and the Law*, 33 T. MARSHALL L. REV. 51, 59 (2007) (quoting Claude McKay, *If We Must Die*, *in* HARLEM SHADOWS: THE POEMS OF CLAUDE MCKAY 53 (1922)).

[3] Don Terry, *Los Angeles Confronts a Bitter Racial Legacy in a Black Panther Case*, N.Y. TIMES, July 20, 1997, at 1 (quoting Elmer "Geronimo" Pratt's attorney, Johnnie Cochran).

[4] *See* Farley, *supra* note 2, at 59 ("Blackness is a prison.").

[5] Cheryl R. Bias, *From Darkest Night to Most Glorious Victory: Johnnie Cochran and the Geronimo Pratt Case*, 33 T. MARSHALL L. REV. 11, 36–38 (2007) (describing the conditions of Pratt's incarceration).

[6] Farley, *supra* note 2, at 52 ("Geronimo Pratt was innocent and his imprisonment was part of the government's conspiracy against the panthers."); Terry, *supra* note 3, at 1 (quoting John Mack, President of the Los Angeles Urban League) ("The Geronimo Pratt case . . . is one of the most compelling and painful examples of a political assassination on an African-American activist."); Posting of Edward J. Boyer to L.A. Times Daily Mirror Blog, http://latimesblogs.latimes.com/thedailymirror/2008/12/geronimo-pratt.html (Dec. 23, 2008, 9:00 EST) ("Pratt was convicted in what his defenders still call one of the most overtly political trials in Los Angeles' history.").

[7] JACK OLSEN, LAST MAN STANDING: THE TRAGEDY AND TRIUMPH OF GERONIMO PRATT 231 (2000) (explaining that the FBI, through its COINTELPRO programs

instead focus on how the Federal Bureau of Investigation (FBI) and other government agencies were able to make Pratt's existence in prison as deplorable as possible. Specifically, this paper will discuss how Pratt's inmate record was manipulated by government agencies through inaccurate information, which was used to justify Pratt's solitary confinement.[8]

After learning how Pratt's inmate record was inaccurately changed before and during his incarceration in California, I wondered if this could happen today. In particular, I wondered if this could happen today in the New York State prison system and, if so, how prisoners and practitioners could protect inmate records from being falsely modified. The first part of this paper will begin with a background of Pratt, the case against him, and his subsequent incarceration. Then, through a lens of how inaccuracies in an inmate record can substantially affect the life of an inmate, the later parts of this paper will analyze inmate record-keeping in New York State prisons. The second section of this paper will explain what an inmate record is, who has access to it, what is in the record, and how to go about changing perceived inaccuracies within the record. Additionally, the second section will advocate for a change to the recording procedure of presentence reports so that they fall more in line with the stated goal of the reports, i.e., to illuminate a defendant's background before a sentence is imposed.[9] The third and final section will advocate that a change be made to Title 7 of the Compilation of Codes, Rules and Regulations of the State of New York (NYCRR or "Code"). Specifically, it will advocate for an addition to the Code that will make it as mandatory to report inmate good behavior as it is to report inmate misbehavior.[10] Such a change is necessary to avoid future unjust incarcerations in solitary confinement. The proposed changes, it will be shown, will not only help inmates like Pratt who were wrongly sent to solitary confinement based on misinformation in their record, but will also be a positive first step in reshaping New York's prison

(a series of counterintelligence programs), fed information to the LAPD to arrest militants); *see* Johnnie L. Cochran, Jr., *Soliloquy of a Master: Words From the Late, Great Johnnie L. Cochran, Jr.*, 33 T. MARSHALL L. REV. 1, 8–9 (2007) (discussing FBI agents who confessed that Pratt was framed); Terry, *supra* note 3, at 1 ("[Pratt] had also become a major concern of the bureau's counterintelligence program, a campaign of domestic spying, psychological warfare, and dirty tricks, known as Cointelpro.").

[8] *See* OLSEN, *supra* note 7, at 175, 180, 240, 315.

[9] *See* People v. Halaby, 430 N.Y.S.2d 717, 718 (App. Div. 1980).

[10] N.Y. COMP. CODES R. & REGS. tit. 7, § 251-3.1 (1995).

system from one that primarily punishes misbehavior[11] to one that also rewards positive behavior.

I. BACKGROUND

A. The Man

Geronimo Pratt was born on September 13, 1947 in Morgan City, Louisiana, about ninety miles west of New Orleans.[12] Pratt was his mother's eighth and youngest child, and spent his early years helping his father run scrap metal from the local dumps around Morgan City to New Orleans.[13] His father, Jack, was a well-respected, hard-working man, who instilled the same set of principles in his children.[14] His mother, Eunice, was spiritual and educated, and made sure that all of her children attended and excelled in school.[15] At seventeen, Pratt graduated from Morgan City Colored High where he had achieved a "B" average and was entertaining the idea of continuing his high school football career in college.[16] It was around the time of graduation that Pratt began speaking with a few of Morgan City's "elders," as they were known.[17] The elders were

> typically aged males, small business proprietors, drycleaners, barbers, corner store vendors, gas station owners, and the like. They convened unceremoniously in barbershops and in local homes playing card games. Despite the casual, unsophisticated, and rather accidental nature of their administration, the elders managed to dictate their desires for the direction of the community as a whole to whoever would oblige.[18]

This description of the elders is correct on the surface, but there was a deeper history to the system of elders; a history Pratt began to realize through his long conversations with them after school.[19] In fact, the system of elders goes back to the revolutionary days of Marcus Garvey and was initially created as

