Pro Se

Vol. 22, No. 5 October 2012 **Published by Prisoners' Legal Services of New York**

NEW YORK CIVIL LIBERTIES UNION ISSUES REPORT ON NEW YORK'S USE OF 'EXTREME ISOLATION'

By Karen Murtagh, Executive Director, Prisoners' Legal Services

On October 2, 2012, the New York Civil Liberties Union (NYCLU) released an extensive report on the overuse of prolonged solitary confinement in New York State prisons. The report, entitled "BOXED IN ~ The True Cost of New York's Dependence on Extreme Isolation," is based on a yearlong in-depth investigation into the Department of Corrections and Community Supervision's (DOCCS) use of extreme isolation in New York State. The investigation included communicating with over 110 prisoners, most of whom were housed at Southport and Upstate Correctional Facilities, interviewing current and retired NYS corrections employees, analyzing thousands of pages of documents relating to solitary confinement from both DOCCS and the Office of Mental Health (OMH), and consulting with lawyers, mental health professionals and academics who have significant experience regarding the use of extreme isolation. The report concludes that "New York's use of extreme isolation is arbitrary, inhumane and unsafe."

The NYCLU report comes on the heels of public outcry from across the nation concerning the overuse of solitary confinement; a chorus of disapproval that was fueled in part by the June 19th hearing before the Senate Judiciary Subcommittee on the Constitution, Civil Rights and Human Rights regarding the use of solitary confinement in our prisons. Although prior to the Senate Judiciary hearing many voiced concern about our nation's use of prolonged solitary confinement, it appears that the testimony submitted by the 100+ people and organizations at that hearing helped bring the issue to light nationally.

But before I get to the substance of the NYCLU report, it is instructive to take a moment to review how we got here in the first place and in so doing, the old adage that 'those who do not remember history are condemned to repeat it," immediately comes to mind.

In the June 2012 testimony I submitted to the Senate Judiciary Subcommittee on the Constitution, Civil Rights and Human Rights, that was reprinted in our last issue of *Pro Se*, I summarized the history of solitary confinement in the United States noting that it can be traced as far back as 1787 when solitary confinement was used in a Philadelphia penitentiary. In re Medley, 134 U.S. 160, 168 (1890). However, the more pervasive use of solitary confinement began in the early nineteenth century, as an outgrowth of the prison reform movement led by Pennsylvania Quakers. Advocates for solitary confinement at the time thought it was rehabilitative in nature because if a prisoner was left alone in his cell with only his conscience and a Bible, he would have time to reflect on his bad deeds and ultimately repent.

Over time, however, we learned that solitary confinement did not reform, but rather, destroyed the person subjected to it. Gustave de Beaumont and Alexis de Tocqueville who toured the American prison system in the early 1800's commented on the origin of New York State's Auburn prison, originally constructed in 1816 but expanded in 1821 to add 80 solitary confinement cells:

> The northern wing having been nearly finished in 1821, eighty prisoners were placed there, and a separate cell was given to each. This trial, from which so happy a result had been anticipated, was fatal to the greater part of the convicts. In order to reform them, they had been submitted to complete isolation; but this absolute solitude, if nothing interrupts it, is beyond the strength of man; it destroys the criminal without intermission and without pity; it does not reform, it kills.
>
> The unfortunates, on whom this experiment was made, fell into a state of depression, so manifest, that their keepers were struck with it; their lives seemed in danger, if they remained longer in this situation; five of them, had already succumbed during a single year; their moral state was not less alarming; one of them had become insane; another, in a fit of despair, had embraced the opportunity when the keeper brought him something, to precipitate himself from his cell, running the almost certain chance of a mortal fall.
>
> Upon similar effects the system was finally judged. The Governor of the State of New York pardoned twenty-six of those in solitary confinement; the others to whom this favor was not extended, were allowed to leave the cells during day, and to work in the common workshops of the prison.

Excerpt from "*On the Penitentiary System in the United States and Its Application in France"* 1833.

