On March 31, 2021, the HALT Solitary Confinement bill—a bill that largely outlaws the use of solitary confinement in New York State prisons—became law. The new law limits solitary confinement, now termed segregated confinement, to 15 days for people found guilty of particularly serious rule violations and 3 days for people found guilty of other rule violations. When the law goes into effect on March 31, 2022, only people charged with particularly serious rule violations, see below, may be placed in segregated confinement before they have been found guilty at a hearing, and even as to these individuals, certain additional criteria must be met.

While in segregated confinement, individuals will have four hours per day out of cell time for programming, including at least one hour of rec. After 15 days in segregated confinement, individuals who have disciplinary dispositions requiring over 15 days of confinement in other than general population will be transferred to a Residential Rehabilitation Unit (RRU) where they will be permitted 7 hours out of cell each day, 6 of which will be spent attending rehabilitative programming that can lead to the reduction in disciplinary confinement time and the restoration of recommended loss of good time.

The HALT Bill was first proposed in 2013. The bill seemed like it would pass in 2019, but it died in committee. In 2021, Jefferion Aubry, Assembly Speaker Pro Tempore and Senator Julia Salazar, Chairperson of the Crime Victims, Crime and Correction Committee, successfully renewed the efforts to get the bill passed in the New York State Legislature and on March 31, the bill was signed into law.

Continued on Page 6 …
Perhaps you thought that you would never see the day, but as you may already know, the HALT bill (S2836, A2277) has been signed into law! The HALT bill will dramatically reform the use of solitary confinement in New York State. It was signed into law right before midnight on March 31st.

The passage of this bill is a culmination of four decades of advocacy, litigation and public education. Efforts to eliminate solitary confinement in New York through legislation began in the fall of 2012, when a group of advocates from across NYS, including PLS, formed the Campaign for Alternatives to Isolated Confinement (CAIC) and drafted what has come to be known as the Humane Alternatives to Isolated Confinement (HALT) bill. CAIC, HaltSolitary, RAPP, VOCAL-NY, and numerous other prisoners’ and human rights advocacy groups, worked tirelessly for the next 8 years to keep the bill and the issue in the forefront of the public eye.

In the Legislature, Jeffrion Aubry, Assembly Speaker Pro Tempore, sponsored the bill in the Assembly and Senator Julia Salazar, Chair of Crime, Crime Victims and Corrections, sponsored the bill in the Senate. On March 16, Assemblyman Aubry persuasively argued for passage of the bill, referencing the first U.S. Supreme Court decision, *In re Medley*, 134 U.S. 160 (1890) to mention the use of solitary confinement. In addressing this issue over 130 years ago, the Court wrote that solitary confinement physically and mentally debilitates those individuals who are forced to live under such conditions.

On March 18, as Senator Salazar championed the bill through the Senate, she thanked the Senate leadership who pushed the bill forward before she assumed the chairpersonship of the Senate, Crime Victims, Crime and Corrections Committee. Asked to comment after the HALT’s passage in the Senate, Senator Salazar stated:

“It is no secret that the use of solitary confinement is inhumane, unethical, and constitutes torture under international law if it extends more than fifteen days. It must be discontinued immediately. The passage of HALT in the Senate brings us one step closer to bringing justice to all those who have lost loved ones to the wrongful use of solitary, and the New Yorkers who have been victims of this state-sanctioned torture. This monumental achievement wouldn’t be possible without the efforts led by survivors of solitary and their family members, and I am thankful for their tireless advocacy. As the lead sponsor of this bill I am grateful for the support of the leadership in bringing this bill to the floor, as we seek to create more humane and effective alternatives to harmful incarceration across our state.”
The HALT bill limits the imposition of solitary to no more than 15 days in any 30-day period and no more than 20 days in any 60-day period. While there are several exceptions to the 15-day limit on segregated confinement, there are also limits on when those exceptions can be activated.

The bill also limits the type of behavior that can result in someone being placed in solitary and categorically prohibits the placement of people 21 and under, 55 and over, pregnant or 8-weeks post-partum and people with disabling conditions in solitary.

Solitary itself is also reformed in that the bill requires that all people in solitary be allowed four hours out of cell time (currently it is 2 hours for most.)

At the end of the 15/20-day period, people will be transferred from solitary to a Residential Rehabilitation Unit (RRU) where they will be held until the expiration of their disciplinary sentence, with the caveat that no one will be held in an RRU for more than one year, unless DOCCS can demonstrate exceptional circumstances for doing so.

The passage of the HALT bill is monumental. It has taken nine years to get HALT passed, but the fight against solitary began long before that. I thought the Pro Se readership would be interested in the chronology of the advocacy and litigation that lead to this seminal moment.

Forty years ago, in 1980, PLS filed the case of Eng v. Coughlin, 858 F.2d 889 (2d Cir. 1988) – later known as Eng v. Goord – in the federal district court in the Western District of New York. This was the first case to challenge the placement of mentally ill individuals in solitary confinement. That case laid the groundwork for literally dozens more, each slowly peeling away at the solitary confinement onion.

While it is impossible to list the hundreds of cases involving solitary confinement that PLS handled between 1980 and 2021, below are some of the highlights.

• In Matter of Batthany v. Scully, 139 Misc.2d 605 (Sup. Ct. Dutchess Co. 1988), PLS succeeded in obtaining a court order holding that mental illness is evidence of mitigating circumstances and is therefore relevant in a prison disciplinary proceeding.

• The Batthany holding was made applicable to all prisons in New York State in 1990, when PLS brought Matter of Huggins v. Coughlin, 76 N.Y.2d 904 (1990), where the Court of Appeals held that “... in the context of a prison disciplinary proceeding in which the prisoner’s mental state is at issue, a Hearing Officer is required to consider evidence regarding the prisoner’s mental condition.”

• In 2003, PLS, together with the Prisoners’ Rights Project of The Legal Aid Society (PRP), settled the case of Anderson v. Goord, N.D.N.Y. 87-CV-141 (McCurn, J) in which the court addressed the issue of the role that an individual’s mental condition should have in a prison
disciplinary hearing. In the settlement, DOCCS agreed to amend its regulations governing when and how a hearing officer must consider a prisoner’s mental health at a disciplinary hearing.

- In 2008, PLS, together with the PRP, Disabilities Advocates, Inc. (DAI) and the law firm of Davis Polk, settled *Disability Advocates, Inc. v. New York State Office of Mental Health*, S.D.N.Y. 02-CV-4002 (Lynch, J.). The lawsuit alleged that incarcerated individuals suffering from mental illness were being denied adequate mental health care, harshly punished for the symptoms of their mental illnesses and frequently confined under conditions amounting to cruel and unusual punishment. As a result, the suit charged, the mental health of mentally ill individuals routinely deteriorates, sometimes to the point that the individual engages in self-mutilation or suicide. The private settlement agreement included, *inter alia*, using diagnostic criteria to define serious mental illness (SMI), adding hundreds of treatment beds for the diversion of SMI prisoners from isolated confinement, offering the possibility of time cuts to SMI prisoners in long-term SHU or keeplock, and placing limits on the types of misconduct for which SMI prisoners may be punished.

- Throughout 2011 and 2012, PLS worked with the New York Civil Liberties Union (NYCLU) on their investigation into solitary confinement in New York State prisons and on October 2, 2012, the NYCLU issued a 64-page report titled, “*Boxed In: The True Cost of Extreme Isolation in New York’s Prisons.*” The report explored the history that led to the use of solitary confinement in New York and compared New York’s use of solitary confinement with that of other states. The report also shined a light into the widespread use of solitary in NYS prisons, the racial disparity associated with its use and the horrific harm done to the people subjected to it.

- Filed by PLS in 2012, and settled in 2014, *Matter of Cookhorne v. Fischer*, 104 A.D.3d 1197 (4th Dep’t 2013), challenged the placement of 16 and 17-year-olds in solitary confinement. The *Cookhorne* case changed the landscape for 16 and 17-year-olds – eliminating solitary confinement for youth under the age of 18. It helped set into motion and push forward the entire Raise the Age movement that ultimately removed 16 and 17-year-olds from DOCCS custody entirely.

- During this same time period, the United Nations Special Rapporteur began investigating and commenting on the use of solitary confinement. This investigation culminated on October 18, 2011, when the United Nations Special Rapporteur on torture, Juan E. Méndez, called on all countries to ban the use of solitary confinement of prisoners except in very exceptional circumstances and for as short a time as possible. Noting that such confinement can amount to torture when used as punishment or for an indefinite or prolonged period of time because of the severe mental pain and suffering it may cause, the Special Rapporteur recommended that solitary confinement in excess of 15 days be prohibited.
What followed was a slow and steady movement away from support for the use of solitary in New York State prisons. First, the NYC Bar Association condemned its use in 2011, followed by the NYS Bar Association in 2013. In response to a report I wrote as a member of the NYSBA’s Civil Rights Committee and presented to the NYS Bar Association’s House of Delegates, the NYSBA House of Delegates adopted a resolution that proposed, among other things, that “the imposition of long-term solitary confinement on persons in custody beyond 15 days be proscribed.”

In 2016, in *Davis v. Ayala*, 135 S.Ct. 2187 (2015), Justice Kennedy invited litigants to bring the issue of solitary confinement before the Supreme Court. He noted that “[t]he human toll wrought by extended terms of isolation long has been understood, and questioned, by writers and commentators” and that while the instant case before the court did not provide an opportunity to address the issue of solitary confinement, “[i]n a case that presented the issue, the judiciary may be required, within its proper jurisdiction and authority, to determine whether workable alternative systems for long-term confinement exist, and, if so, whether a correctional system should be required to adopt them.”

Also, in 2016, a settlement between NYCLU and New York State in *Peoples v. Annucci*, 180 F.Supp.3d 294 (S.D.N.Y. 2016), paved the way to a comprehensive overhaul of the state’s use of solitary confinement. The case, brought by the NYCLU with *pro bono* co-counsel Morrison & Foerster and co-counsel Professor Alexander Reinert of the Benjamin N. Cardozo School of Law, challenged the system-wide policies and practices governing disciplinary solitary confinement in New York State. This ground-breaking settlement significantly limited the use of solitary, but still allowed for very long “box hits” in many cases.

While all of this was happening, the HALT bill was being introduced time and time again – in 2013, 2015, 2017, and 2019 – but the political will to address the issue was not there.

It took forty years. It took dozens of men and women dying in solitary. It took the destruction of thousands of people’s lives. It took advocates of all kinds relentlessly pushing and prodding, but we’re finally here.

Sam Cooke’s words keep ringing in my head: It's been a long, a long time coming, but I know a change gonna come, oh, yes it will.

And it has! Oh Happy Day!
The HALT law imposes other restrictions on the use of segregated confinement and includes many reforms that are intended to replace the current punitive culture of segregated confinement with the therapeutic culture integral to the RRUs. Selected provisions of the law are summarized below.

People who are members of a “special population” may not be placed in segregated confinement except for pre-hearing confinement in keeplock. While in keeplock for pre-hearing confinement, members of special populations will get 7 hours out of cell time or be transferred to an RRU as soon as possible but no later than 48 hours after being admitted to keeplock. Included in the definition of special populations are:

- A person who is 21 years of age or younger;
- A person who is 55 years of age or older;
- A person with a disability as defined in Executive Law §292(21);
- A person who is pregnant, in the first eight weeks of post-partum recovery following child birth, or who is caring for a child in a prison.

At their hearings, individuals charged with rule violations may be represented by any lawyer, law student, paralegal or incarcerated person unless DOCCS reasonably disapproves of such paralegal or incarcerated person based upon objective written criteria developed by DOCCS.

While people are in segregated confinement or RRUs, the HALT law prohibits punishment in the form of limits on services, treatment or the provision of basic needs such as clothing, food or bedding. It also prohibits punishment by means of restricted diets or any other change in diet.

People in the RRU will have six hours of out of cell congregate programming and at least one hour of rec.

While in an RRU, individuals will receive programming and work assignments that are comparable to those offered in general confinement.

People in the RRUs will have all of their personal property unless a specific item poses a significant and unreasonable risk to the safety of others on the unit.