---

[11] *Id.*
[12] OLSEN, *supra* note 7, at 11, 16.
[13] *Id.* at 11; Bias, *supra* note 5, at 13.
[14] OLSEN, *supra* note 7, at 11–13.
[15] *Id.* at 15.
[16] *Id.* at 24.
[17] Bias, *supra* note 5, at 15.
[18] *Id.*
[19] OLSEN, *supra* note 7, at 25 ("They weren't just a bunch of old black dudes sitting around telling lies. They were our underground, our soul and backbone. Those who knew about 'em didn't say, and those who said didn't know. When the elders told you what to do, man, you did it!").

a defense against the Ku Klux Klan.[20] Instead of persuading Pratt to go to college, as some of his brothers and sisters had done, the elders encouraged Pratt to enter the military.[21] Basic training in self-defense and military tactics, the elders reasoned, would provide Pratt with skills they thought he could use to help the black community.[22] On the day of his high school graduation, Pratt heeded the elders' request and boarded a bus headed to the Army recruiting office in New Orleans.[23]

Pratt served almost three years in the Army, earning a number of accolades.[24] He completed paratrooper training in Georgia, received a Purple Heart and Silver Star during his two tours of duty in Vietnam, participated in more than sixty combat jumps, and was eventually honorably discharged in 1967.[25] When he returned to Morgan City after his military service concluded, Pratt again sought the elders' advice on what to do next.[26] The elders arranged a meeting between Pratt and Alprentice "Bunchy" Carter, the founder of the Southern California Chapter of the BPP for Self-Defense.[27]

Carter founded the Southern California chapter of the Panthers a year before Pratt arrived in Los Angeles.[28] It is commonly thought that there were three different sides to Carter's organization—the three sides were:

> political, military and 'underground.' The political tried to win the hearts and minds of the people; the military gathered a wide variety of weaponry and made fortifications for the 'revolution' and battle against the police and rival black organizations; and the underground consisted of criminal armed robberies against businesses and banks to 'liberate' money for personal and organizational use.[29]

Carter quickly realized that Pratt would be a perfect fit for the military arm of the Panther party, and the two became fast friends.[30] Pratt enrolled in a Black Studies program at the

---

[20] *Id.*
[21] *Id.* at 26–27.
[22] *Id.* at 26; Bias, *supra* note 5, at 16.
[23] OLSEN, *supra* note 7, at 27.
[24] Bias, *supra* note 5, at 16.
[25] *Id.*
[26] OLSEN, *supra* note 7, at 35.
[27] *Id.* at 35, 37 (the elders told Pratt that the Los Angeles Panthers needed help defending themselves against the police, so Pratt was sent to Los Angeles to see if he could put his military training to use).
[28] *Id.* at 38.
[29] *Id.*
[30] *Id.*

University of California at Los Angeles, a program in which Carter was also enrolled, and began teaching party members the basics of weaponry and fortification.[31] The elders' vision of Pratt's role in the black community was becoming reality. During his first four months in the BPP, Pratt was informed of party plans and introduced to high-ranking members.[32] By mid-December of 1968, Pratt's stock in the party was rising. He was tapped to fly to Oakland to attend Panther meetings on local racial problems and drug use within the party.[33] Pratt returned to Los Angeles a week later to find racial tensions in the city at an all-time high.[34] During Pratt's time in Oakland, Franco Diggs, a leader of a Panther underground cell (and Pratt's ride to the airport a week earlier), had been murdered.[35] Within one month of Diggs' murder, Carter and another high-ranking Panther were also killed.[36]

Carter's murder created a power vacuum within the party.[37] Two main contenders for his replacement emerged: Pratt and a man named Julius Carl Butler, a hairdresser by trade and, it would later be uncovered, a regular informant for both the Los Angeles Police Department (LAPD) and the FBI.[38] It turned out, however, that Carter had left a pre-recorded message which instructed that Pratt run the California chapter of the Panthers in case of Carter's death.[39] Soon after Pratt's promotion within the Panthers, Butler was cut off from the party.[40] Eventually, due in part to Butler's role in the beating of a young Panther, Pratt banned Butler from the party and Butler vowed that "Pratt would 'be sorry' for expelling him."[41]

After the issue with Butler, Pratt continued to use his military experience for the benefit of the Panthers.[42] He traveled around the country to teach Panthers how to protect themselves from police raids and how to fortify their compounds.[43] While traveling in the summer of 1970, Pratt found himself in Dallas awaiting a

---

[31] *Id.* at 40; Bias, *supra* note 5, at 17.
[32] Bias, *supra* note 5, at 18.
[33] OLSEN, *supra* note 7, at 42.
[34] *Id.*
[35] *Id.*
[36] Bias, *supra* note 5, at 18.
[37] *Id.* at 20–21.
[38] *Id.* at 20, 35.
[39] *Id.* at 19.
[40] *See In re* Pratt, 170 Cal. Rptr. 80, 101 (Ct. App. 1980).
[41] Bias, *supra* note 5, at 21.
[42] OLSEN, *supra* note 7, at 69.
[43] *Id.*

meeting with party leader Huey Newton that was set up by a fellow Panther, Melvin "Cotton" Smith.[44] The meeting, according to Smith, was arranged to quell internal bickering within the Panthers.[45] Newton, however, never showed.[46] In fact, Smith was an informant for the LAPD and the meeting with Newton was a ploy to arrest Pratt.[47] Soon after his arrest in Dallas, Pratt was transferred back to Los Angeles and appeared in Los Angeles Superior Court to face a litany of charges.[48] One of the charges was in connection with a murder that had occurred two years earlier, and the prosecution had a star witness who claimed Pratt had confessed.[49] The prosecution's witness was none other than Pratt's old rival, Julius Carl Butler.[50]