Nine years later, Charles Dickens toured the United States and cataloged his experiences in *America Notes for General Circulation*. I noted in my testimony before the Senate Judiciary Committee, that, during his trip, he visited Eastern State Penitentiary located in Philadelphia and commented on the use of solitary confinement:

> I believe that very few men are capable of estimating the immense amount of torture and agony which this dreadful punishment, prolonged for years, inflicts upon the sufferers; and in guessing at it myself, and in reasoning from what I have seen written upon their faces, and what to my certain knowledge they feel within, I am only the more convinced that there is a depth of terrible endurance in it which none but the sufferers themselves can fathom, and which no man has a right to inflict upon his fellow-creature. I hold this slow and daily tampering with the mysteries of the brain, to be immeasurably worse than any torture of the body: and because its ghastly signs and tokens are not so palpable to the eye and sense of touch as scars upon the flesh; because its wounds are not upon the surface, and it extorts few cries that human ears can hear; therefore I the more denounce it, as a secret punishment which slumbering humanity is not roused up to stay. I hesitated once, debating with myself, whether, if I had the power of saying 'Yes' or 'No,' I would allow it to be tried in certain cases, where the terms of imprisonment were short; but now, I solemnly declare, that with no rewards or honours could I walk a happy man beneath the open sky by day, or lie me down upon my bed at night, with the consciousness that one human creature, for any length of time, no matter what, lay suffering this unknown punishment in his silent cell, and I the cause, or I consenting to it in the least degree.

As a result of the findings of de Tocqueville, de Beaumont, Dickens and others, the use of solitary confinement in the United States was, for the most part, abandoned for over a century. But beginning in the early 1980's with the building of the first modern "supermax" prison in Marion, Illinois, the concept of solitary confinement began to take hold again. Many believe "mass incarceration," which resulted in overcrowded prisons, is responsible for the increase in the use of solitary confinement as prison administrators, with limited resources, pursued harsh measures in an attempt to maintain control over the prison population. Regardless of the reason, the fact is that solitary confinement, almost completely abandoned as a criminal justice alternative for over 100 years because it was equated with torture, has returned to America with a vengeance and, until recently, few people seemed to care.

But on March 30, 2009, The New Yorker published an article by Atul Gawande entitled, "Hellhole" where Gawande questioned whether solitary confinement is torture. In that article, then-Presidential hopeful John McCain talked about his experience in solitary confinement as a prisoner of war in Vietnam where he spent five and a half years in isolation in a fifteen-by-fifteen-foot cell. He stated: "It's an awful thing, solitary . . . . [i]t crushes your spirit and weakens your resistance more effectively than any other form of mistreatment." Gawande commented saying, "And this comes from a man who was beaten regularly; denied adequate medical treatment for two broken arms, a broken leg, and chronic dysentery; and tortured to the point of having an arm broken again. A U.S. military study of almost a hundred and fifty naval aviators returned from imprisonment in Vietnam, many of whom were treated even worse than McCain, reported that they found social isolation to be as torturous and agonizing as any physical abuse they suffered."

Since that article, public awareness regarding the ill-effects of solitary confinement has grown with literally thousands of newspaper articles, radio, and television shows, addressing the issue and asking the question: Does extreme isolation work? De Tocqueville and de Beaumont answered that question in the negative noting that, in 1823, the practice was completely abandoned at New York's Auburn prison when it was determined that such a system of "unmodified isolation" was "fatal to the health of criminals" and "inefficient at producing their reform." Almost 190 years later, Maine and Mississippi have also answered that question in the negative and are working to virtually eliminate their use of solitary confinement. Many other states are following suit by significantly limiting their use of solitary confinement.

In New York, through the work of PLS and other legal services organizations such as the Prisoners' Rights Project and Disability Advocates, Inc., case law has developed over the last two decades that requires DOCCS to consider a person's mental health when imposing solitary confinement. In addition, thanks to the efforts of numerous advocacy groups, Assemblyman Aubry and Senator Nozzolio, New York passed the SHU exclusion law which limits DOCCS' ability to place individuals suffering with mental illness into isolation. Even our courts are becoming more receptive to the idea that we may need to reassess penalties that impose extreme isolation.