While participating in RRU out of cell programming, individuals will not be required to wear restraints.

Rec in the RRU will be congregate unless exceptional circumstances create a significant and unreasonable risk to the safety and security of other incarcerated persons, staff or the prison.

If an individual has not been discharged from the RRU within one year of their admission, they shall have a right to be discharged from the unit unless they have committed one of the acts described in Correction Law §137(k)(ii)(A-G), see next page, in the last six months and they pose a significant and unreasonable risk to the safety and security of other incarcerated people or staff.

People assigned to protective custody and residential mental health treatment units (RMHTU) may not be housed in segregated confinement units. Protective custody units and RMHTUs must conform to the requirements of RRUs.
The law creates a carve out with respect to some of the limits on segregated confinement for individuals found guilty of particularly serious misconduct. Particularly serious misconduct is conduct that creates a significant risk of imminent physical injury to staff or other individuals and an unreasonable risk to prison security and includes the following acts:

A. Causing or attempting to cause serious physical injury or death, or threatening to do so where the DOCCS Commissioner or the OMH Commissioner, or their designees, determine there is a strong likelihood the individual will carry out the threat;

B. Using force or the threat of force to compel or attempt to compel another person to engage in a sexual act;

C. Using force or the threat of force to extort money or property from another;

D. Using force or the threat of force to coerce another to violate any rule;

E. Leading, organizing, inciting or attempting to cause a riot, insurrection, or other similarly serious disturbance that results in the taking of a hostage, major property damage or physical harm to another person;

F. Obtaining deadly weapons or other dangerous contraband that poses a serious threat to the security of the institution;

G. Escaping or attempting to escape (or facilitating an escape) from a prison or escaping or attempting to escape (or facilitating an escape) while under supervision outside such prison.

Violations of the rules prohibiting the conduct listed in A – G may result in segregated confinement for up to 15 days (or 20 days in a 60-day period). When that period of time ends, subject to a few exceptions, individuals found guilty of serious rule violations will be transferred to an RRU within 48 hours. Violation of the rules prohibiting conduct listed in A-G while in an RRU may, with limitations, lead to transfer to segregated confinement.

The HALT Law begins a new era for people in the DOCCS custody. We celebrate the end of solitary confinement as we have known it for the last 40 years and look forward to the development of a more humane culture within DOCCS.

False Positive Urinalysis Putative Class Action Update

As Pro Se previously reported, in 2019 DOCCS began using new urinalysis drug testing devices in New York State prisons. The drug testing device is called the Indiko Plus. DOCCS later discovered that the test results from these devices were unreliable. As a result, DOCCS reversed all disciplinary dispositions for drug use where positive urinalysis test results were obtained from the Indiko Plus in 2019.

claims against the companies that provided DOCCS with the Indiko Plus urinalysis testing devices. Shortly after filing, the defendants moved to dismiss the lawsuit and to strike the class action allegations.

On March 22, 2021, the court issued a decision denying defendants’ motions to dismiss and to strike the class action allegations. See, Steele-Warrick v. Microgenics Corporation, 2021 WL 1109052 (E.D.N.Y. March 22, 2021). In order to survive a motion to dismiss, the Steele-Warrick court wrote, quoting Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009), the complaint must “contain sufficient factual matter…to state a claim for relief that is plausible on its face.” The Steele-Warrick court determined that the plaintiff had plausibly alleged that the defendants owed her a duty of care and that they had breached their duty of care. The assertion that the plaintiffs had failed to adequately plead these two elements of the negligence claim were the basis for the defendants’ motion to dismiss. For this reason, the court denied the motion to dismiss.

With respect to the allegations relating to the proposed class, Federal Rule of Civil Procedure 12(f) provides that a court, upon motion “may strike from a pleading…any redundant, immaterial, impertinent, or scandalous matter.” Case law has established that motions to strike class allegations are disfavored because they require a court to preemptively terminate the class aspects of litigation based solely on the allegations of the complaint. Dismissing the allegations so early in the litigation does not allow the plaintiffs to complete discovery regarding those matters. After applying these two principles to the complaint, the court declined to dismiss plaintiff’s class allegations at this time.

PLS continues to receive many inquiries about the status of this case but, due to the large number of individuals affected by this matter, and the numerous letters we are receiving, we are unable to respond to individual inquiries. To address some of those inquiries, below are the answers to the most frequently asked questions:

I heard that the class action has been settled. When will I be receiving my portion of settlement?

The class action has not been settled. As described above, our current complaint has survived defendants’ motion to dismiss. If there is a settlement in the future, this will be announced via Pro Se.

When will the class action be resolved?

We are still at the very beginning stages of a class action and are moving forward with discovery. Due to their complexity, class actions tend to move slowly and can take several years to be resolved.

How much money will I receive in damages?

It is far too early in the litigation to make any assessment regarding potential damages or how they may be calculated.

Am I a class member?

Currently, the class action is a “putative” class action. This means that the court has not yet decided whether the case may be litigated as a class action, and if so, what the definition of class will be. If the court agrees to certify the class, the proposed definition of the class may change. Our proposed class definition presently includes incarcerated and formerly incarcerated individuals who in 2019 received disciplinary dispositions for drug use as a result of urinalysis results obtained from testing via an Indiko Plus device and subsequently received a reversal of the disposition from DOCCS. If you meet these
criteria, you are currently part of the proposed class.

Need Assistance from PLS? Write, Don’t Call!

Legal Mail is Privileged Mail

Letters sent by incarcerated individuals to attorneys are privileged mail. Privileged mail is confidential. This means that prison staff are prohibited from reading the letters. It also means that generally speaking, letters to attorneys cannot be used as evidence at disciplinary hearings or in criminal proceedings.

Phone Calls from Prison Tablets or Rec Yard Phones Are Not Privileged

Phone calls made from tablets and phones in the prison yard are recorded. Phone calls that are recorded by DOCCS or JPay, or which take place in the presence of DOCCS employees, are not privileged. DOCCS can use any information in a recorded call as a basis for discipline or criminal charges. If you call PLS from your tablet or from a DOCCS phone intended for use by incarcerated individuals, the only message you should leave is your name, DIN and prison and a message that you would like assistance.

Three-Way Calls Violate DOCCS Rules and Are Not Privileged

Sometimes people in custody call PLS using the three-way call function of a non-incarcerated person’s cell phone. These calls are recorded, are not privileged and violate DOCCS rules. PLS staff cannot participate in three-way calls.

Writing to PLS is the Fastest and Most Reliable Method for Getting in Touch with PLS

Write us a letter describing your problem and the relief you would like and we will respond by mail. If it’s an emergency, we can arrange a confidential call with you.

If you call and leave only non-confidential information – your name, DIN and the prison you are writing from, we will have to write you to find out the reason for your call. This means we will not have the information we need to assess your request for a week or two. You can cut the time in half by just writing us.

Use of “Cleaned Up” In Pro Se

Recently, attorneys and courts have begun using the parenthetical (“cleaned up”) following quotations from decisions in their briefs and decisions. The use of “(cleaned up)” indicates that the often distracting and confusing symbols and citations to other decisions that actually appear in the quoted material have been removed.

In Pro Se, we have always used the full quotation, thinking that our readers would both want to see the way the language in the decision actually appears and learn what the various symbols mean. Although we still see the value in this approach, because Pro Se is a newsletter and not a legal brief, and because use of quotations with the symbols and citations can make a quotation difficult to read, starting with this issue, we will add the parenthetical “cleaned up” to indicate that we have omitted the internal quotation marks, brackets, ellipses, and citations when we quote from a decision. Below is an example from this issue’s “Immigration Matters” column that shows the difference between the original quoted portion from a decision and the “cleaned up” version.

The quote from the decision People v. Steinberg, 79 N.Y.2d 673, 680 (1992):

“Parents have a nondelegable affirmative duty to provide their children with adequate medical care (Matter of Hofbauer, 47 N.Y.2d 648, 654–655, 419 N.Y.S.2d 936, 393 N.E.2d 1009; Family Ct. Act §1012[f][i][A]). Thus, a parent’s failure to fulfill that duty can form the basis of a homicide charge (see, People v. Flayhart, 72 N.Y.2d 737, 536 N.Y.S.2d 727, 533 N.E.2d 657; People v. Henson, 33 N.Y.2d 63, 349 N.Y.S.2d 657, 304 N.E.2d 358).”
The “cleaned up” quote from the decision:

As the New York Court of Appeals has stated, “parents have a nondelegable affirmative duty to provide their children with adequate medical care . . . [and so] a parent’s failure to fulfill that duty can form the basis for a homicide charge. People v. Steinberg, 79 N.Y.2d 673, 680 (1992) (cleaned up).

PLS’ FAMILY MATTERS UNIT

In January 2017, PLS opened the Family Matters Unit (FMU). A grant from Judiciary Civil Legal Services enabled PLS to open this unit. The FMU is staffed by PLS staff attorneys. The attorneys working in the FMU assist incarcerated parents who were convicted in the counties of Albany, Bronx, Erie, Kings, Nassau, New York, Queens or Richmond (or have children living in those counties) to:

- Challenge prison disciplinary proceedings that result in interference with visitation or communication with their minor children;
- Prepare child visitation petitions;
- Prepare child support modification petitions; and
- Help incarcerated parents access family court records.

In the last year, we have helped a number of incarcerated parents with legal matters involving their children.

The FMU is a resource for incarcerated parents. The unit helps parents who were convicted in, or whose children reside in, the eight identified counties to use the court system to help maintain family ties during their incarceration. For parents who are subject to child support orders, the FMU also helps to remove one of the major barriers to successful reintegration – the accumulation of insurmountable debt as a result of child support arrears.

You are eligible for services from PLS’ Family Matters Unit if:

1. You are a prisoner whose county of conviction was Albany, Bronx, Erie,

Kings, Nassau, New York, Queens or Richmond; OR

2. You have a visitation or support issue involving children who reside in Albany, Bronx, Erie, Kings, Nassau, New York, Queens or Richmond; AND

3. You have been subjected to a recent prison disciplinary proceeding that resulted in suspension or termination of visitation or communication with your minor children; OR

4. You are interested in seeking an order of visitation; OR

5. You are interested in seeking modification of an existing child support order; OR

6. You are having difficulty accessing family court records.

If you would like the assistance of the FMU and you meet the above eligibility requirement, please write to the FMU at this address:

Prisoners’ Legal Services of New York
Family Matters Unit
41 State Street, Suite M112
Albany, NY 12207

PRO SE VICTORIES!


After DOCCS agreed to reverse the Tier III hearing challenged in this Article 78 proceeding, Percy West sought, and the court granted, reimbursement of the Tier III surcharge and the filing fee for the Article 78.
Court Orders State to Include Prisoners in Category 1b for Vaccine Eligibility

In *Matter of Charles Holden v. Howard Zucker*, Index No. 801592/2021E (Sup. Ct. Bronx Co. March 29, 2021), the court reviewed petitioners’ challenge to the State of New York’s failure to include incarcerated individuals in the State’s vaccine priority category 1b. People who fall within category 1b became eligible for the vaccine on January 11, 2021. The State of New York included the following groups of people in category 1b:

- Residents and staff at nursing homes and other congregate care facilities;
- Staff and residents at the Office for People with Developmental Disabilities, Office of Mental Health, and Office of Addiction Services and Supports;
- Corrections;
- Any individual living in a homeless shelter where sleeping, bathing or eating accommodations must be shared with individuals and families.

“Corrections” specifically includes NYS DOCCS and local correctional facilities personnel, including correction and parole officers and state and local juvenile detention and rehabilitation facilities.

All adult incarcerated individuals in correctional or detention facilities were explicitly excluded from 1b eligibility for the vaccine. Residents of all other government operated licensed or regulated facilities designated by the State Department of Health (DOH) as congregate living facilities are explicitly included in categories 1a and 1b. Residents of congregate facilities for youth are also included.

The petition alleged that excluding incarcerated New Yorkers from 1b eligibility for the vaccine 1) was arbitrary and capricious and 2) violated the equal protection clauses of the New York and U.S. constitutions. The petitioners asked the court to issue a preliminary injunction mandating (requiring) the State to immediately modify current COVID-19 vaccine eligibility category 1b to include the incarcerated population.