B. The Murder

A few minutes past eight o'clock on the evening of December 18, 1968, Kenneth Olsen, thirty-one years old and the head of the English department at Belmont High School, and his ex-wife Caroline, twenty-seven years old, drove to the Lincoln Park tennis courts in Santa Monica, California.[51] While they were legally divorced, the Olsens were considering reconciliation and looking forward to a doubles match with another couple.[52] As they were preparing for their match, Caroline walked over to the coin-operated light system to deposit some money.[53] Kenneth offered his assistance after Caroline initially had some trouble switching on the lights.[54] As he approached her, he noticed two gentlemen enter the tennis court area.[55] After depositing coins in the machine and watching the lights flicker on, Kenneth realized that the two men he saw enter the courts were walking towards him and his ex-wife.[56] They were carrying pistols.[57]

---

[44] *Id.* at 71.
[45] *Id.*
[46] *Id.*
[47] Bias, *supra* note 5, at 21.
[48] OLSEN, *supra* note 7, at 75.
[49] *Id.* at 76.
[50] *Id.*
[51] OLSEN, *supra* note 7, at 78; Bias, *supra* note 5, at 22; Terry, *supra* note 3, at 1; Posting of Edward J. Boyer, *supra* note 6.
[52] Bias, *supra* note 5, at 22.
[53] OLSEN, *supra* note 7, at 78.
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*

The robbers demanded that the couple hand over any money in their possession.[58] Kenneth relinquished his car keys and wallet, and Caroline motioned to her purse on the nearby bench.[59] Netting a total of eighteen dollars, the robbers then directed the couple to "lay down and pray."[60] Hearing the robbers walk away and thinking the ordeal was over, Kenneth decided to look up just as the two men whirled around and opened fire on the defenseless couple.[61] Kenneth sustained multiple injuries in the gunfire including a broken thumb and wounds to his arms, stomach, and forehead.[62] His ex-wife was in far worse condition, as she was struck twice in the chest.[63] Kenneth eventually recovered from his injuries and survived the attack, but his ex-wife succumbed to complications soon after the incident.[64]

Two years later, in December 1970, after Pratt was transferred from Dallas to Los Angeles, he was secretly indicted on murder charges related to the shooting.[65] On the night the events of the murder unfolded, however, he was over 300 miles away attending the Panther meeting in Oakland on racial problems and drug use.[66]

After a lengthy trial, Pratt was eventually wrongfully convicted of the tennis court crimes and sentenced to life in prison.[67] His conviction was primarily based on the jury's belief that Pratt had confessed to Butler.[68] What the jury did not learn at the time of trial, however, was that Butler acted as an informant for the Los Angeles County District Attorney's Office (LADA), the LAPD, and the FBI.[69] Had they known of Butler's involvement with law enforcement, the jurors never would have convicted Pratt.[70]

Knowing that the law enforcement agencies had committed

---

[58] *Id.*

[59] *Id.*

[60] *Id.*; *In re* Pratt, 170 Cal. Rptr. 80, 83 (Ct. App. 1980); Bias, *supra* note 5, at 22.

[61] OLSEN, *supra* note 7, at 78; Posting of Edward J. Boyer, *supra* note 6.

[62] OLSEN, *supra* note 7, at 79.

[63] *Id.*

[64] Bias, *supra* note 5, at 22; Terry, *supra* note 3, at 1.

[65] OLSEN, *supra* note 7, at 76–77.

[66] OLSEN, *supra* note 7, at 75; Bias, *supra* note 5, at 22; Posting of Edward J. Boyer, *supra* note 6.

[67] Bias, *supra* note 5, at 34–35; *see In re* Pratt, 170 Cal. Rptr. 80, 82 (Ct. App. 1980) (discussing Pratt's conviction in 1972).

[68] Posting of Edward J. Boyer, *supra* note 6; *see In re* Pratt (*In re Pratt II*), 82 Cal. Rptr. 2d 260, 265 (Ct. App. 1999).

[69] Bias, *supra* note 5, at 35.

[70] Posting of Edward J. Boyer, *supra* note 6 (providing statements by three jurors in the case).

various transgressions during the trial, Pratt's lawyers (including a young Johnnie Cochran) filed an appeal after his conviction and sentence.[71] The lawyers were prepared to fight vigorously for Pratt's freedom during the appeals process. What Pratt's lawyers were not prepared for, however, was the extent to which his inmate record would define his time in the California prison system.[72]

C. Pratt's Inmate Record

In November 1972, upon Pratt's conviction and life sentence for the tennis court crimes, he was transported to San Quentin State Prison.[73] He was immediately placed in a cell named the Adjustment Center, more commonly known as the "hole," or "solitary confinement."[74] Usually reserved for "[u]nruly, dangerous or otherwise disruptive individuals . . . to isolate them from the prison population for their asocial behavior," the hole was used as a kind of last-resort punishment for prisoners who violated inmate codes of conduct.[75] Pratt, however, was placed in the hole on his very first day in prison. He would remain in the hole's four-by-eight-foot cell for the first eight years of his sentence.[76]

Pratt's lawyers soon learned that the reason behind his placement in the hole was the existence of false information in his inmate record.[77] The District Attorney responsible for prosecuting Pratt had included false statements in Pratt's record which indicated that he was "a vicious killer [and that he] must never be released."[78] Additionally, the District Attorney