In the recent case of Peoples v. Fischer, 2012 WL 2402593 (June 26, 2012), Mr. Peoples asserted that a three-year SHU sentence for a non-violent infraction of prison rules was so grossly disproportionate to the offense that it violated the 8th Amendment. DOCCS's officials asserted the defense of qualified immunity to the claim. Judge Shira Scheindlin began her decision by quoting the 2006 findings of the Vera Institute for Justice's Commission on Safety and Abuse in America's Prisons, wherein the Commission found that "[t]he overreliance on and inappropriate use of segregation hurts individual prisoners and officers. But the consequences are broader than that: The misuse of segregation works against the process of rehabilitating people and threatens public safety." The Judge went on to state that, in 2010, the "American Bar Association [ABA] approved its Criminal Justice Standards on the Treatment of Prisoners which recommended that '[s]egregated housing should be for the briefest term and under the least restrictive conditions practicable and consistent with the

rationale for placement and with the progress achieved by the prisoner.' " And relying on the ABA recommendation that "only the most severe disciplinary offenses, in which safety or security are seriously threatened, ordinarily warrant a sanction that exceeds 30 days placement in disciplinary housing, and *no placement in disciplinary housing should exceed one year,"* Judge Scheindlin denied DOCCS's motion for qualified immunity.

In Miller v. Brereton, 217 N.Y.S.2d 950 (3d Dep't August 30, 2012), there was a question as to whether the petitioner, a prisoner, sufficiently preserved for review the issue of the severity of his penalty. Although the majority found that the issue was not preserved for review, Judge Garry, in a well-reasoned and pioneering dissent, found that a penalty of 60 months in SHU, with 24 months suspended, was "so disproportionate to the offense as to be shocking to one's sense of fairness."

Articles in the New York Times, Albany Times Union and many other New York papers, as well as reports and recommendations authored by the Correctional Association, Human Rights Watch, New York City Bar Association's Committee on International Human Rights and now NYCLU, all conclude that prolonged solitary confinement is detrimental to those who are subjected to it, does not work as a prison management tool, and should be abandoned.

In its report, when referring to what many call solitary confinement, NYCLU utilizes the term "extreme isolation" to "capture New York's particular practice of subjecting one or two prisoners in a cell to the conditions most commonly understood as 'solitary confinement.' " The report states that 4500 prisoners in New York State are kept in extreme isolation every day and that this isolation is arbitrary, inhumane and unsafe.

The report found that imposing extreme isolation is arbitrary because there are no limits to the amount of time a person can be placed in extreme isolation and corrections officials have wide discretion to impose discipline for an almost limitless list of misbehavior including "minor or non-violent disciplinary infractions." As a result, vulnerable populations such as juveniles, the elderly and those suffering from mental health and/or substance abuse issues are caught up in the disciplinary process. In addition, the report states, the broad discretion in the disciplinary process allows bias in determining who is disciplined and for how long "as suggested by the disproportionate number of black prisoners in the SHU."

The report also found that extreme isolation actually harms not only the prisoners who are subjected to it, but also corrections staff. Not surprisingly, just as de Tocqueville, de Beaumont, Dickens and more recent scientific studies have shown, prisoners subjected to extreme isolation reported experiencing "apathy, lethargy, anxiety, depression, despair, rage and uncontrollable impulses" with vulnerable prisoners reporting even greater harm. What was unexpected were the NYCLU findings regarding corrections staff:

> For corrections staff, working in extreme isolation had lasting negative consequences, including persistent discord and stress that permeated their lives even outside the workplace. Staff reported that the SHU relegates them to performing menial functions, undermining their ability to maintain authority and increasing the likelihood of conflict. Moreover, gaps in basic education and training hamper the ability of staff to respond effectively to prisoners living in the difficult environment of extreme isolation. An atmosphere of distrust in the SHU creates a parallel culture of isolation among corrections staff, who fear retribution by isolated prisoners and potential exposure by peers. This distrust discourages staff from seeking help for their own mental health and emotional concerns and from intervening on behalf of prisoners.

The finding that extreme isolation negatively impacts not just the prisoner but also his keeper, adds a new dimension to the extreme isolation analysis. If extreme isolation breeds depression, despair and rage in those who are subjected to it and stress, fear and distrust in those who must enforce it, then why are we using it?

A third finding in the report is that extreme isolation negatively impacts prison and community safety. Prisoners reported that "extreme isolation resulted in uncontrollable outbursts of anger, rage and aggression against other prisoners and corrections staff." Prisoners suffering from mental illness reported significant emotional issues "including self-harm and attempted suicide." Other vulnerable prisoners, such as those dealing with substance abuse, reported that while in extreme isolation their use of illegal drugs actually increased "in an effort to ease the intense emotional and psychological toll of living in the SHU."