The State of New York argued that because it is the State’s responsibility to decide, based on its judgment of who needs to be vaccinated soonest and how the limited supply of vaccines will be distributed, the relief the petitioners are seeking would undermine the phased vaccination roll out. With respect to CDC guidelines suggesting that states prioritize the vaccination of their incarcerated populations, the State argued that guidelines are not mandates. It further argued that its phased vaccine rollout is rationally based to further the legitimate government purpose of distributing a limited supply of vaccines in a phased approach, starting with those in the most need.

**Court’s Analysis**

To win an arbitrary and capricious challenge to state agency conduct where the petitioners are seeking a writ of mandamus (an order requiring the respondent to take an action), Civil Practice Law and Rules (CPLR) §7803(3) requires that petitioners show that the agency decision was made in violation of lawful procedure, was affected by error of law or was arbitrary and capricious or an abuse of discretion. “Courts must uphold,” the court wrote, “an administrative act of discretion unless it has no rational basis or the action is arbitrary and capricious.”

The equal protection claim is also governed by the rational basis standard. The state classification must bear some fair relationship to a legitimate public purpose. “In the area of economics and social welfare,” the court wrote, citing *Dandridge v. Williams*, 397 U.S. 471 485 (1970), “a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some reasonable basis, it does
not offend the constitution simply because the classification is not made with mathematical nicety or because the practice results in some inequality.”

It is well-known and universally accepted fact that people living in congregate settings have an exponentially higher risk of getting COVID-19. Consistent with CDC Guidelines, the respondents specifically prioritized vaccination for New Yorkers who live in or work in congregate facilities. In spite of these facts, incarcerated individuals were excluded from 1b eligibility. Notably, the State of New York failed to explain why, despite the vaccine supply limitations, it chose to prioritize all of the residents of all other congregate facilities, including teenagers in juvenile detention facilities, while excluding incarcerated adults. Against this backdrop, the court considered whether the State’s conduct was arbitrary and capricious and/or violated the equal protections clauses of the State and U.S. constitutions.

Court’s application of the law to the facts

Here, the court found, the respondents, at great risk to the lives of incarcerated people and in violation of the State and Federal equal protection guarantees, irrationally distinguished between incarcerated people and people living in every other type of adult congregate facility. Based on this finding, the court ruled, the current definition of category 1b must be vacated and modified to allow incarcerated individuals as a group to access vaccine eligibility in phase 1b.

Further, the court found that a limitation on the supply of vaccines does not justify treating incarcerated people differently from other similarly situated people in congregate living situations. Supply limitations do not explain prioritizing the vaccination of all residents in other congregate settings while disregarding the same heightened risk of contracting COVID-19 faced by incarcerated people. In New York, the number of people eligible for the vaccines has exceeded the supply of vaccines. In spite of this, respondents continue to expand the eligibility categories beyond the supply for groups other than incarcerated adults. These facts show that respondent’s claim that limited supplies justify the arbitrary decision not to include incarcerated individuals in category 1b is not credible. The court therefore found that the respondents’ decision to exclude incarcerated persons from eligibility for the vaccine was “unquestionably arbitrary and capricious,” and an abuse of discretion.

Based on the above findings, the court issued an order vacating and annulling respondents’ determination excluding incarcerated individuals from those currently eligible for COVID-19 vaccine priority category 1b and a preliminary injunction directing the respondents to immediately authorize incarcerated individuals as a group for vaccination.

The Neighborhood Defender Service of Harlem, The Bronx Defenders, The Legal Aid Society, the New York Civil Liberties Union, and Brooklyn Defender Services represented Petitioners Charles Holden and Alberto Frias in this Article 78 proceeding.

Court Denies Preliminary Relief in Challenge to Conditions at Adirondack

In January 2021, incarcerated individuals at Adirondack C.F. and the organization Release Aging Prisoners in Prison (RAPP) brought a class action lawsuit alleging, among other claims, that the defendants were violating the Eighth Amendment rights of incarcerated individuals at Adirondack to adequate medical care. The plaintiffs moved for a preliminary injunction with respect to conditions and practices that they claimed unnecessarily increased the risk that the plaintiffs, men ages fifty years and up, many with comorbidities, would contract COVID-19. On March 1, 2021, the magistrate-judge before whom the motion was pending denied the plaintiffs’ motion for a preliminary injunction in Harper v. Cuomo, 9:21-cv-00019 (N.D.N.Y. March 1, 2021), finding that 1) the plaintiffs were unlikely to succeed on the merits of their claims, 2) the plaintiffs would not suffer irreparable harm if preliminary relief were not granted, and 3) the plaintiffs had not shown a clear likelihood that they will succeed in establishing that the Adirondack officials were deliberately indifferent to the incarcerated population’s health or safety.

The Prisoners’ Rights Project of the Legal Aid Society and lawyers from Relman Colfax, PLLC, represented the plaintiffs in this lawsuit.

Disciplinary & Administrative Segregation

Court Reverses Determination of Guilt Based on Confidential Information

Based on statements made by two confidential informants, the Hearing Officer found Brandon Brown guilty of violating the rules against engaging in violent conduct, creating a disturbance, assaulting staff, belonging to an unauthorized organization, smuggling and soliciting.

The facts as set forth in the misbehavior report are that the Mr. Brown directed Incarcerated Individual 1 to go to the visiting room to pick up drugs that had been smuggled into the prison. Incarcerated Individual 2 then wired Mr. Brown money whereupon Mr. Brown slid the drugs under the door between the E1 and E2 dorms to Incarcerated Individual 3. However, correction staff intercepted the drugs and put them on the staff desk in the dorm. Incarcerated Individual 4 then stole the drugs from the desk. Angered by the interference from staff, petitioner put a hit out on a correction officer “to send a message to officers to stop taking his drugs.”

In Matter of Brown v. Annucci, 182 A.D.3d 885 (3rd Dep’t 2020), the respondent conceded that because one of the pieces of confidential information upon which the hearing officer stated he relied was not included in the record, the determinations of guilt with respect to the charges of engaging in violent conduct, creating a disturbance, assaulting staff and belonging to an unauthorized organization had to be annulled.

Turning to the remaining charges – smuggling and soliciting – and the confidential information purportedly supporting the determinations of guilt with respect to those charges, the court again found that substantial evidence did not support the determination of guilt because the hearing officer did not independently assess the reliability and credibility of the informant.

A disciplinary determination may be based upon hearsay confidential information, provided that the information is sufficiently detailed and probative such that the hearing officer can make an independent assessment of the informant’s reliability. Here, the court said, the hearing officer wrote that he had independently assessed the confidential testimony. However, there was no confidential testimony in the record.

The author of the misbehavior report testified that he had previously received information from the informant and that the information that the informant had provided to the officer about Brown was accurate. Other than this “general and conclusory testimony,” the court wrote, “no further details regarding the basis for the information or the results of the author’s investigation into the incident were provided.” In addition, there was evidence that contradicted the confidential information: according to the visiting room log, the individual whom the petitioner is alleged to have sent to the visiting room to pick up the drugs had not been in the visiting room at the relevant time.

In light of these facts, the court wrote, and because neither the testimony nor evidence at the hearing was sufficiently detailed or probative, the hearing officer was not able to assess the reliability or credibility of the confidential informant. Thus, the determination of guilt with respect to the remaining charges was also annulled.

The Ithaca Office of PLS represented Brandon Brown in this Article 78 proceeding.
Foundation Needed to Re-call a Witness

In Matter of Randolph v. Annucci, 190 A.D.3d 1196 (3d Dep’t 2021), the petitioner argued that the hearing officer had violated his right to call witnesses when he refused to re-call witnesses who had already testified. The hearing related to charges that the petitioner had assaulted staff, engaged in violent conduct, refused an order, interfered with an employee and engaged in a movement violation. After the correction officer witnesses had testified, the petitioner asked the hearing officer to re-call some of the officers. He cited inconsistencies in the officers’ testimony as the basis for his request.

In analyzing the petitioner’s argument, the court noted that “notwithstanding his general assertion that there were inconsistencies in the testimony, the petitioner had refused to elaborate on the alleged inconsistencies or provide the questions that he wanted to ask in order to establish that the testimony would not be redundant or irrelevant.” Based on this observation, the court stated that it was “unpersuaded by the petitioner’s contention that he was improperly denied the right to present various witnesses.”

Practice Point: When you want to re-call a witness at a disciplinary hearing, be sure to back up your request with the reason that the re-call is necessary and the questions that you are interested in asking.

Edward Randolph represented himself in this Article 78 proceeding.

Court of Claims

Damages for Wrongful Confinement to SHU

While in custody at Bedford Hills, Taliyah Taylor was found guilty of fighting, violent conduct and creating a disturbance. The hearing officer imposed a penalty of 20 days keeplock. After Ms. Taylor had served 12 days of the penalty, the hearing was administratively reversed (reversed on appeal to DOCCS personnel). Following the reversal, Ms. Taylor filed a claim in the NYS Court of Claims, seeking damages for defamation, failure to protect and wrongful confinement. The court dismissed the defamation claim in pre-trial proceedings. After trial, the court dismissed the failure to protect claim and found in favor of the claimant on her wrongful confinement claim, awarding her $120.00 or $10.00 for each day that she was wrongfully confined. Ms. Taylor appealed the court’s judgment.

In Taylor v. State of New York, 191 A.D.3d 915 (2d Dep’t 2021), the court first agreed with the lower court’s decision to dismiss the defamation and negligence claims. Citing Arteaga v. State of New York, 72 N.Y.2d 212, 219 (1988), the court found that the lower court had correctly dismissed the claim because correction officers are absolutely immune from suit for the preparation and filing of misbehavior reports. Likewise, the court ruled that the lower court was correct in dismissing the failure to protect claim – a negligence-based claim – due to the absence of evidence showing that the State breached a duty that it owed to the claimant or that the alleged breach was the proximate cause of her injuries.

The court ruled in Ms. Taylor’s favor with respect to her claim that the damages ordered by the lower court were too low. Citing Estate of Loughlin v. State of New York, 146 A.D.3d 863 (2d Dep’t 2017), the court found that the amount of the award “deviated materially from what would be reasonable compensation.” The court increased the damages award from $10.00 per day to $50.00 per day, and
modified the judgement to award damages in the amount of $600.00.

Taliyah Taylor represented herself in this Court of Claims action.

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**Miscellaneous**

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**Court Finds Insufficient Evidence that Contraband Was Dangerous**

In *People v. McLamore*, 191 A.D.3d 1413 (4th Dep’t 2021), the court reviewed a non-jury verdict (a verdict resulting from a trial where the judge rather than a jury is the fact finder, also known as a “bench trial”) finding the defendant guilty of promoting prison contraband in the first degree. On appeal, the defendant argued that the evidence was insufficient (not enough) to show that the substance he possessed was dangerous contraband.

According to Penal Law §205.25, a person is guilty of promoting prison contraband in the first degree when he or she “knowingly and unlawfully introduces any dangerous contraband into a detention facility.” (emphasis added). In *People v. Finley*, 10 N.Y.3d 647, 657 (2008), the Court of Appeals ruled that “[g]enerally, dangerous contraband refers to weapons. . . . Items that facilitate escape are also dangerous contraband.”

Agreeing with this view, the Fourth Department, in *People v. Flagg*, 167 A.D.3d 165, 169 (4th Dep’t 2018), stated that small amounts of marijuana, “unlike other contraband such as weapons, are not inherently dangerous and the dangerousness is not apparent from the nature of the item.”

While the People argued that the drugs at issue might lead to disputes over sales or to inmates becoming violent, the *McLamore* court found that the People did not establish that synthetic marijuana causes violence, death or other serious injury. Based on this reasoning, the court modified the judgment by reducing the conviction for promoting prison contraband in the first degree to promoting prison contraband in the second degree and remitting the matter for re-sentencing on that conviction.

Promoting prison contraband in the first degree is a class D felony; promoting prison contraband in the second degree is a class A misdemeanor.

Gary Muldoon of Kaman Berlove Marafioti Jacobstein & Goldman, represented Jerry McLamore in this criminal appeal.