> painstakingly placed inaccurate updates in the Pratt file. The [District Attorney] stated that Pratt was violence prone, to be feared, capable of escape attempts, vindictive, and [a] threat to those who placed him behind bars. He emphasized repeatedly that he should never be paroled. The file was stocked with baseless accusations of crimes and attempted crimes including the stabbing of a prison guard, the hijacking of a plane and a thwarted attack

---

[71] *In re Pratt*, 170 Cal. Rptr. at 82; Bias, *supra* note 5, at 35–36.
[72] Bias, *supra* note 5, at 36.
[73] OLSEN, *supra* note 7, at 177.
[74] *Id.*
[75] Bias, *supra* note 5, at 36.
[76] *Id.* at 37–38; *see* Internationalist Group, *Geronimo is Out! Now Free Mumia!*, INTERNATIONALIST, June 16, 1997, http://www.internationalist.org/geronimo.html.
[77] Bias, *supra* note 5, at 37–38.
[78] OLSEN, *supra* note 7, at 175.

> on a school bus containing the children of prison employees . . . his bulky file contained line after line labeling him as a trained assassin, a high escape risk, and a danger to other inmates. This was the justification for keeping him in the hole.[79]

Even after Pratt's lawyers won the civil suit and got him out of the hole and back to the general population after eight years in solitary confinement,[80] the false allegations in his record continued to haunt him for years to come. For example, eleven years after the civil suit in the spring of 1989, Pratt was transferred to San Juan, Puerto Rico to testify at a trial for a member of Los Macheteros, a Puerto Rican political group.[81] While en route to the trial, Pratt was "padlocked to a 'black box,' a block of steel that kept his handcuffed wrists apart."[82] As it was a highly unusual procedure reserved only for the most dangerous of prisoners,[83] Pratt asked the guards why he was being black-boxed.[84] He later discovered that "the California Department of Corrections had transmitted a copy of his prison record showing three escapes, the attempted murder of two guards, a cop killing in Los Angeles, a failed attempt to hijack a school bus and a poison dart plot."[85]

Not one of the allegations in the record was true. The inaccurate information in Pratt's record and his subsequent unjustified treatment within prison, were sometimes the result of intentional attacks, like those from the LADA, and were sometimes the result of reports that were only half true. For example, while Pratt was serving time in San Quentin early on in his sentence, a fight broke out between a few inmates and a guard.[86] During the ensuing scuffle, Pratt made it look like he was involved in the attack against the guard, but he actually protected the guard from a possibly life-threatening blow.[87] Pratt's "attack" on the guard was reported, placed in his permanent record, and served as a mark against him.[88] The record was not rectified with the truth until the civil trial was

---

[79] Bias, *supra* note 5, at 38.
[80] OLSEN, *supra* note 7, at 245, 247; Bias, *supra* note 5, at 38.
[81] OLSEN, *supra* note 7, at 313.
[82] *Id.* at 315.
[83] *Id.* ("Pratt had seen only one other black-boxed prisoner, an inmate from the super-maximum security facility at Marion, Illinois, who was being transferred for inciting a riot.").
[84] *Id.*
[85] *Id.*
[86] *Id.* at 2–3.
[87] *Id.* at 3.
[88] *Id.* at 5–6, 240–41.

well underway.[89] The guard later admitted that he was afraid to tell anyone about Pratt's heroics during the fight out of fear that other inmates would retaliate against Pratt.[90] He further admitted that, in his opinion, Pratt was "neither a threat to staff, the security of the institution, nor an unusual escape risk."[91]

Pratt's inmate record played an important role in how he was treated in prison and, to the prison officials, justified his time in the hole.[92] If the record was kept accurately and Pratt's actual behavior during the fight was recorded, an injustice (albeit a minor one when compared to the fact that Pratt was in prison at all) could have been avoided. In order to avoid this kind of injustice in the future, it is necessary to take a closer look at inmate record-keeping and what kind of information is included in the records. After analyzing the system of inmate record-keeping in New York State, it will be shown that a change is necessary to avoid a situation like Pratt's from arising in New York.

II. INMATE RECORDS IN NEW YORK STATE

This section of the paper will focus on three aspects of the inmate record: (1) what the inmate record is, and what is included in it; (2) who has access to the inmate record and what the procedure is for gaining access to it; and (3) how to change perceived inaccuracies within the inmate record. This section is offered as a tool for both prisoners and practitioners seeking to change inaccuracies within a record and to highlight a concern in the area of inmate record-keeping, i.e., the high level of discretion conferred upon government agencies to include data they deem relevant in a presentence report. This section will conclude by advocating for proposed changes to the presentence report procedure, which will allow the court to fulfill one of the stated goals of the presentence report, namely, to get a better, fuller picture of the defendant's background before sentencing.[93]

A. Elements of an Inmate Record in New York State

The NYCRR defines an inmate record as "a department record

---

[89] *Id.* at 240–41.
[90] *Id.* at 241.
[91] *Id.*
[92] *See id.* at 240.
[93] *See* People v. Halaby, 430 N.Y.S.2d 717, 718 (App. Div. 1980).

that pertains to an individual inmate."[94] There are six enumerated items that comprise the inmate record, although the record is not limited to these items.[95] The items in the record include the commitment, the New York State Division of Criminal Justice Services (DCJS) report, the presentence report, the receiving blotter, personal history data, and criminal history information.[96] The DCJS report is simply a summary of the defendant's case history.[97] The presentence report, on the other hand, includes almost anything that the investigating agency deems relevant to sentencing.[98] This includes:

> circumstances attending the commission of the offense, the defendant's history of delinquency or criminality, and the defendant's social history, employment history, family situation, economic status, education, and personal habits. *Such investigation may also include any other matter which the agency conducting the investigation deems relevant to the question of sentence*, and must include any matter the court directs to be included.[99]

Also included in the presentence report are physical and mental examinations of the defendant,[100] as well as a victim impact statement, which incorporates the victim's version of the events, the extent of the victim's injury (both physical and economic), and any thoughts the victim may have on the defendant's punishment.[101] Statements made by the defendant do not need to be included in a presentence report.[102] Interestingly, offenses for which a defendant has not been convicted may be included in a presentence report as well.[103]

---

[94] N.Y. COMP. CODES R. & REGS. tit. 7, § 5.5(g) (2005).

[95] *Id.*

[96] *Id.*

[97] *Id.* § 5.5(b).

[98] N.Y. CRIM. PROC. LAW § 390.30(1) (McKinney 2005 & Supp. 2010); *id.* practice cmt. (practice commentary by Peter Preiser) ("The primary responsibility for deciding what information should be in the report lies with the probation officials who prepare it. But, mindful of the fact that the purpose of the report is to inform the court on matters relevant to determining the sentence to be imposed, the statute makes it clear that the investigation and report must include any matter the court directs to be included.").

[99] N.Y. CRIM. PROC. LAW § 390.30(1) (emphasis added).

[100] *Id.* § 390.30(2).

[101] *Id.* § 390.30(3)(b).

[102] People v. Davila, 655 N.Y.S.2d 698, 699 (App. Div. 1997) ("[T]here is no statutory requirement that a statement by the defendant be included in the presentence report.").

[103] People v. Whalen, 472 N.Y.S.2d 784, 787 (App. Div. 1984) ("A presentence report may include any relevant information on the history of the defendant and may include history not only of prior offenses for which defendant has been

Personal history data in the inmate record includes basic facts such as the "inmate['s] name, age, birthdate, birthplace, city of previous residence, physical description, occupation, correctional facilities in which the inmate has been incarcerated, commitment information and departmental actions regarding confinement and release."[104]

Correctional supervision history data in the inmate record includes any "information collected by criminal justice agencies on individuals consisting of identifiable descriptions and notations of arrests, detentions, indictments, informations, or other formal criminal charges, and any disposition arising therefrom."[105]

B. Inmate Record Access and Procedure

In order for a current inmate to gain access to his or her record, a request to review and copy the record must be made by the inmate to the facility superintendent or his designee.[106] A former inmate must either mail, or personally deliver, a written request to the record access officer in Albany.[107] Either type of request must describe in detail the record sought.[108] If an attorney of an inmate is seeking access to the inmate record, the attorney generally must follow the same procedure as an inmate, and must either have client consent or show good cause to access the record.[109]

An inmate's examination of his or her record is governed in part by the access and review regulations of the Law Enforcement Assistance Administration.[110] Under these guidelines, anyone seeking review of his or her criminal history record can, after verification of his or her identity, gain access to his or her record.[111] These regulations also provide for administrative review of information that the inmate believes is inaccurate.[112]

---

convicted, but even offenses for which he has not been convicted." (citation omitted)); *see* People v. Wright, 429 N.Y.S.2d 993, 1000 (Sup. Ct. 1980) ("Nor is the court limited to consideration of material contained in the probation report. A court may also take its own observations into account.").

[104] N.Y. COMP. CODES R. & REGS. tit. 7, § 5.5(i) (2005).

[105] 28 C.F.R. § 20.3(d) (2010).

[106] N.Y. COMP. CODES R. & REGS. tit. 7, § 5.20(a).

[107] *Id.*; *see id.* § 5.11.

[108] *Id.* § 5.11.

[109] *Id.* § 5.20(b).

[110] *Id.* § 5.20(a); 28 C.F.R. § 20.21(g).

[111] 28 C.F.R. § 20.21(g)(1).

[112] *Id.* § 20.21(g)(2).

Even with these guidelines regarding inmate record review, an inmate's access to his or her record is limited to only that portion which deals with his or her criminal history.[113] Other portions of the inmate record are released at the sole discretion of the State Commissioner of Correctional Services.[114] Furthermore, an inmate is specifically denied access to that portion of the record which deals with mental disability, any portion of the record that is evaluative in nature, or any information which could endanger the life or safety of any person.[115]

After a written request is made to the records officer, the officer can do one of three things: (1) inform the requestor that the record is not in his custody;[116] (2) produce the record at his office and make copies upon the payment of a fee;[117] or (3) deny access to the record.[118] Denial of access to the whole or a portion of the record must be based on specific grounds.[119] Grounds for denial include, but are not limited to, records that: "are compiled for law enforcement purposes;"[120] records that "if disclosed could endanger the life or safety of any person;"[121] or records that "are examination questions or answers which are requested prior to the final administration of such questions."[122] The guidelines for access, therefore, instill a considerable amount of discretion on the agency keeping the records to decide whether or not to release them, as the grounds for denial are broad.