These negative effects continued even when prisoners were returned to general population as prisoners reported that extended time in total isolation made it difficult to engage in any type of social interaction and to keep their emotions in check. Most disturbing however, is that for many, these negative effects continued when prisoners were released back into their communities.

As a result of these findings, the NYCLU recommended that New York implement the following reforms:

(1) abolish the use of extreme isolation;

(2) adopt stringent criteria, protocols and safeguards for separating violent or vulnerable prisoners; and

(3) audit the current population in extreme isolation to identify people who should not be in the SHU, transitioning them back to the general prison population and reducing the number of SHU beds accordingly.

The report concluded: "These three steps will align New York's prisons with smart and effective evidence-based corrections practices, improve the safety of our prisons and communities and reaffirm our commitment to respecting basic human dignity."

Does extreme isolation work? Based upon what we learned in the 1800's, one might think that we should already know the answer to that question, and in fact, contemporary research shows that what 19th century observers concluded about the use of isolation was accurate. And this is where the old adage that 'those who don't know history are condemned to repeat it,' comes in. Regardless of the fact that we figured out 190 years ago that extreme isolation doesn't work, New York State currently routinely imposes long term isolated confinement on a significant percentage of its prison population. But, if history is our barometer, the good news is that despite New York State's current reliance on prolonged solitary confinement, the time will come when we once again realize that extreme isolation does not reform a person but rather kills the soul. When that happens, the State will once again move away from using extreme isolation as a prison management tool. In New York, thanks to the many brave voices who have continued to raise awareness on this issue, I believe we are well on our way to doing just that.

~ DONORS ~

PLS would like to thank those who were able to send donations to help defray the costs of publishing Pro Se. Your contributions are very much appreciated.

$200.00 - Patron
Anonymous

$100.00 – Sponsor
Fernando Guerrero

$50.00 – Friend
Kevin Ramlall
Thomas McRoy
Barbara Hamilton – The Legal Aid Society

$25.00 – Supporter
JoSue Deliser
Eric Seiff

$10.00 – Donor
Markeith Boyd

$5.00 – Subscriber
Paul Stokes
Stephen Poole
Stoney Harrison

Subscribe to *Pro Se*!

Pro Se is now published six times a year**.** ***Pro Se*** accepts individual subscription requests. With a subscription, a copy of ***Pro Se*** will be delivered, free of charge, directly to you via the facility correspondence program. To subscribe send a subscription request with your name, DIN number, and facility to ***Pro Se***, 114 Prospect Street, Ithaca, NY 14850.

***Pro Se* On-Line**
Inmates who have been released, and/or families of inmates, can read ***Pro Se*** on the PLS website at www.plsny.org.

News and Briefs

DOCCS Adopts New Rules for Visitation and Suspension of Visiting Privileges

In March of this year DOCCS adopted significant changes to its rules covering entrance to a correctional facility, visitation, and discipline. The new rules went into effect on October 1, 2012. The new rules are available in facility law libraries. DOCCS reports that the purpose of these changes is to improve safety in facilities and enhance the benefits of visitation for those who use it in a positive way by stopping the introduction of contraband into the prisons and by curbing improper physical contact in the visiting rooms. The new rules change the provisions in the visiting regulations which were required by the consent decree which resulted from the settlement of Kozlowski v. Coughlin, 539 F.Supp. 852 (S.D.N.Y. 1982). In Kozlowski, the court ruled that because inmates have a "state created liberty interest" which is constitutionally protected in receiving the visitors of their choice, DOCS must give inmates and their visitors procedural due process before taking away visiting privileges. (State created liberty interests are created when a state voluntarily restricts its discretion to act in what would otherwise be conduct that is not protected by the federal constitution). In a later decision, the Court, rejecting DOCS' arguments, held that a prisoner's right to visit could only be restricted as a result of visit related misconduct. See, Kozlowski v. Coughlin, 871 F.2d 241 (2d Cir. 1989).