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**Court Rejects Challenge to SOTCP “Recommendation”**

In 1990, the petitioner in *Matter of Williams v. Annucci*, 189 A.D.3d 1839 (3d Dep’t 2020), was convicted of rape in the first degree and unlawful imprisonment in the first degree and sentenced to 16 to 50 years. The petitioner had successfully completed sex counseling in 2004. In 2018, DOCCS transferred him so that he could participate in the sex offender treatment and counselling program (SOTCP). The SOTCP director told the petitioner that if he refused to participate in the program, there might be a reduction in his pay assignment. The petitioner refused the program, whereupon he was removed from his job.

The petitioner filed a grievance protesting the SOTCP assignment and asking that his job assignments and rate of pay be reinstated. He appealed the denial of his grievance to the Central Office Review Committee and filed his Article 78 challenge before the Committee had decided his appeal.

The lower court dismissed the petition. On appeal, the Third Department first noted that because the petitioner had not received a decision from CORC, he had not exhausted his administrative remedies. Normally, a petitioner’s failure to exhaust would lead to a dismissal of the petition. See *Matter of Green v Kirkpatrick*, 167 A.D.3d 1138, 1139 (3d Dep’t 2018), * lv denied 32 N.Y.3d 919 (2019). However, because the respondent did not raise the petitioner’s failure to exhaust as a defense in its answer or in a motion to dismiss and did not address
this issue in its brief, the court, citing, *Matter of Galunas v Annucci*, 166 A.D.3d 1182, 1182 n (3d Dep’t 2018), found that the respondent had waived the defense.

Turing to the merits of the petition, the court wrote that as set forth in the respondent’s papers, prior to the passage of the Sex Offender Management and Treatment Act (SOMTA) in 2007, DOCCS’ sex offender *counselling* program lasted at most six months and was not interactive, that is, a teacher or counselor simply provided information. SOMTA added §622 to the Correction Law. Section 622 requires DOCCS to provide a sex offender *treatment program* to incarcerated individuals serving sentences for felony sex offenses. The current SOTCP is a 6- to 18-month program that uses an integrated approach based on an individualized treatment plan.

Due to the existence of the new treatment program, the court ruled that DOCCS’ decision to refer petitioner to a more comprehensive program than the one that he had completed in 2004 was neither arbitrary nor an abuse of discretion.

The court also ruled that because SOMTA is a remedial statute intended to prevent future crime, rather than a penal statute imposing punishment for a past crime, petitioner’s argument that Correction Law §622 was impermissibly applied to him because he began serving his sentence prior to its enactment was without merit.

Finally, the court rejected petitioner’s challenge to the reduction of his pay grade and the changes in his job assignment. These were not, the court wrote, arbitrary and capricious, irrational or affected by error of law.

*Petitioner Williams represented himself in this Article 78 proceeding.*

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**Refusal to Take SOTCP Results in Loss of All Good Time**

In 2015, the petitioner in *Matter of Burnett v. DOCCS*, 2021 WL 922299 (3d Dep’t March 11, 2021), refused to participate in the Sex Offender Treatment and Counseling Program (SOTCP). Later that year, when the petitioner went before the Time Allowance Committee (TAC), the Committee recommended that all of his good time be withheld because of the SOTCP refusal. The Commissioner affirmed the recommendation. Petitioner then challenged the determination in an Article 78.

Citing *Matter of Thomas v. Fischer*, 106 A.D.3d 1343 (3d Dep’t 2013), the court first noted that the determination of whether to withhold good time, and the amount of good time to withhold, is a discretionary decision. The decision will be upheld so long as it was made in accordance with law and premised upon a review of the individual’s entire record. Further, the court noted, Correction Law §803(1)(a) provides that good time allowance may be withheld for failure to engage in an assigned program. Thus, there was a rational basis for a decision to withhold the petitioner’s good time.

Finally, the court noted, the petitioner could have challenged the determination to withhold all of his good time through the DOCCS Inmate Grievance Program.

For these reasons, the court affirmed the judgement of the Supreme Court, Albany County, dismissing the petition.

*Petitioner Burnett represented himself in this Article 78 proceeding.*
FEDERAL COURT DECISIONS

Court Reinstates Jury Verdict Finding that Being Required to Exercise in Restraints for a Six Month Period Violates the 8th Amendment

For six months, while M. A. Edwards, a person incarcerated in Connecticut, was in administrative segregation (Ad Seg), he was required to wear full restraints when he exercised out-of-doors. When he was in the yard, his hands were cuffed behind his back, he wore leg irons on his ankles and there was a chain connecting the ankle cuffs to the hand cuffs. Other than push-ups and sit-ups, he was unable to exercise in his 7’ x 12’ cell because the furniture took up most of the space.

Mr. Edwards sued the defendant Warden Quiros in federal court alleging that the warden’s restraint policy and practice violated the plaintiff’s Eighth Amendment right to exercise. The defendant moved for summary judgment, arguing that he was entitled to qualified immunity because “prisoners do not have a clearly established statutory or constitutional right to ‘recreate free from restraints.’” The district court granted the motion. The Second Circuit, however, vacated the judgment, finding that the appropriate delineation (framing of the issue) was not whether there was a recognized right to exercise without restraints, but rather whether the defendants’ restraint policy violated the plaintiff’s clearly established Eighth Amendment right “to some meaningful opportunity to exercise.” The Court returned the case to the district court for trial.

The case went to trial in 2018. The jury found that Defendant Quiros had violated Mr. Edwards’ Eighth Amendment rights. The district court however, set aside the verdict and issued a judgment in favor of the defendant. The plaintiff appealed.

In Edwards v. Quiros, 986 F.3d 187 (2d Cir. 2021), the Second Circuit vacated the judgment in favor of the defendant, ruling that 1) there was enough evidence to support the jury’s verdict finding that the defendant had personal awareness of, and was deliberately indifferent to, the risk posed to the plaintiff’s health posed by requiring him to exercise in full restraints and 2) the evidence was sufficient to support the jury’s verdict that the failure to give the plaintiff the opportunity to exercise outside of the cell without restraints for six months posed a serious risk to his health.

To win an Eighth Amendment conditions of confinement claim, a prisoner-plaintiff must show that objectively, the deprivation suffered by the plaintiff was sufficiently serious that he was denied the minimal civilized measure of life’s necessities, such as being denied a meaningful opportunity for physical exercise. See, Williams v. Griefinger, 97 F.3d 699, 704, n.5 (2d Cir. 1996). The prisoner-plaintiff must also show that subjectively, the defendant acted with deliberate indifference to the plaintiff’s health or safety. McCray v. Lee, 963 F.3d 110, 117 (2d Cir. 2020). That is, the defendant must have both known about and disregarded an excessive risk to the plaintiff posed by the challenged condition. Jabbar v. Fischer, 683 F.3d 54, 57 (2d Cir. 2012). Finally, the prisoner plaintiff must show that the defendant was not entitled to qualified immunity, that is that the right alleged to have been violated was clearly established.

Before granting a motion for judgment as a matter of law made after a jury verdict in the non-moving party’s favor, the Edwards Court wrote, citing Cross v. N.Y.C Transit Authority, 417 F.3d 241, 248 (2d Cir. 2005), there must be such a complete absence of evidence supporting the
verdict that the jury’s findings could only have been the result of sheer surmise and conjecture. Alternatively, there must be such an overwhelming amount of evidence in favor of the party seeking the judgment as a matter of law, that reasonable and fair-minded jurors could not arrive at a verdict against that party. The court must also draw all reasonable inferences in favor of the non-moving party, and it may not make credibility determinations or weigh evidence.

Here, the Court found, the defendant warden testified about the prison’s policy of requiring prisoners in administrative segregation to exercise in full restraints when there were others in the exercise yard, thus acknowledging his knowledge and support of the policy about which the plaintiff had sued him. Based on this evidence, the court wrote, the jury’s conclusion that Defendant Quiros was deliberately indifferent was based on “abundant circumstantial evidence from which the jury could infer that Defendant Quiros had actual knowledge of Plaintiff Edwards’s recreation status and the related risk to his health from being required to exercise in restraints.”

In addition, Defendant Quiros’ own testimony provided a sufficient basis for the jury’s conclusion that he knew that the plaintiff was required to exercise in full restraints for the six months at issue. That is, he testified that he knew about the policy, knew it was in effect when the plaintiff was in administrative segregation, endorsed the policy, monitored the Ad Seg prisoners closely and knew which prisoners were required to wear full restraints when exercising.

The Court also found that the defendant’s testimony provided sufficient support for the jury’s findings that the warden understood that prisoners should not be exercising in full restraints. The Defendant testified that Ad Seg prisoners should not be exercising in full restraints for more than one or two weeks. An inference could be drawn from this testimony that the defendant knew that deprivation of meaningful exercise poses a risk of serious health problems, hence the defendant’s decision to limit restraint-required exercise to two weeks. To be held liable, the Court wrote, “Quiros need only appreciate that the deprivation of meaningful exercise posed an excessive risk to [the plaintiff’s] health; he need not have known the specifics of the health risk with the level of detail that a physician would understand.”

Turning to the objective component of the plaintiff’s conditions of confinement claim, the Court found that sufficient evidence supported this portion of the verdict. Here, the defendant argued that the availability of in-cell exercise and the safety justification for “restrained exercise” defeated the Eighth Amendment claim. The Court first addressed the in-cell opportunity to exercise. In this case, the Court found, the jury rejected the argument that the opportunity for in-cell exercise was sufficient to provide the plaintiff with a meaningful opportunity to exercise. The jury reached its verdict after hearing the plaintiff’s testimony concerning the inadequacy of the in-cell exercise due to lack of space. The verdict was not based on sheer surmise and conjecture and therefore could not be set aside.

Nor did the fact that the plaintiff could walk outside and get fresh air deprive the jury’s verdict of a factual underpinning; the Court could not determine as a matter of law that the jury erred in finding that the plaintiff’s limited ability to shuffle around in full restraints while breathing fresh air did not constitute “meaningful exercise.”

While the defendant argued that the prison’s safety justification for the restraint policy was adequate to defeat the plaintiff’s claim, the Court ruled that the jury was entitled to disagree. The safety justification for the policy was
undermined by the plaintiff’s testimony that officers did not always use the most restrictive shackling method when they moved him around the prison. That testimony, the Court wrote, called into question the prison’s safety justification for requiring the plaintiff to be fully shackled during outdoor exercise. “Because corrections officers were not always so concerned about their safety as to employ the most restrictive shackling methods while transporting [the plaintiff], a reasonable jury was entitled to doubt the prison’s basis for leaving the [plaintiff] fully restrained in the yard enclosure.” Thus, the Court concluded, the jury did not act unreasonably by discrediting the defendant’s safety justification.

Finally, the Court held that the defendant was not entitled to qualified immunity. The Court found that the jury reasonably concluded that Defendant Quiros knowingly violated the plaintiff’s clearly established right to meaningful exercise under the circumstances and lacked a sufficient justification for doing so. Based on this analysis, the Court concluded it would not disturb the jury’s finding that the defendant was not entitled to qualified immunity.

The central question in Scott II is whether an omission—that is, the failure to take physical action—can constitute the use of force necessary to be an ACCA crime of violence. The ACCA definition of “a crime of violence” requires “as an element the use, attempted use, or threatened use of physical force against the person of another.” 18 U.S.C. §16(a). The ACCA crime of violence definition is important in the immigration context because the Immigration and Nationality Act (“INA”)—the statute which governs immigration cases—defines a variety of aggravated felonies that bar a noncitizen from most forms of relief from deportation. Included in the definition of an aggravated felony is a crime of violence as defined by the ACCA. Thus, Scott II also impacts whether a New York first-degree manslaughter conviction is an aggravated felony under the INA.