C. Changing Inaccuracies

Pursuant to 7 NYCRR § 5.50, "[i]f the completeness or accuracy of any item of information contained in the *personal history* or *correctional supervision history* portion of an inmate's record is disputed by the inmate," the inmate may review a copy of any records that contain the alleged inaccurate information and bring the dispute up with the custodian of the record.[123] The Appellate

---

[113] *Id.* § 20.21(g).
[114] N.Y. COMP. CODES R. & REGS. tit. 7, § 5.25.
[115] *Id.* § 6.1(f); N.Y. PUB. OFF. LAW §§ 95(6)–(7), 96(2)(c) (McKinney 2008 & Supp. 2010).
[116] N.Y. COMP. CODES R. & REGS. tit. 7, § 5.35(c).
[117] *Id.* §§ 5.35(d)(1), 5.36 ("The fee for photocopies of a department record . . . shall be 25 cents per page.").
[118] *Id.* § 5.35(d)(5).
[119] *Id.*; N.Y. PUB. OFF. LAW § 87(2).
[120] N.Y. PUB. OFF. LAW § 87(2)(e).
[121] *Id.* § 87(2)(f).
[122] *Id.* § 87(2)(h).
[123] N.Y. COMP. CODES R. & REGS. tit. 7, § 5.50 (emphasis added).

Division, Second Department has held that the documents available for inmate review with respect to an accuracy challenge are strictly limited to only the information included in the definitions of "personal history" and "correctional supervision history" within the NYCRR.[124] For example, in *Rowland D. v. Scully*, an inmate being transferred sought disclosure of records that were prepared to help prison officials determine in which facility to place the inmate.[125] The court held that, under 7 NYCRR § 5.50, the prisoner could not review these records because they did not contain information regarding either the inmate's personal or correctional supervision history.[126] Rather, the court held that because they contained "predecisional evaluations, recommendations and conclusions concerning the petitioner's conduct in prison" the records were not available to the inmate for review.[127] The *Rowland D.* court limited an inmate's review of his or her record to only the following information:

> records constituting disciplinary charges and dispositions, good behavior allowance reports, warrants and cancellations of warrants, legal papers, court orders, transportation orders, records of institutional transfers and changes in program assignments, reports of injury to inmates and records relating to inmate property including the personal property lists and postage account card,[128]

and

> records consisting of inmate name, age, birthdate, birthplace, city of previous residence, physical description, occupation, correctional facilities in which the inmate has been incarcerated, commitment information and departmental actions regarding confinement and release.[129]

---

[124] *See* Rowland D. v. Scully, 543 N.Y.S.2d 497, 498 (App. Div. 1989) ("We construe [N.Y. COMP. CODES R. & REGS. tit. 7, § 5.50] as permitting a challenge to the accuracy of only two types of records, namely, records relating to the inmate's 'correctional supervision history' or his 'personal history' . . . .").

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] *Id.* (limiting inmate review to, inter alia, correctional supervision history as defined in N.Y. COMP. CODES R. & REGS. tit. 7, § 5.5(a)). Note that the good behavior allowance reports mentioned by the court allow officials to review the attitude, capacity, and efforts of the prisoner while incarcerated. They are not mandatory (as the proposed section to the NYCRR in this paper advocates) and the reports do not specify what kind of behavior should be rewarded (as the proposed section in this paper outlines). *See* N.Y. COMP. CODES R. & REGS. tit. 7, § 260.3 (1999).

[129] *Rowland D.*, 543 N.Y.S.2d at 498.

The information available to inmates for review was further limited in *Eastman v. Malone*.[130] In *Eastman*, an inmate sought review of information in his record that had resulted in his being placed in administrative confinement.[131] The *Eastman* court held that because the information sought was "contained in program security and assessment summary forms," the inmate had no right to review the information per the court's ruling in *Rowland D.*[132] The *Eastman* court also held that an inmate has no right to a hearing "to determine what information should go into his file."[133]

The finding in *Eastman* is especially troubling because the information the inmate sought for review was "information implicating him in an assault on another inmate."[134] This type of information seems to fall directly within the correctional supervision history portion of an inmate record as a "record[] constituting disciplinary charges."[135]

In light of *Rowland D.* and *Eastman*, it seems that courts are more concerned with how the information is classified within the inmate record, rather than the information itself. As long as the information is couched in terms of an "evaluation," "recommendation," or "conclusion" concerning the inmate's behavior (such as a recommendation that the inmate be placed in administrative confinement for assault[136]), the inmate cannot review the record to challenge the accuracy of the information.

Moreover, information contained in the criminal history portion of the record, as a result of the inclusion of the presentence report in the record, will most likely not be expunged for inaccuracy as long as there is a rational basis for the inclusion of the information, and as long as the information included is not "based solely on a recital of allegations in the presentence investigation report."[137] This means that, in essence, if there is a

---

130 588 N.Y.S.2d 209 (App. Div. 1992).
131 *Id.* at 209.
132 *Id.* at 210.
133 *Id.*
134 *Id.*
135 N.Y. COMP. CODES R. & REGS. tit. 7, § 5.5(a) (2005).
136 *See Eastman*, 588 N.Y.S.2d at 209–10.
137 Loliscio v. Goord, 817 N.Y.S.2d 776, 777 (App. Div. 2006) ("[T]he Commissioner's determination that petitioner's criminal conduct involved a sexual element was not based solely on a recital of allegations in the presentence investigation report for which petitioner was not convicted, but was instead based upon admissions made during petitioner's criminal trial. Under these circumstances, we find a rational basis for the inclusion of a reference to a sex crime characteristic in petitioner's institutional records.").

rational basis for the information and if it is not merely an allegation, it will be very difficult to get the information expunged from the record.