In 2001, DOCS returned to court, asking, based on the 1996 passage of the Prison Litigation Reform Act (PLRA), that the court terminate the Kozlowski consent decree. The PLRA provides for the termination of **prospective relief** (injunctive relief which places restrictions and obligations on state officials which extend into the future) found in consent decrees that apply to prison conditions where the court did not find that the relief is narrowly drawn, extends no further

than necessary to correct the violation of a federal right and is the least intrusive means necessary to correct the violation of the federal right. 18 U.S.C. 3626 (b)(2).

The court made two findings relevant to the PLRA's impact on the consent decree. See Kozlowski v. Coughlin, 2001 WL 1506010 (S.D.N.Y. Nov. 26, 2001). First, finding that the settlement decree pertained to prison conditions and that it provided for prospective relief, the court ruled that the decree fell within the provisions of the PLRA. Second, the court found that because there is no federally created liberty interest in visitation, see Kentucky Dept of Corrections v. Thompson, 490 U.S. 454 (1989), the consent decree required prospective relief greater than was necessary to secure a federal right and guaranteed due process in excess of the requirements of federal law. Based on these findings, the court granted the motion to terminate the Kozlowski consent decree and dismissed the case.

In 2004, the United States Supreme Court reviewed a case in which the plaintiffs − state prisoners and their prospective visitors − alleged that the visiting regulations of a state department of corrections violated the plaintiffs' First Amendment right of freedom of association. See Overton v. Bazzetta, 539 U.S. 126 (2003). The regulations at issue excluded nieces, nephews and children as to whom parental rights had been terminated from the family members with whom inmates could have non-contact visits; prohibited visits with former inmates; required children to be accompanied by family members or legal guardians; and subjected inmates with two substance abuse violations to a ban of at least 2 years on future visitation. Without finding whether inmates have a constitutionally protected right to visitation, the Court said that as long as the restrictions on visitation were rationally related to a legitimate penological objective – which it found, the regulations at issue were − they would not be unconstitutional.

Between 2001 and 2010, DOCCS did not act to change the visiting regulations that were in place due to the Kozlowski consent decree. Between 2010 and the present, DOCCS published its proposed regulations and sought comments. Prisoners' Legal Services and the Prisoners' Rights Project of the Legal Aid Society commented on the proposed regulations. The regulations which go into effect on October 1, 2012 appear to be the Department's response to the termination of the consent decree and to the Supreme Court's decision in Overton v. Bazzetta.

The most important rule changes for prisoners and their visitors are the following:

Identification

The previous version of the rules allowed visitors to present a photo ID or a signature card (such as a Social Security card) as proof of identity. The new rules require a photo ID, whether issued by a government entity or an employer. In addition, as part of a pilot program, DOCCS *may* photograph a visitor at the time of visit and keep the picture on file.

Strip Searches

Previously, if the superintendent or his designee approved a strip search of a visitor, and the visitor refused, the rules stated that the visit *may* be denied and a non-contact visit *may* be allowed at the discretion of the superintendent. The new rules state that if a strip search is authorized and the visitor refuses, the visit *will* be denied.

Ion Scan

Previously, visiting guidelines informed visitors that they may be subject to an ion scan—a non-invasive procedure that is used to detect substances such as narcotics and explosives—without further details. The new rules also state that visitors may be subject to an ion scan and lay out a procedure for how to handle positive tests. If a test is positive, a second test of the same area is done. If the second test is also positive, DOCCS will deny the visitor entry into any facility for two days. The same two-day bar will apply to any visitor who refuses the ion scan.

Penalties for Visit-Related Misconduct

Under the old rules, DOCCS had a set of escalating penalties to be imposed on visitors and/or prisoners for first, second, and third offenses of various types. Under the new rules, DOCCS sets the penalty only for the initial offense and the maximum penalty for each type of misconduct. Superintendents have discretion to determine the appropriate penalty within the permissible range. The maximum penalties for most types of misconduct remain the same, but some were raised, with different provisions for prisoner and visitor. For example, Unacceptable Physical Conduct (such as masturbation or intercourse) used to carry a maximum one-year suspension of visitation for both prisoner and visitor. Under the new rules, the maximum penalty for a visitor is indefinite suspension of visitation, which may be lifted upon request after one year; if kept in place, the suspension may be reviewed annually. For a prisoner, the new maximum for Unacceptable Physical Conduct is also indefinite suspension of visiting privileges, but the new rules allow for suspension of all visits, not just those with the person involved, if other visitors "were subjected to exposure." The new rules provide that the superintendent must review a prisoner's indefinite suspension of all visits after one year and annually thereafter.