To understand the surprisingly complex question at issue in Scott II, some background is required. Under New York law, a person can be convicted of first-degree manslaughter when, “with intent to cause serious physical
injury to another person, he causes the death of such person or of a third person.” P.L. §125.20(1). New York law further provides that a person can be criminally liable based on an omission, defined as “a failure to perform an act as to which a duty of performance is imposed by law.” P.L. §15.00(3). Putting these together, then, a person can be found guilty of first-degree manslaughter by (1) intending to cause serious physical injury, (2) failing to act when the person has a legal duty to do so, and (3) thereby causing serious physical injury. One example of this scenario would be a parent who owes a duty to a child and who takes no action to prevent harm to the child. As the New York Court of Appeals has stated, “parents have a nondelegable affirmative duty to provide their children with adequate medical care . . . [and so] a parent’s failure to fulfill that duty can form the basis of a homicide charge.” People v. Steinberg, 79 N.Y.2d 673, 680 (1992) (cleaned up).

In a divided 9-5 ruling, the Scott II Court concluded that an omission can constitute the use of force and that first-degree manslaughter is therefore a crime of violence. Writing for the majority, Judge Raggi (who dissented in Scott I) emphasized that the petitioner’s manslaughter convictions “were undoubtedly brutal: Scott shot one of his victims in the head at point-blank range; he stabbed the other to death.” Slip op. at 4. Judge Raggi acknowledged that the particular facts of the convictions are ultimately irrelevant because the Court was bound to apply the categorical approach, which requires determining whether the minimum conduct criminalized by the statute, taken in the abstract, constitutes a crime of violence. Applying that approach, the majority found that an omission is the use of force because “when a defendant causes death by breaching a legal duty to check or redress [remedy] violent force because he intends thereby for that force to cause serious physical injury, what he is doing is making that force his own injurious instrument.” Id. at 8–9 (emphasis in original; definition of redress added).

The Scott II decision included two passionate dissenting opinions by Judge Leval and Judge Pooler, which would have found that petitioner’s convictions are not crimes of violence. It also featured two interesting concurring opinions, one of which (authored by Judge Park and joined by four judges) noted “the absurdity of the exercise we have now completed” and expressed frustration at how the categorical approach “perverts the will of Congress, leads to inconsistent results, wastes judicial resources, and undermines confidence in the administration of justice.” Id. at 55.

The second major decision is Pereida v. Wilkinson, 141 S. Ct. 754 (2021), a Supreme Court case which also deals with the vexing categorical approach. Pereida concerns a form of relief from deportation called Cancellation of Removal for Certain Non-Permanent Residents, which requires a noncitizen to prove, among other things, that he or she has not been convicted of a “crime involving moral turpitude,” also known as a CIMT. The petitioner in Pereida was convicted of criminal impersonation under a Nebraska statute with several prongs, some of which were CIMTs (like stealing someone’s personal identity for financial gain) and some of which were not (like running a business without a license). The
record of conviction was ambiguous as to which prong petitioner was convicted under, giving rise to the question in *Pereida*: was the petitioner eligible for Cancellation even though he didn’t conclusively prove he was not convicted of a CIMT?

Justice Gorsuch, writing for a five Justice majority, concluded that the petitioner was not eligible for Cancellation because he failed to meet his burden of proof. In so holding, Justice Gorsuch emphasized that under the INA, a noncitizen applying for relief from deportation must “show ‘clearly and beyond doubt’ that he is ‘entitled to be admitted and is not inadmissible.’” 141 S. Ct. at 761 (quoting 8 U.S.C. § 1229a(C)). Justice Gorsuch distinguished the factual question of conviction from the legal question of whether a conviction constitutes a federal offense, like a CIMT, and concluded that “like any other fact, the party who bears the burden of proving these facts bears the risks associated with failing to do so.” *Id.* at 765. The three-Justice dissent, written by Justice Breyer, disagreed with the majority’s contention that identifying the elements of a conviction is a factual question and instead would find that the categorical approach is a purely legal determination unaffected by the burden of proof.

Notably, *Pereida* does not change the law with respect to the threshold determination of whether a noncitizen is removable in the first place, since the burden of proving removability rests with the Department of Homeland Security, not the noncitizen. Thus, if there is ambiguity in ascertaining whether a noncitizen’s conviction is a removable offense, the noncitizen would simply not be removable and *Pereida* would not apply. But

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**Notices**

Your Right to an Education

If you have a learning disability, need a high school diploma, or have questions about access to academic or vocational programs, for more information please write to:

Maria E. Pagano  
Education Unit  
Prisoners’ Legal Services of New York  
14 Lafayette Square, Suite 510  
Buffalo, New York 14203  
(716) 854-1007
WHAT DID YOU LEARN?

The answers to the following questions are found in the articles in this issue of *Pro Se*. Let’s see how carefully you read!

1. Under the HALT Law, where an individual gets a ticket for causing another person to suffer serious physical injury all the following consequences are authorized except:

   a. segregated confinement for up to five years.
   b. confinement in a Residential Rehabilitation Unit.
   c. confinement prior to the disciplinary hearing.
   d. segregated confinement with 7 hours of out-of-cell time daily.

2. To maintain the confidentiality of a telephone call with a lawyer a prisoner must:

   a. make the call in the presence of a DOCCS employee.
   b. use the three-way call function on a non-incarcerated person’s cell phone.
   c. make the call in such a manner that recording of the conversation is assured.
   d. Have an attorney arrange a legal call.

3. In an Article 78 challenge to an administrative policy the court must uphold a state agency’s policy if the policy:

   a. has a rational basis.
   b. achieves its objectives.
   c. promotes the general goal of good government.
   d. seems consistent with constitutional standards.

4. Which action by a state agency is most likely the result of a writ of mandamus issued by a court?

   a. withdrawal of an appeal to a higher court.
   b. payment as compensation for physical injury.
   c. a policy requiring compliance with certain medical standards.
   d. a memorandum giving the court guidance about a legal issue.

5. As discussed in *Matter of Charles Holden*, the Equal Protection Clause, a classification made by a state agency will be found constitutional if the resulting policy:

   a. abolishes inequality among persons affected by the classification.
   b. has some reasonable basis.
   c. promotes the common good.
   d. creates perfect equality among all groups affected by the classification.

6. In the case, *Matter of Charles Holden*, involving the availability of COVID vaccine for state prisoners the court held that incarcerated adult individuals as a group must be given access to the vaccine because the State of New York:

   a. possessed sufficient quantities of the vaccine for all New Yorkers.
   b. had denied access to this group of persons without having a rational basis for this policy.
   c. could afford the vaccine for all adults in congregate settings.
   d. had denied access to this group of persons on the basis of race, religion, gender, immigration status or ethnicity.
7. In the case *Harp v. Cuomo*, the magistrate-judge denied the relief sought by prisoners aged 50 and up on the grounds that:

a. elderly prisoners are not constitutionally entitled to special treatment.
b. the plaintiffs did not establish the merit of their claims beyond a reasonable doubt.
c. Eighth Amendment claims do not encompass medical issues.
d. the plaintiffs did not sufficiently establish deliberate indifference by prison officials.

8. In *Brown v. Annucci*, the respondent acknowledged that a finding of guilt must be annulled when the hearing officer:

a. relies on any information treated as confidential.
b. refuses to consider confidential information.
c. relies on confidential information not included in the record.
d. fails to provide the charged prisoner with a summary of confidential information.

9. In *Matter of Randolph*, the court ruled that a prisoner charged with a disciplinary violation is entitled to re-call a witness:

a. at any time prior to the end of the hearing.
b. during the hearing after making a generalized claim of inconsistent testimony.
c. after the hearing if specific instances of inconsistent testimony are presented to the hearing officer.
d. during the hearing if specific instances of inconsistent testimony and proposed questions are presented to the hearing officer.

10. In *Matter of Williams*, the court ruled that the Sex Offender Management and Treatment Act (SOMTA) applies to sex offenders:

a. only if their sentence was imposed after the enactment of SOMTA.
b. who volunteer to participate in a treatment and counselling program.
c. irrespective of the date of their sentence.
d. only if they refuse to participate in sex counselling.

**Answers**
1. a
2. d
3. a
4. c
5. b
6. b
7. d
8. c
9. d
10. c
PLS Offices and the Facilities Served

Requests for legal representation and all other problems should be sent to the local office that covers the prison in which you are incarcerated. Below is a list identifying the prisons each PLS office serves:

ALBANY, 41 State Street, Suite M112, Albany, NY 12207
Prisons served: Bedford Hills, CNYPC, Coxsackie, Eastern, Edgecombe, Great Meadow, Greene, Hale Creek, Hudson, Marcy, Mid-State, Mohawk, Otisville, Queensboro, Shawangunk, Sing Sing, Sullivan, Taconic, Ulster, Wallkill, Walsh, Washington, Woodbourne.

BUFFALO, 14 Lafayette Square, Suite 510, Buffalo, NY 14203

ITHACA, 114 Prospect Street, Ithaca, NY 14850

NEWBURGH, 10 Little Britain Road, Suite 204, Newburgh, NY 12550
Prisons served: Downstate, Fishkill, Green Haven.

PLATTSBURGH, 24 Margaret Street, Suite 9, Plattsburgh, NY 12901
Prisons served: Adirondack, Altona, Bare Hill, Clinton, Franklin, Gouverneur, Moriah Shock, Ogdensburg, Riverview, Upstate.

Pro Se Staff
EDITORS: BETSY HUTCHINGS, ESQ., KAREN L. MURTAGH, ESQ.
WRITER FOR IMMIGRATION MATTERS: NICHOLAS PHILLIPS, ESQ.
WRITER FOR WHAT HAVE YOU LEARNED?: BRAD RUDIN, ESQ.
CONTRIBUTING WRITER: NICOLE JOLICOEUR, ESQ.
COPY EDITING AND PRODUCTION: ALETA ALBERT
COVID-19 VACCINE FAQ (FREQUENTLY ASKED QUESTIONS)
Prisoners’ Legal Services April 26, 2021

At the beginning of 2021, the Food and Drug Administration (FDA) recently approved COVID-19 vaccines for use in the United States. A great many people have already received the vaccine, including President Biden and Vice President Harris, all nine U.S. Supreme Court Justices, former presidents Barack Obama, Bill Clinton and Jimmy Carter, Dr. Anthony Fauci, Jessie Jackson, Alexandria Ocasio-Cortez, the Dalai Lama, Mavis Staples, Samuel L. Jackson, Kareem Abdul-Jabbar, Stephanie Elam, Tyler Perry and Al Roker.¹ In April, many colleges and universities, including Cornell University, Syracuse University, and Ithaca College announced that they are requiring students to be vaccinated before returning to campus in the fall. Prisoners’ Legal Services compiled this fact sheet so incarcerated New Yorkers will know as much as possible about the vaccine.

1. When will DOCCS offer the vaccine to the incarcerated population?
DOCCS is now offering the vaccine to all incarcerated individuals. The vaccine is being distributed on a hub by hub basis. How quickly the vaccines are distributed depends in part on how many doses of the vaccine the Department of Health allocates (gives) to DOCCS.

2. Are the COVID-19 vaccines safe?
The Food and Drug Administration (FDA) approved three vaccines for emergency use. These vaccines were tested on tens of thousands of adults from diverse backgrounds, including older adults and communities of color. Clinical trial data showed that all three vaccines are safe and effective at preventing COVID-19. The FDA holds these vaccines to the same safety standards that it held all previously approved vaccines. The FDA continues to closely monitor the safety of the vaccines.

In April 2021, the Centers for Disease Control and Prevention (CDC) briefly paused the use of the Johnson and Johnson (J&J) vaccine when we learned that out of the 7,000,000 people who had been given the J&J vaccine, 7 people had developed blood clots with low platelets. Blood clots with low platelets are a serious health risk.

The pause was lifted shortly after it was imposed because the risk of blood clots was so low.² However, the CDC warns that women younger than 50 “especially should be aware of the rare risk of blood clots with low platelets after vaccination” and that other vaccines are available where this risk has not been seen.

¹ The list of vaccinated people is heavily weighted toward older individuals as they are people to whom many states first offered doses of the vaccine

People who take the J&J vaccine are twice as likely to be hit by lightning as they are to develop blood clots.³

3. Why should I get vaccinated?
First, so you won’t get COVID-19, a virus that can have serious, life-threatening complications. Some people who have “recovered” from COVID-19 continue to have a variety of serious and sometimes permanent health issues.