D. Proposed Changes to Presentence Reports

As described above, presentence reports may include anything the investigating agency decides is important enough to put in the report, i.e., anything that can be justified on a rational basis.[138] The way the statute is written gives a large amount of discretion to law enforcement agencies to add information to a defendant's inmate record. The agencies may use this discretion to add false or inflammatory information to the record in order to obtain a longer sentence. The problem with the amount of discretion conferred upon investigating agencies is exemplified in *People v. Redman*.[139] In *Redman*, the defendant received an indeterminate term of three to nine years, out of a maximum of eight and one-third to twenty-five years, for selling a controlled substance.[140] The defendant challenged his sentence on grounds that the court had relied upon tenuous information that insinuated he had sold drugs in the past.[141] The information the defendant was challenging was an "*ex parte* communication from the brother of the informant [stating] that defendant had sold LSD to him on a prior occasion."[142] The court held the sentence valid because it was within the allowable time frame for the offense, and because the defendant could not prove that the court relied on the information when imposing the sentence.[143] The court stated that there was no abuse of discretion in imposing the sentence, even though a co-defendant had received a lesser sentence.[144]

The problem with the amount of discretion given to court officials in determining what to include in a presentence report is fourfold. First, the information in the report can be unsubstantiated, as it was in *Redman*. Second, it will be nearly impossible for the sentencing court to ignore the information, especially when it includes details or information on crimes which

---

[138] *See id.*; *see also* N.Y. CRIM. PROC. LAW § 390.30(1) (McKinney 2005 & Supp. 2010) (codifying the scope of presentence reports).
[139] 539 N.Y.S.2d 203 (App. Div. 1989).
[140] *Id.* at 204.
[141] *Id.* at 203.
[142] *Id.*
[143] *Id.* at 204.
[144] *Id.* at 203–04.

are close in nature to the alleged offense. Third, as was the case for the defendant in *Redman*, it will be extremely difficult for a defendant to prove that the sentencing court relied on the challenged information. This is especially true when the sentence imposed is perhaps only a year or two more than the defendant would have received in the absence of the information, but the sentence is still within the time frame allowed by the sentencing guidelines. This example brings to light the fourth problem with this kind of discretion; it is nearly impossible for a defendant in this situation to show that the sentence imposed was excessive or overly harsh, which is another potential ground for reversing the sentence imposed.[145]

There are two possible solutions to this discretion problem: (1) limit the type of information the investigating agency may include in a presentence report; or (2) allow the defendant to supplement the presentence report. For example, as it stands now, the investigating agency can include any information that it "deems relevant to the question of [the] sentence."[146] To control this seemingly limitless opportunity for investigating agencies to pad the inmate record against the defendant at sentencing, the standard should not be *any information* that the investigating agency deems relevant because, as was the case for Pratt, investigating agencies will take advantage of this discretionary power. Instead, a better standard would be one that limits information in the presentence report only to that which is *directly relevant* to questions relating to the crime or the length of the sentence. Therefore, the first portion of the last sentence of section 390.30(1) of the New York Criminal Procedure Law would change from, "[s]uch investigation may also include *any other matter* which the agency conducting the investigation deems relevant to the question of [the] sentence" to,[147] "[s]uch investigation may also include *only those matters* which the agency conducting the investigation *deems directly, substantially relevant to the nature of the crime committed or* to the question of the *length of the* sentence." These changes will have the effect of limiting extraneous, and possibly false, information that investigating agencies may try to add to a defendant's record.

---

[145] *See* People v. Whalen, 472 N.Y.S.2d 784, 787 (App. Div. 1984) ("As a final issue, defendant contends that the sentence imposed was excessive and overly harsh. This court will not reduce a sentence unless there is a clear abuse of discretion in the imposition of a sentence." (citation omitted)).

[146] N.Y. CRIM. PROC. LAW § 390.30(1) (McKinney 2005 & Supp. 2010).

[147] *Id.* (emphasis added).

The District Attorney in the Pratt case, for instance, included in Pratt's record a statement that Pratt was capable of escaping from prison.[148] While his capability to escape from prison may have been a matter that the prosecutor deemed relevant to the question of Pratt's sentence (so it would be included in the record under the current New York statute), it was certainly not a matter that was directly, substantially relevant to the question of the nature of the crime or the length of the sentence (and therefore, it would be excluded under the proposed statute).

The second possible solution to the discretion problem is to allow the defendant to add a section to the presentence report, which would include potential mitigating factors that may help the sentencing court determine a more suitable sentence. The proposed change to the statute would come after the last sentence of the first paragraph of section 390.30 and would read, "[t]he defendant may add to the presentence report only those matters which the defendant deems directly, substantially relevant to the nature of the crime committed or to the question of the length of the sentence." This change would allow the presentence report, and therefore the inmate record, to have both aggravating and mitigating effects on the defendant's sentence. This change is directly in line with the stated goal of the presentence report, i.e., to bring before the court "the fullest possible information on a defendant's background before sentence is imposed for a serious crime."[149]

III. PROPOSED ADDITION TO TITLE 7 OF THE COMPILATION OF CODES, RULES AND REGULATIONS OF THE STATE OF NEW YORK

The final section of this paper addresses the problem of reporting inmate good behavior. Specifically, this section addresses the problem in the Pratt case that came about when he saved a guard's life in prison.[150] Pratt's heroic actions were never formally reported and included in his inmate record.[151] Currently, if the same "inmate saving guard" scenario took place in a New York State prison, there is no statutory requirement that directs the guard to include a report of the good behavior in the inmate's record. Rather, the record-keeping system with respect to inmate behavior is primarily geared toward punishing bad behavior, as