Visitation Suspension Through the Disciplinary Process*

Perhaps most significant for prisoners, the new rules allow a hearing officer to impose suspension of visiting privileges for drug related disciplinary infractions not related to visitation.

The maximum visitation suspensions for drug related disciplinary charges will be the same as those for visit-related misconduct, with a few exceptions. A first-offense maximum of six months and repeat-offense maximum of one year will apply to the following rule violations:

113.24: prohibiting the use of narcotics, controlled substances, or marijuana, e.g., positive urinalysis;

113.25: prohibiting making, possessing, selling or exchanging any narcotic, narcotic paraphernalia, controlled substance or marijuana; and

180.14: requiring an inmate to comply with instructions by staff regarding urinalysis testing.

Review of Suspensions of Visiting Privileges

When a hearing officer suspends all visiting privileges for two years or more, the superintendent will conduct an immediate discretionary review. When a hearing officer imposes an indefinite suspension of all visiting privileges, the director of special housing and inmate disciplinary programs will review the suspension within six months of the hearing, whether or not the prisoner appeals it.

The editors of ***Pro Se thank David Gilbert for bringing to our attention that our article in ***Pro Se***, Vol. 22, No., 3 misstated the rule violations for which the suspension of visiting privileges may be imposed. The only non-visit related misconduct for which a suspension of visiting privileges may be imposed are violations of the rules which prohibit the use or possession of drugs and the failure to comply with instructions from staff pertaining to urinalysis testing.

Incarceration and Child Support Modification

In 2010, a new law called The Low Income Support Obligation and Performance Improvement Act was enacted. The new law amends Section 236 of the New York Domestic Relations Law and Section 451 of the New York Family Court Act. The new law gives a court discretion to consider a reduction of income due to incarceration as a substantial change in circumstances that justifies a downward modification of your child support obligations. This means that you may petition the court to request that the court modify the amount of child support you must pay while you are incarcerated. Any downward modification you might obtain under the new law will only be prospective (going forward). This means you should apply for a modification as soon as possible.

The new law only gives the court the option to consider your incarceration as a substantial change in circumstances. The court is not required to grant a downward modification due to incarceration.

There are two important exceptions to the new law. First, you are not covered under the new law if the reason you are incarcerated is for non-payment of child support. Second, you are not covered under the new law if your incarceration is the result of an offense against the custodial parent or child which is the subject of the order or judgment.

This article was written by Dori Lewis of the Prisoners' Rights Project of the Legal Aid Society in New York City.

The Exoneration Initiative: Fighting to Free the Forgotten

The Exoneration Initiative (**EXI**) is an organization that provides free legal assistance to wrongfully convicted persons in New York. **EXI** primarily focuses on the most challenging cases, those that lack DNA evidence.

The organization's mission is simple: **To exonerate the actually innocent**.

Hundreds of DNA exonerations in the United States over the last 20 years have raised serious concerns about the criminal justice system's failure to protect the innocent from wrongful conviction. But the DNA exonerations are only the tip of the iceberg, representing a mere fraction of the wrongful convictions. However without DNA evidence, very few lawyers and organizations have the expertise and the resources to effectively handle these extremely difficult non-DNA cases. **EXI** was founded to take on this important work.

Expanding on the efforts of DNA-based organizations such as the Innocence Project, **EXI** is taking the Innocence Movement to the next level. When selecting its cases, **EXI** applies the lessons learned from the DNA exonerations to non-DNA cases, focusing on the problems proven to cause wrongful conviction. **EXI** then approaches prosecutors and Courts urging them to take a second look at convictions and undo injustices.

The Initiative comes at a time when courts are becoming receptive to non-DNA cases. Confronted with the reality that intolerable numbers of innocent people are languishing in jail, courts are now considering the merits of innocence claims, looking beyond overly formalistic barriers which have prevented review for decades.

EXI's staff of highly experienced lawyers and its alliances with law schools and premier New York law firms committed to pro bono innocence work, enables the organization to pool the legal talent and resources needed to sustain complex litigation and give the forgotten, non-DNA population the best chance of success for exoneration.