Second, so that you don’t get sick and spread the disease to friends, family, and others around you.

Third, data from clinical studies of tens of thousands of participants demonstrate that the known and potential benefits of the vaccine outweigh the known and potential harms of becoming infected with COVID-19.

4. How many approved vaccines are there?
There are currently three COVID-19 vaccines approved for emergency use by the FDA, the Pfizer-BioNTech (Pfizer) vaccine, the Moderna vaccine, and the Johnson & Johnson (J&J) vaccine. All three have been approved by New York State’s Independent Clinical Advisory Task Force.

5. Are there risks and side effects of the vaccine?
You may experience side effects from the vaccine. The side effects mean your body is building protection. Common side effects are pain and swelling in the arm where you got the shot, fever, chills, headache, and tiredness. Side effects may feel like the flu and even effect your ability to do daily activities, but they should go away in a few days. If the redness or other side effects do not seem to be going away after a few days, see a doctor.

A statistically insignificant number of people who got the J&J vaccine experienced blood clots. See 2 above.

There is no risk that getting the vaccine will infect you with COVID-19.

6. How is the vaccine administered?
COVID-19 vaccines are administered by intramuscular (IM) injection, that is, a shot in the arm. The Moderna vaccine requires two doses, administered 28 days apart. The Pfizer vaccine also requires two doses, administered 21 days apart. The J&J vaccine only requires one dose.

7. Will the vaccine prevent me from getting COVID-19?
A COVID-19 vaccination will help protect you from getting COVID-19. The Pfizer and Moderna vaccines have around 95% efficacy. The J&J vaccine has around 72% efficacy but has 85% efficacy with respect to severe disease, including people who were sick

³ ABC News, April 17, 2021, available at Rare reactions to Johnson & Johnson vaccine remain a mystery, putting many women on edge - ABC News (go.com)
enough to require medical intervention but recovered without hospitalization. By way of comparison, the seasonal flu vaccine has an efficacy rate of 40-60%.

It does take time for your body to build protection after any vaccination so you may not be protected until a week or two after your second shot.

8. **When I get vaccinated, can I stop physical distancing and wearing a face covering?**
   
   No. There is not yet enough information to say if or when it will be safe to stop physical distancing and wearing face coverings. While the vaccine protects you from getting COVID-19, you may be able to transmit the virus. Thus, after being vaccinated, you should continue to physically distance and wear a mask to protect others.

9. **How long will immunity last after getting the vaccine?**
   
   Scientists have not determined the duration of immunity resulting from being vaccinated. Looking at studies on natural immunity from the coronavirus, experts hypothesize that protective immunity from the vaccines will last at least six to eight months.  

   The Moderna vaccine gives immunity for at least 6 months. Pfizer reports that its vaccine also provides immunity for at least 6 months. As of the date of publication, (April 26, 2021), we were unable to find specific data on the duration of immunity conferred by the J&J vaccine.

   It is possible that getting a COVID-19 vaccination will become an annual event like getting a flu shot.

10. **Will the vaccine prevent me from passing COVID-19 to others?**
    
    This is still unclear. The vaccine, which is injected deep into the muscles to stimulate the immune system to produce antibodies, keeps the vaccinated person from developing symptoms and getting sick. It is unclear though if the antibodies will be able to neutralize the virus in the nose and throat which is where the virus enters. If it does not, the virus can still be sneezed, coughed, or breathed out. It will take more time to know the answer. **That is why even after receiving the vaccine, you should continue to wear masks and socially distance.**

11. **Do I need to get vaccinated if I’ve already had COVID-19 and recovered?**
    
    Yes. While evidence suggests that reinfection with the virus is uncommon in the first 90 days after the initial infection, scientists have not determined that people who recover from COVID-19 are immune from getting the virus a second time. A small number of

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4 National Center for Biotechnology Information, January 6, 2021, available at [Immunological memory to SARS-CoV-2 assessed for up to 8 months after infection (nih.gov)](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7758343/)


people have been infected twice. Further, a recent study shows that the body stops producing antibodies to the virus roughly six months after a person has recovered.

Doctors recommend that **if you test positive for COVID-19 and you were treated with monoclonal antibodies or convalescent plasma, you wait 90 days before getting the vaccine.**

12. **What if I have allergies?**

If you have a history of severe allergic reactions not related to vaccines or injectable medications, you may still get a COVID-19 vaccine. You should be monitored for 30 minutes after getting the vaccine.

If you’ve had a severe allergic reaction to other vaccines or injectable medications, ask your doctor if you should get a COVID-19 vaccine. If you have ever had a severe allergic reaction to any ingredient in a COVID-19 vaccine, the Centers for Disease Control and Prevention recommends not getting that specific vaccine.

If you have a severe allergic reaction after getting the first dose of a COVID-19 vaccine, you should not get the second dose.

The vaccine does not contain eggs, preservatives, or latex.

13. **Can a COVID-19 vaccine give you COVID-19 or cause a positive test?**

No. The vaccines do not use a live virus.

14. **Which vaccine will I get?**

It depends on which vaccine the NYS DOH distributes to DOCCS. Other vaccines that are still in development may also become available following the completion of successful clinical trials and FDA approval.

**COVID-19 VACCINE FACTS**

**Fact: The rapid development and testing of the COVID-19 vaccine did not reduce its safety or effectiveness.**

Many pharmaceutical companies invested significant resources into quickly developing a vaccine for COVID-19 because of the world-wide impact of the pandemic. The emergency situation warranted an emergency response but that does not mean that companies bypassed safety protocols or didn't perform adequate testing. To receive emergency use authorization, the biopharmaceutical manufacturer must have followed at least half of the study participants for at least two months after completing the vaccination series, and the vaccine must be proven safe and effective in that population. In addition to the safety review by the FDA, the Advisory Committee on Immunization convened a panel of vaccine safety experts to independently evaluate the safety data from the clinical trial. Mayo Clinic vaccine experts also reviewed the available data. The safety of the COVID-19 vaccine will continue to be closely monitored by the Centers for Disease Control and Prevention (CDC) and the FDA.
Fact: The mortality rate for COVID-19 is significantly higher than the mortality rate for the seasonal flu.

COVID-19’s mortality rate is 1% to 2%. A 1% mortality rate is 10 times more lethal than the mortality rate for the seasonal flu. COVID-19 also appears to spread more easily than the flu and cause more serious symptoms and long-lasting health problems.

Fact: The COVID-19 vaccine does not involve the insertion of a microchip or nano-transducers in your brain

There is no vaccine “microchip” and the vaccine will not track people or gather personal information into a database. The idea that the vaccination involves microchips or nano-transducers started after Bill Gates from The Gates Foundation talked about creating digital certificate of vaccine records. The technology he was referencing did not involve a microchip, has not been implemented in any manner and is not tied to the development, testing or distribution of the COVID-19 vaccine.

Fact: The COVID-19 vaccine will not alter your DNA

The Moderna and Pfizer COVID-19 vaccines are messenger RNA (mRNA) vaccines. According to the CDC, mRNA vaccines work by instructing cells in the body how to make a protein that triggers an immune response. Injecting mRNA into your body will not interact or do anything to the DNA of your cells. 7 Human cells break down and get rid of the mRNA soon after they have finished using the instructions.

The J&J vaccine is an adenovirus vaccine. Adenovirus vaccines do not have the capacity to alter DNA. 8

Fact: Relying on herd immunity rather than vaccines is not a realistic or safer method for controlling COVID-19.

In order to reach herd immunity, society would be shut down longer, millions more would die, and many more would suffer. People need to get vaccinated to stop the spread of COVID-19.


8 Id.
1. Background
On October 8, 2020, a federal court judge, in a nation-wide class action lawsuit, ordered the IRS to provide Economic Impact Payments (EIPs) to eligible incarcerated people. DOCCS and PLS provided the incarcerated population in New York State with the information, forms and instructions for obtaining these payments. Many people in DOCCS custody received the payments to which the court found that they were entitled. Many others have not yet received their payments.

This Fact Sheet provides information on:
- The Application process and the IRS action that resulted in payments not being received.
- The steps that people who timely applied but did not receive payments can take to get their payments.
- The steps that people who did not timely apply for EIP 1 can take to receive EIPs 1, 2 and 3.

2. The Application Process
The deadline for applying for EIP 1 by means of a paper application was November 4, 2020. The deadline for filing electronically for EIP 1 was November 20, 2020.

EIP 2 and EIP 3 (the Biden Stimulus Act) payments are automatically sent to people whom the IRS found were eligible for EIP 1. There was no application process for EIP 2 or 3.

3. IRS Suspends Processing of EIP 1 Applications
In December, 2020, the IRS announced that it had stopped processing CARES Act applications for the 2020 calendar year. This is the reason that many people who submitted timely applications for EIP 1 have not received their EIP 1 or EIP 2 payments and will not receive their EIP 3 payment.

4. How can People Who Submitted Timely Applications EIP 1 But Did Not Receive a Response and Eligible Individuals Who Did Not File Timely Applications, Get Their Payments?
Timely EIP 1 filers who did not get a response, untimely-EIP 1-filers and non-filers can get their three EIP payments by filing a 2020 Tax Return (IRS Form 1040). When you get the payments by filing a 2020 Tax Return, the payment is called a “Recovery Rebate Credit” (RRC). Recovery Rebate Credit is just another name for payments known as EIP 1 2 and 3. The deadline for filing (mailing) a 2020 Form 1040 is May 17, 2021. The envelope must be postmarked no later than 5/17/21 to be timely.

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1 This Fact Sheet was prepared by Prisoners’ Legal Services using information provided by the law firms representing the plaintiff class in Scholl v. Mnuchin, 3:20 cv 5309 (N.D. Cal.) and by the IRS.
The following instructions for filling out the 2020 Form 1040 are for single tax filers – or tax filers who are married but filing separately – who in 2020 had income below $12,400.\(^2\) The instructions and attached Sample Form 1040 were provided by the IRS. Also attached is a blank 2020 Form 1040 that you can use. **The Deadline for Filing Form 1040 Is MAY 17, 2021.**

**IRS Instructions for Filing a 2020 Form 1040 claiming the Recovery Rebate Credit**

If an inmate is eligible and either didn’t receive Economic Impact Payments – or if they think they qualify for more than they received – they will need to file a 2020 tax return and claim the Recovery Rebate Credit even if they otherwise are not required to file a tax return. We will check their RRC claim against EIP payments already made to prevent overpayments.

If [you are] only claiming Recovery Rebate Credit, see attached Sample Form 1040.

- Select filing status.
- Enter name(s) including the inmate identifying number, address, Social Security numbers(s).
- Answer virtual currency question.
- Enter “Standard deduction” amount on line 12.
- Compute the Recovery Rebate Credit amount using the instructions
- Enter the computed amount to all the following lines:
  - line 30, Recovery Rebate
  - line 32, Total Other Payments and Refundable Credits
  - line 33, Total Payments
  - line 34, Overpaid
  - line 35a, Refunded to you
- Complete direct deposit information on line 35b-35d.\(^3\)
- Don’t forget to sign your return.
- Mailing addresses for where to file are located at the bottom of attached Sample Form 1040.

\(^2\) If you are married and filing jointly or have income over $12,400, you should not use the instructions or the attached sample form. You will need to use the IRS general instructions for Form 1040. PLS cannot provide you with those instructions.

\(^3\) Direct deposit is the safest and fastest way to receive your refund. NYS DOCCS has instructed the incarcerated population to use their facility address so the checks are mailed to their facility for depositing. If you don’t choose direct deposit, a paper check will be mailed to you; keep in mind that JPay only accepts checks in amounts up to $999.99.
The Recovery Rebate Credit was eligible to be paid in two rounds of advance payments during 2020 and early 2021. These advanced payments are referred to as the first and second Economic Impact Payments.

U.S. citizens and U.S. resident aliens may be eligible to claim the Recovery Rebate Credit on Form 1040 if:
1. they did not receive the full amount of each payment,
2. no one else can claim them as a dependent on their 2020 federal income tax return AND
3. they have a social security number (SSN) that is valid for employment in the United States.