---

[148] OLSEN, *supra* note 7, at 181.
[149] People v. Halaby, 430 N.Y.S.2d 717, 718 (App. Div. 1980).
[150] OLSEN, *supra* note 7, at 241.
[151] *Id.*

opposed to rewarding good behavior.[152] With no requirement that good behavior be mandatorily reported, a situation like Pratt's, where an inmate performs a heroic deed, could have no effect on his potential placement in solitary confinement or a later parole hearing, for example. This is simply unacceptable. The following proposed section to the NYCRR is a first step toward rewarding the protection of life, security, and property in the prison system through positive inmate behavior. The proposed change ensures that if another inmate in Pratt's situation saves someone's life while in prison, the behavior can be used as a mitigating factor in a parole hearing, or in determining whether the inmate deserves to be in solitary confinement. This goal would be achieved by using the proposed good behavior section in the same way the current misbehavior section is used against inmates in parole hearings, except the proposed section would benefit inmates.

The section proposed below in effect mirrors the NYCRR misbehavior report and standards of inmate behavior but allows them to be used in a positive way.[153] In essence, the proposed section uses the misbehavior and inmate standards sections as a guide to promote good behavior. Note that the good behavior allowance reports currently in place allow prison officials to review the attitude, capacity, and efforts of the prisoner while incarcerated.[154] However, they are not mandatory, nor do they specify what kind of behavior should be rewarded.[155] The proposed section 260.5 to Title 7 of the NYCRR appears below.

§ 260.5. Good behavior reporting.

(a)For the purposes of this section, "inmate good behavior" shall include—

(1) saving or attempting to save the life of any person;

(2) breaking up or attempting to break up a fight or assault on any person;

(3) stopping or attempting to stop a sexual assault on any person;

(4) stopping or attempting to stop a riot;

(5) stopping or attempting to stop an escape;

(6) stopping or attempting to stop the introduction of narcotics, narcotics paraphernalia, controlled substances, or weapons into the facility;

(7) stopping or attempting to stop the smuggling of any

---

[152] *See* N.Y. COMP. CODES R. & REGS. tit. 7, § 251-3.1(a) (1995).
[153] *Id.* §§ 251-3.1, 270.2 (2009).
[154] *See id.* § 260.3 (1999).
[155] *Id.* §§ 260.2, 260.3.

item in or out of the facility or from one area to another;

(8) stopping or attempting to stop the destruction, damage, or waste of state property;

(9) stopping or attempting to stop the detonation of an explosive device; or

(10) stopping or attempting to stop the start of a fire.

(b)For the purposes of this section, an "attempt to stop" means a good faith effort on the part of the inmate to prevent, impede, or otherwise hinder the misbehavior from occurring. This generally includes physically interrupting the misbehavior or alerting prison staff to the misbehavior.

(c)Every incident of inmate good behavior involving a protection or defense of life, security, or property must be reported, in writing as soon as practicable.

(d)The good behavior report shall be made by the employee who has observed the incident or who has ascertained the facts of the incident. Where more than a single employee has personal knowledge of the facts, each employee shall make a separate report or, where appropriate, each employee shall endorse his/her name on a report made by one of the employees with personal knowledge.

(e)The good behavior report shall include the following:

(1) a written specification of the particulars of the alleged incident of good behavior involved;

(2) the date, time and place of the incident;

(3) when more than one inmate was involved in an incident, the report should, to the extent practicable under the given circumstances, indicate the specific role played by each inmate. Where two or more incidents are involved, all of them may be incorporated into a single good behavior report; however, each incident must be separately stated.

(f)Employees of the Division of Parole and the Office of Mental Health may report good behavior to the same extent as department employees.

(g)To protect an inmate's safety whose good behavior has been reported, a good behavior report or testimony of an inmate's good behavior must be kept confidential with respect to disciplinary, violation, or superintendent hearings for other inmates that may result from the incident.

(h)When it is thought a good-behaving inmate's safety may be in jeopardy due to the incident of good behavior, a transfer to another prison of the same security level is mandatory unless the inmate requests to stay in his or her current facility.

Pratt's actions were never formally recorded by the guard he saved out of a fear that other inmates would retaliate against Pratt.[156] The proposed section attempts to eliminate that fear by mandating a transfer of the inmate to another prison if, after the incident, the inmate's safety is in jeopardy. While this solution does not guarantee that an inmate's reputation will not follow him or her to another facility, it is a far better alternative than requiring the inmate to face his or her fellow prisoners in the facility where the incident occurred.

CONCLUSION

Without the proposed changes for which this paper advocates, today, a prisoner in Pratt's situation could face the same unjustified time in solitary confinement in New York State prisons. Currently, in the New York State prison system there is a substantial amount of discretion, perhaps too much, in the hands of the investigating agencies to add information to the inmate record; discretion that the agencies can use to add false or inflammatory information to the records. Allowing a defendant to supplement his or her presentence report is a first step in achieving some balance and fairness with respect to what is included in an inmate record. If the judiciary truly wants to understand each defendant's relevant background before sentencing, the addition of relevant mitigating information would permit the bench a broader, and perhaps more accurate, view of the defendant.

Furthermore, the proposed change to Title 7 of the NYCRR would help to avoid future situations like Pratt's, where an inmate was not recognized for his heroic behavior. The proposed good behavior section allows inmates to be recognized for positive behavior, as opposed to the current system that only punishes inmates for their transgressions. While it is not a guarantee that these changes would have saved Pratt from his deplorable existence inside the prison system, the changes represent a way to achieve fairness for prisoners with respect to their inmate records.

---

[156] OLSEN, *supra* note 7, at 241.