You can contact the **EXI** at the following address:

The Exoneration Initiative
350 Broadway
Suite 1207
New York, NY 10013

LETTERS TO THE EDITOR

Over the years, we have received many letters from ***Pro Se*** readers. Some thank us for the newsletter and others suggest articles for future issues. Some, like the letter printed below, describe how ***Pro Se*** has helped with the writers' rehabilitation. Because we find the letters astute, inspirational, witty or just plain interesting, in this and in future issues of ***Pro Se***, we will share such letters with you. When you write to ***Pro Se***, if you want your letter to be considered for publication, please mark the envelope, "Attention: Letters to the Editor." Please indicate whether, if your letter is published, you want your name published. We look forward to receiving mail from you. Letters may be edited due to space or other concerns.

Dear Editors:

I have been receiving ***Pro Se*** for some years now and I must say that I am always pleased with the information that ***Pro Se*** provides. Your articles are insightful and make clear the legal issues/cases that you share with us. It is always good to know what is going on within the Criminal Justice System when one is incarcerated.

I recently earned my BA in Humanities and Literature from Bard College's Prison Initiative Program while at Eastern C.F. On many levels, obtaining a formal education has really transformed my views about life. Most importantly, I no longer carry that "baggage" to justify my past criminal behavior. Taking responsibility for my actions has freed me from many 'inner prisons' that comprised my life before I ever came to a real prison. I cannot ever take back what I did; however, I can only move forward in a positive direction and continue taking responsibility for my actions by doing something meaningful with my education and new outlook on life.

Pro Se has been a part of my transformative process in that it presents cases and issues that not only affect the lives of the incarcerated but also the lives of their loved ones and society as a whole. I am always reminded of the pain and suffering that involves criminal behavior, and my hope is that many of your readers will look beyond the text and see the subtext, which is about CHANGE! We must seek to change our behavior and thinking in order to stop the cycle of mass incarceration and social decay.

Thanks to all the ***Pro Se*** staff for the great work that you do in order to keep those of us on the inside well informed.

Sincerely,

Terrence Reid

STATE COURT DECISIONS

Disciplinary

Dissent Would Hold that Penalty was Disproportionate to the Offense

In Matter of Miller v. Brereton, 217 N.Y.S.2d 950 (3d Dep't Aug. 30, 2012), the court reviewed a decision dismissing an Article 78 challenge to a Tier III hearing. The petitioner was charged with possession of contraband and altering state property. The charges followed a cell search in which a cell phone and a cell phone charger were found in a compartment carved out of the window sill in his cell. The hearing officer found him guilty of the charges and imposed a penalty of 60 months SHU with 24 months suspended for 6 months.

All five judges on the court agreed that the petitioner's rights to due process of law had not been violated at the hearing. Four of the five judges held that because petitioner had not briefed his excessive penalty argument before the appellate division, he had abandoned that claim. The fifth judge dissented from that portion of the decision. In her dissent, Judge Garry wrote that she could not **countenance** (support) the penalty, which she wrote, was disproportionate to the offense. Judge Garry noted that the DOCCS guidelines for dispositions involving assaultive behavior, weapons possession and gang related violent behavior were between 3 and 24 months of SHU confinement and that in deciding the penalty, the hearing officer was to take into account factors such as the nature of the incident and the inmate's prior disciplinary history. Judge Garry wrote that while sentences like that imposed on the petitioner had been upheld in the past, the conduct involved was typically for disruptions such as escape, rioting, fighting and other dangerously violent behavior. Here, Judge Garry noted, the offense did not involve physical violence and the petitioner had no disciplinary history beyond two minor infractions 8 years before this offense. Judge Garry also questioned the

hearing officer's conclusion that this penalty was justified by the petitioner's participation in a sophisticated scheme to smuggle cell phones into the facility, noting that the petitioner had been found not guilty of the charge of smuggling. Although others, including inmates and correctional officers were involved in the smuggling and distribution scheme, the evidence did not show that the petitioner was among those who had done so. Thus, Judge Garry concluded, to the extent that the penalty was based on the sophistication of the smuggling scheme, it is unsupported by the record.

Based on the nature of the offense, the length of the penalty, the lack of full evidentiary support for the hearing officer's explanation of the penalty and petitioner's otherwise exemplary disciplinary record, Judge Garry found the length of the SHU confinement imposed on the petitioner to be so disproportionate as to shock one's sense of fairness and **opined** (stated her opinion) that the matter should be remitted for reconsideration of the punishment pertaining to petitioner's confinement to SHU.