If you do not file a joint tax return with your spouse, have less than $12,400 in income, and claim no qualifying children who live with you, claim the Recovery Rebate Credit as follows:
1. Select 'Single' or 'Married filing separately' as your filing status.
2. Enter your name, SSN, and address information and answer the question about virtual currency.
3. Enter your income on lines 1 through 8 followed by the $12,400 standard deduction on lines 12 and 14.
4. Enter the Recovery Rebate Credit amount on lines 30, 32, 33, 34, and 35a. If the IRS did not issue you either Economic Impact Payment, enter $1,800. If the IRS issued a $1,200 payment only, enter $600. If the IRS issued a $600 payment only, enter $1,200.
5. Sign and date the tax return.

U.S. territory residents should not follow these simplified instructions and should contact their territory tax authorities.
Form 1040 (2020)

### Mailing Addresses

Mailing addresses are based on the state you live in:

- **Alabama, Arkansas, Delaware, Georgia, Illinois, Indiana, Iowa, Kentucky, Maine, Massachusetts, Minnesota, Missouri, New Hampshire, New Jersey, New York, North Carolina, South Carolina, Tennessee, Oklahoma, Vermont, Virginia, Wisconsin**
  - **Mail to:** Department of the Treasury, Internal Revenue Service, Kansas City, MO 64999-0002
  - **Until June 18, 2021 - Mail to:** Department of the Treasury, Internal Revenue Service, Fresno, CA 93888-0002
  - **After June 18, 2021 - Mail to:** Department of the Treasury, Internal Revenue Service, Ogden, UT 84201-0002

- **Alaska, California, Hawaii, Ohio, Washington**
  - **Mail to:** Department of the Treasury, Internal Revenue Service, Ogden, UT 84201-0002

- **Arizona, Colorado, Connecticut, District of Columbia, Idaho, Kansas, Maryland, Michigan, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oregon, Pennsylvania, Rhode Island, South Dakota, Utah, West Virginia, Wyoming**
  - **Mail to:** Department of the Treasury, Internal Revenue Service, Ogden, UT 84201-0002

- **Florida, Louisiana, Mississippi, Texas**
  - **Mail to:** Department of the Treasury, Internal Revenue Service, Austin, TX 73301-0002
**Filing Status**

Check only one box.

- [ ] Single
- [ ] Married filing jointly
- [ ] Married filing separately (MFS)
- [ ] Head of household (HOH)
- [ ] Qualifying widow(er) (QW)

If you checked the MFS box, enter the name of your spouse. If you checked the HOH or QW box, enter the child’s name if the qualifying person is a child but not your dependent ▶

<table>
<thead>
<tr>
<th>Your first name and middle initial</th>
<th>Last name</th>
<th>Your social security number</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

If joint return, spouse’s first name and middle initial

<table>
<thead>
<tr>
<th>Last name</th>
<th>Spouse’s social security number</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Home address (number and street). If you have a P.O. box, see instructions.**

<table>
<thead>
<tr>
<th>Apt. no.</th>
<th>City, town, or post office. If you have a foreign address, also complete spaces below.</th>
<th>State</th>
<th>ZIP code</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Foreign country name**

<table>
<thead>
<tr>
<th>Foreign province/state/county</th>
<th>Foreign postal code</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Presidential Election Campaign**

Check here if you, or your spouse if filing jointly, want $3 to go to this fund. Checking a box below will not change your tax or refund.

- [ ] You
- [ ] Spouse

**At any time during 2020, did you receive, sell, send, exchange, or otherwise acquire any financial interest in any virtual currency?**

- [ ] Yes
- [ ] No

**Standard Deduction**

<table>
<thead>
<tr>
<th>Someone can claim:</th>
<th>[ ] You as a dependent</th>
<th>[ ] Your spouse as a dependent</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Spouse itemizes on a separate return or you were a dual-status alien</td>
<td></td>
</tr>
</tbody>
</table>

**Age/Blindness**

You: [ ] Were born before January 2, 1956  [ ] Are blind  Spouse: [ ] Was born before January 2, 1956  [ ] Is blind

**Dependents**

(see instructions):

<table>
<thead>
<tr>
<th>(1) First name</th>
<th>Last name</th>
<th>(2) Social security number</th>
<th>(3) Relationship to you</th>
<th>(4) □ If qualifies for Child tax credit</th>
<th>(see instructions): Credit for other dependents</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Wages, salaries, tips, etc. Attach Form(s) W-2**

**Attach Sch. B if required.**

**Standard Deduction for—**

- [ ] Single or Married filing separately, $12,400
- [ ] Married filing jointly or Qualifying widow(er), $24,800
- [ ] Head of household, $18,650
- [ ] If you checked any box under Standard Deduction, see instructions.

**Adjustments to income:**

- [ ] From Schedule 1, line 22
- [ ] Charitable contributions if you take the standard deduction. See instructions
- [ ] Add lines 10a and 10b. These are your total adjustments to income

**Subtract line 10c from line 9. This is your adjusted gross income**

**12 Standard deduction or itemized deductions (from Schedule A)**

**13 Qualified business income deduction. Attach Form 8995 or Form 8995-A**

**14 Add lines 12 and 13**

**15 Taxable income. Subtract line 14 from line 11. If zero or less, enter -0-**
<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>16</td>
<td>Tax (see instructions). Check if any from Form(s): 1 8814 2 4972 3</td>
</tr>
<tr>
<td>17</td>
<td>Amount from Schedule 2, line 3</td>
</tr>
<tr>
<td>18</td>
<td>Add lines 16 and 17</td>
</tr>
<tr>
<td>19</td>
<td>Child tax credit or credit for other dependents</td>
</tr>
<tr>
<td>20</td>
<td>Amount from Schedule 3, line 7</td>
</tr>
<tr>
<td>21</td>
<td>Add lines 19 and 20</td>
</tr>
<tr>
<td>22</td>
<td>Subtract line 21 from line 18. If zero or less, enter 0-</td>
</tr>
<tr>
<td>23</td>
<td>Other taxes, including self-employment tax, from Schedule 2, line 10</td>
</tr>
<tr>
<td>24</td>
<td>Add lines 22 and 23. This is your total tax</td>
</tr>
<tr>
<td>25</td>
<td>Federal income tax withheld from:</td>
</tr>
<tr>
<td>a</td>
<td>Form(s) W-2</td>
</tr>
<tr>
<td>b</td>
<td>Form(s) 1099</td>
</tr>
<tr>
<td>c</td>
<td>Other forms (see instructions)</td>
</tr>
<tr>
<td>d</td>
<td>Add lines 25a through 25c</td>
</tr>
<tr>
<td>26</td>
<td>2020 estimated tax payments and amount applied from 2019 return</td>
</tr>
<tr>
<td>27</td>
<td>Earned income credit (EIC)</td>
</tr>
<tr>
<td>28</td>
<td>Additional child tax credit. Attach Schedule 8812</td>
</tr>
<tr>
<td>29</td>
<td>American opportunity credit from Form 8863, line 8</td>
</tr>
<tr>
<td>30</td>
<td>Recovery rebate credit. See instructions</td>
</tr>
<tr>
<td>31</td>
<td>Amount from Schedule 3, line 13</td>
</tr>
<tr>
<td>32</td>
<td>Add lines 27 through 31. These are your total other payments and refundable credits</td>
</tr>
<tr>
<td>33</td>
<td>Add lines 25d, 26, and 32. These are your total payments</td>
</tr>
<tr>
<td>34</td>
<td>If line 33 is more than line 24, subtract line 24 from line 33. This is the amount you overpaid</td>
</tr>
<tr>
<td>35a</td>
<td>Amount of line 34 you want refunded to you. If Form 8888 is attached, check here</td>
</tr>
<tr>
<td>35b</td>
<td>Routing number</td>
</tr>
<tr>
<td>35c</td>
<td>Type: Checking Savings</td>
</tr>
<tr>
<td>35d</td>
<td>Account number</td>
</tr>
<tr>
<td>36</td>
<td>Estimate amount of line 34 you want applied to your 2021 estimated tax</td>
</tr>
<tr>
<td>37</td>
<td>Subtract line 33 from line 24. This is the amount you owe now</td>
</tr>
<tr>
<td>38</td>
<td>Estimated tax penalty (see instructions)</td>
</tr>
<tr>
<td>39</td>
<td>Amount You Owe</td>
</tr>
<tr>
<td>40</td>
<td>For details on how to pay, see instructions.</td>
</tr>
<tr>
<td>41</td>
<td>Third Party Designee</td>
</tr>
<tr>
<td>42</td>
<td>Do you want to allow another person to discuss this return with the IRS? See instructions</td>
</tr>
<tr>
<td>43</td>
<td>Designee’s name</td>
</tr>
<tr>
<td>44</td>
<td>Phone no.</td>
</tr>
<tr>
<td>45</td>
<td>Personal identification number (PIN)</td>
</tr>
<tr>
<td>46</td>
<td>Sign Here</td>
</tr>
<tr>
<td>47</td>
<td>Under penalties of perjury, I declare that I have examined this return and accompanying schedules and statements, and to the best of my knowledge and belief, they are true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge.</td>
</tr>
<tr>
<td>48</td>
<td>Your signature</td>
</tr>
<tr>
<td>49</td>
<td>Date</td>
</tr>
<tr>
<td>50</td>
<td>Your occupation</td>
</tr>
<tr>
<td>51</td>
<td>If the IRS sent you an Identity Protection PIN, enter it here (see inst.)</td>
</tr>
<tr>
<td>52</td>
<td>Spouse’s signature. If a joint return, both must sign.</td>
</tr>
<tr>
<td>53</td>
<td>Date</td>
</tr>
<tr>
<td>54</td>
<td>Spouse’s occupation</td>
</tr>
<tr>
<td>55</td>
<td>If the IRS sent your spouse an Identity Protection PIN, enter it here (see inst.)</td>
</tr>
<tr>
<td>56</td>
<td>Phone no.</td>
</tr>
<tr>
<td>57</td>
<td>Email address</td>
</tr>
<tr>
<td>58</td>
<td>Paid Preparer Use Only</td>
</tr>
<tr>
<td>59</td>
<td>Preparer’s name</td>
</tr>
<tr>
<td>60</td>
<td>Preparer’s signature</td>
</tr>
<tr>
<td>61</td>
<td>Date</td>
</tr>
<tr>
<td>62</td>
<td>PTIN</td>
</tr>
<tr>
<td>63</td>
<td>Check if: Self-employed</td>
</tr>
<tr>
<td>64</td>
<td>Firm’s name</td>
</tr>
<tr>
<td>65</td>
<td>Firm’s address</td>
</tr>
<tr>
<td>66</td>
<td>Phone no.</td>
</tr>
<tr>
<td>67</td>
<td>Firm’s EIN</td>
</tr>
</tbody>
</table>

Go to www.irs.gov/Form1040 for instructions and the latest information.
COVID-19 Update
Prisoners’ Legal Services of NY (3/26/2021)

The staff of Prisoners’ Legal Services is concerned about the health and safety of everyone in DOCCS custody during this pandemic. To ensure that your health and safety are protected, PLS, other prisoners’ rights advocacy organizations and Legislators have been in regular contact with DOCCS, the Board of Parole and Governor Cuomo’s office about our concerns, particularly with respect to 1) reducing the prison population by selectively releasing people, 2) increasing the amount and frequency of testing and 3) offering vaccinations to incarcerated individuals.

Changes in DOCCS Operations

Visitation: As a result of the decline in the overall positivity rate and the distribution of vaccines to staff and incarcerated individuals 65 years and older, and the ongoing vaccinations of those who have identified comorbidities, DOCCS is lifting the suspension of visits.

Excerpt from DOCCS website:
The Department will resume visitation within our institutions starting Wednesday, April 28, 2021 in maximum security facilities, and all other locations on Saturday, May 1, 2021. This schedule will help ensure that incarcerated individuals with comorbidities that have chosen to receive the vaccine will be fully vaccinated when visitation resumes.

Recognizing the importance of family and visitation, while being mindful of the critical need to continue protecting staff and the incarcerated population within our facilities, we will resume visitation under the previously announced criteria:

- Visiting rooms will operate at half capacity to facilitate social distancing. Facilities with outside visiting areas will utilize such areas, if weather permits;
- All visitors, incarcerated individuals and staff will be required to wear a mask during processing and during the visit. Masks may be temporarily removed for processing, and while eating items purchased from the vending machine. Masks must not have any pictures, writings, or sayings on them. If a visitor does not have a mask, the visit may be denied;
- Visitors will be screened with the questionnaire and temperature check prior to being allowed to visit. In facilities with a hospitality center, the screening shall occur at the entrance to the hospitality center;

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1 The coronavirus public health emergency and the actions undertaken in response to it are continually changing. The information in this message is current and accurate through March 12, 2021, and supersedes prior versions of this message.

PLS COVID-19 Update: March 26, 2021
• Physical contact will not be allowed;

• Visiting will be divided into specific segments of the population (i.e., alpha by name or numeric by DIN) to ensure that each incarcerated individual can have two weekend visits per month, as published on our website. Weekday visiting at maximum security facilities will remain in place;

• Each visit will be limited to three adult visitors (unless the current facility policy specifies less) and one child, under the age of five, who must sit on an adult’s lap, with no cross visiting allowed;

• Visitors must adhere to all travel advisories in place at the time of visitation, including individuals who have traveled to New York from another State (see Travel Advisory link below;

• All movement in the visiting area will be controlled by staff to ensure social distancing;

• Each table will be disinfected at the completion of a visit, as well as the vending machines, and other shared areas;

• The children’s area will be off-limits on the re-opening of visiting, but this restriction will be periodically re-evaluated;

• Incarcerated individuals in quarantine or isolation will not be permitted to visit until they are determined to be recovered;

• Packages will be allowed in accordance with current policy; and

• Limits will be placed on the number of visitors at any one time in the hospitality center, processing area and pathways to visiting room, in order to maintain social distancing between persons.

NOTE: These provisions are subject to change and visitation could again be suspended should there be an increased infection rate at one or more facilities, if a region is placed in a red or orange micro cluster, or if conditions change in the community.

As we resume visitation, it is not only critical, but required, that all staff wear a mask while on duty and for all incarcerated individuals to wear a mask when leaving their cell or cube. The wearing of the mask is the single most important precaution any person can take in order to defeat COVID-19. All of us in this agency, whether staff, incarcerated individuals, or parolees, have worked very hard and made many difficult sacrifices in the fight against the COVID-19 pandemic. The last thing any of us want or
need is to lose any of the invaluable ground we thus far have gained against this terrible disease.

It is critical that we continue to follow the safety protocols that have been put in place for everyone’s safety to stop the spread of COVID-19 and other respiratory viruses as follows:

- Wash your hands frequently with soap and water for at least 20 seconds;
- Social distance;
- Avoid touching your eyes, nose or mouth with unwashed hands, especially before you eat;
- Avoid close contact with people who are sick;
- Cover your cough or sneeze;
- Avoid sharing food and utensils;
- Report any symptoms promptly; and
- Wear your mask when on duty or not in your cell or cube.

The Department takes seriously its duty to ensure the safety and wellbeing of those that work, and live in our correctional facilities, as well as those who supervise or are supervised in the greater community of New York. During this difficult time, the Department is appreciative of everyone’s patience and understanding as we continue to face this virus together.

In partnership with its phone and tablet vendor, DOCCS will continue to provide the following free services through March 31, 2021:

- **Phone Calls:** Each week, incarcerated individuals in general confinement will receive three (3) free calls of up to fifteen-minutes each. The calls are available beginning at 7:00 a.m. on Saturday and are associated with the first three calls made during each week. If you do not use the calls during the week they are made available, you cannot carry forward the unused calls. Individuals serving a disciplinary confinement sanctions will be provided access to the phone as per policy;

- **Secure Message Stamps:** Each incarcerated individual with access to a general confinement tablet and kiosk will continue to receive two (2) free stamps to use for secure messaging per week (this is not available to individuals serving a disciplinary confinement sanction). Stamps are added to your account on Friday afternoon and do not accumulate; that is, if you do not use them during the week that they become available, you will lose them;

- **Free Pre-paid Reply Wednesdays:** For the time being, every secure message sent by a friend or family member on Wednesdays will be accompanied with a free pre-paid stamp that will allow the incarcerated individual to reply to the message; and

- **Newsstand application:** There is no change for access to the Newsstand. The previously enacted free one-month subscription to the Newsstand application has been extended for the time being. Users must update their tablets to receive the Newsstand app and subscribe
to the service before they can download updates. Updates will be available daily via the kiosk.

DOCCS is also providing each incarcerated individual with the equivalent of 2 free USPS one ounce postage stamps. Unused postage cannot be carried over to the next week.

**Eligibility for Early Release:** DOCCS is currently continuing to consider for early release non-violent felony offenders who have not been convicted of sex offenses and who are within 90 days of a release date. People who meet the eligibility criteria will be evaluated for release; they are not entitled to release. In addition to the requirement that individuals have a parole approved address, there are other factors that may result in denial of early release even if an individual otherwise meets the threshold eligibility requirements.

Consideration for early release is on a rolling basis. That means that as eligible individuals approach the 90-day mark, DOCCS will review the other factors to determine whether they will be released. If you believe you qualify for early release consideration, we urge you to contact your ORC to make sure that your proposed release address will be approved.

DOCCS is also considering for early release pregnant and postpartum women who are nonviolent felony offenders who have not been convicted of sex offenses and who would otherwise be released within 6 months. To be released, women who meet the criteria must have stable housing and health care.

As of February 26, DOCCS had granted early release from prison to 3,032 individuals.

**The Impact of the Pandemic-Related Suspension of Programs:** As of the end of February, 2021, DOCCS has resumed group programming at most facilities. As of March 12, a few prisons remain on pause due to local outbreaks of the virus. Where group programs are suspended, DOCCS presents some of its education, vocation and drug treatment programs by means of written materials, such as workbooks, and materials on the tablets.

To date, lawsuits challenging the impact of the suspension of programming that is required for release has been unsuccessful. See, e.g., *Matter of Brandon Franz v. Anthony Annucci*, 2021 WL 97607 (Sup. Ct. Albany Co. Jan. 21, 2021) (Court rejects challenge to denial of merit time that plaintiff argued was due the suspension of programs) and *People ex rel. Dusten Rhodes v. William Fennessy*, Index No. 2020-002262 (Sup. Ct. Oneida Co. Dec. 2, 2020) (finding that because there are no statutory deadlines for enrolling an individual in shock incarceration, DOCCS’ failure to enroll the petitioner until 5½ months after his Shock eligibility date was permissible.)

**Transfers:** On March 31, due to the reduction in COVID-19 cases in the community and within DOCCS facilities, transfers of individuals from the county jails to DOCCS will resume.

The rate of transfers from one prison to another which, due to rising numbers of infections, had been slowed and prioritized for medical emergencies and disciplinary confinement and releases, is expected to return to normal as well.
Vaccines: In late February, DOCCS began offering the COVID-19 vaccine to incarcerated individuals who are ages 65 and over. DOCCS is now offering the vaccine to individuals with co-morbidities regardless of age. Co-morbidities include severe obesity, Type 1 or 2 diabetes, sickle cell disease, liver disease, heart conditions, chronic kidney disease and pulmonary disease. See the PLS Vaccination Fact Sheet to learn about the safety and efficacy of the vaccinations.

Testing For COVID-19: In consultation with the NYS Department of Health, DOCCS developed an asymptomatic surveillance testing plan (ASTP). This plan calls for testing a number of incarcerated individuals from multiple housing units in each facility every weekday, in order to avert potential outbreaks and target resources to facilities and housing units identified as potential problems. The ASTP is in addition to testing individuals who display symptoms and those who have been exposed to an individual who tested positive. While tests are voluntary, as a precaution, DOCCS will place individuals who refuse the test in isolation for 14 days.

Reducing the Spread of the Virus: Wearing masks is one of the most effective measures for reducing the spread of COVID-19. DOCCS reports that it has provided all incarcerated individuals with surgical-type masks as well as washable cloth masks. Individuals can request replacement masks if the masks that they were given are damaged. DOCCS requires correction officers, parole officers and civilian staff to wear masks while on duty. Incarcerated individuals are encouraged to wear masks and are required to wear them during movement, visits, and programming.

We at PLS strongly encourage you to wear a mask. Medical science has demonstrated that masks are an important and effective measure for controlling the spread of the virus. Masks protect the person who wears the mask as well as those who come into contact with him or her.

Scientists have not determined that people who recover from COVID-19 are immune from getting the virus a second time. Several people have been infected twice and many people do not have antibodies to the virus after they recover. For this reason, even people who have recovered from COVID-19 should continue to wear masks and maintain 6 feet between themselves and others.

New York State and Federal Lawsuits Relating to COVID-19
Due to the danger of widespread COVID-19 infection in prisons, there have been numerous lawsuits in state and federal courts throughout the United States seeking the release of prisoners serving sentences imposed by state court judges. To date in New York, the lawsuits have led to the release of only one New York State prisoner; the court granted bail pending appeal to an individual in DOCCS custody. The defendant has a medical condition that, if he is infected with COVID-19, is likely to cause his death. The decision in the case, People v. George Garcia, 70 Misc.3d 206 (Sup. Ct. N.Y. Co. Oct. 8, 2020), is reported in Pro Se, Vol. 31, No. 1.

The reasoning used by the courts to deny release varies, but is rooted generally in obstacles created by various procedural and substantive legal principles. Lawsuits seeking relief for people who are not in state prison, for example pre-trial detainees and people charged with technical parole violations, have been more successful.

PLS COVID-19 Update: March 26, 2021
In January 2021, incarcerated individuals at Adirondack C.F. and the group Release Aging Prisoners in Prison (RAPP) brought a class action lawsuit alleging, among other claims, that the defendants were violating the Eighth Amendment rights of incarcerated individuals at Adirondack to adequate medical care. Represented by the Prisoners’ Rights Project of the Legal Aid Society and lawyers from Relman Colfax, PLLC, the plaintiffs moved for a preliminary injunction with respect to conditions and practices that they claimed unnecessarily increased the risk that they would contract COVID-19. On March 1, 2021, the magistrate-judge before whom the motion was pending denied the plaintiff’s motion for a preliminary injunction in Harper v. Cuomo, 9:21-cv-00019 (N.D.N.Y. March 1, 2021), finding that 1) the plaintiffs were unlikely to succeed on the merits of their claims, 2) the plaintiffs would not suffer irreparable harm if preliminary relief were not granted, and 3) the plaintiffs had not shown a clear likelihood that they will succeed in establishing that the Adirondack officials were deliberately indifferent to the incarcerated population’s health or safety.

PLS has not ruled out bringing a lawsuit should there be significant legal and/or factual developments that change the current legal landscape. We continue to monitor the situation in the NYS prisons and are closely watching what is happening in courts across the country. Our goal is to take whatever action we believe is the most likely to result in, to the greatest extent possible, the protection of the health and safety of the incarcerated population.

**PLS Offices and the Prisons in Each Office’s Service Area**

**ALBANY, 41 State Street, Suite M112, Albany, NY 12207**
Bedford Hills, CNYPC, Coxsackie, Eastern, Edgecombe, Great Meadow, Greene, Hale Creek, Hudson, Marcy, Mid-State, Mohawk, Otisville, Queensboro, Shawangunk, Sing Sing, Sullivan, Taconic, Ulster, Wallkill, Walsh, Washington, Woodbourne.

**BUFFALO, 14 Lafayette Square, Suite 510, Buffalo, NY 14203**

**ITHACA, 114 Prospect Street, Ithaca, NY 14850**
Auburn, Cape Vincent, Cayuga, Elmira, Five Points, Southport, Watertown, Willard.

**NEWBURGH, 10 Little Britain Road, Suite 204, Newburgh, NY 12550**
Downstate, Fishkill, Green Haven.

**PLATTSBURGH, 24 Margaret Street, Suite 9, Plattsburgh, NY 12901**
Adirondack, Altona, Bare Hill, Clinton, Franklin, Gouverneur, Moriah Shock, Ogdensburg, Riverview, Upstate.

PLS COVID-19 Update: March 26, 2021