Failure to Follow Cell Search Procedures Leads to Reversal of Hearing

A pat frisk resulting in the recovery of 4.1 grams of marijuana in KM's shoe led to a search of KM's cell where the officer claimed he recovered 29.8 grams of marijuana. KM was not present during the search and at his hearing claimed that 1) his cell should not have been searched outside of his presence, and 2) the officer had not found marijuana during the pat frisk. The hearing officer found KM guilty of possessing drugs. KM challenged this determination and the Supreme Court, Cayuga County, finding that the respondent had wrongfully failed to allow KM to observe the cell search, granted the petition and ordered the hearing expunged. The respondent appealed.

In Matter of Murphy v. Graham, 949 N.Y.S.2d 842 (4th Dep't 2012), the court agreed that the respondent had failed to follow its own procedures with respect to allowing petitioner to observe the cell frisk, rejecting the respondent's argument, raised for the first time on appeal, that prison officials had properly invoked the security exception contained in the cell search directive (Directive 4910(V)(C)(1)). Further, the court commented, had the court reached the argument, it would have rejected it as the record was **devoid of** (completely lacking) evidence that allowing petitioner to observe the search would "present a danger to the safety and security of the facility," or that petitioner had waived his right to be present during the search.

The appeals court however, disagreed with the lower court about the appropriate remedy. The appeals court found that the charge that petitioner had possessed a small amount of marijuana — the 4.1 grams which the correction officer had found in the petitioner's shoe during the pat frisk — was supported by substantial evidence. Whether to believe the petitioner or the correction officer about the presence of marijuana in the petitioner's shoe was a credibility determination — a determination as to which of the two witnesses was more believable. Credibility determinations fall within those decisions that a hearing officer is entitled to make. In this case, the hearing officer resolved the difference in testimony by believing the correction officer's report. The court found that the misbehavior report was substantial evidence that the petitioner possessed 4.1 grams of marijuana.

Because the court upheld the hearing officer's determination of guilt as to only a small portion of the total amount of marijuana recovered, the court concluded that the hearing should not be reversed and expunged. Rather, the court wrote, the appropriate remedy is to remand the case for a re-determination of the appropriate penalty. The penalty, which included a recommendation that petitioner lose 12 months of good time, was based on the recovery of 33.9 grams of marijuana. The court's decision reduced the amount of marijuana that the petitioner had been found guilty of possessing to 4.1 grams, and the hearing officer, the court wrote, had expressly found that the total quantity demonstrated an intent to distribute which was an aggravating factor in assessing punishment. Under these circumstances, the court wrote, insofar as the record failed to specify what penalty might have been imposed based solely upon the much

smaller quantity of marijuana, the appropriate remedy is to vacate the penalty and remit the matter to the respondent for reconsideration of that part of the penalty that had not already been served, including reconsideration of the recommended loss of good time.

Failure to Investigate Petitioner's Mental State Leads to Reversal of Hearing

AR was found guilty of lewd conduct and the hearing officer imposed a penalty of 90 days SHU and 90 days recommended loss of good time. AR then filed an Article 78 proceeding asserting that his right to be present at the hearing had been denied.

Reviewing this claim, the court in Matter of Rodriguez v. Fischer, Index No. 2883-12 (Sup. Ct. Albany Co. July 19, 2012), found that the petitioner had submitted an Inmate Refusal form stating that he was feeling suicidal and hearing voices and could not at that time attend the hearing. The hearing officer, without referencing the reason for the petitioner's decision not to attend, classified this statement as a refusal to attend the hearing. An OMH clinician testified that the petitioner was able to understand the charges, the purpose of the hearing and his role at the hearing.

The court found that the hearing officer's conduct violated the petitioner's fundamental right to attend the hearing − a right which can only be abridged if the inmate waives it or refuses to attend. In order for an inmate to make a knowing and intelligent waiver of the right to attend, he or she must be informed of the right and of the consequences of failing to appear. While the petitioner in Rodriguez signed the witness refusal form, he modified the form to make it clear that his refusal was founded upon his mental health issues. Further, the court found, the record established that the petitioner's mental health was at issue in the hearing. He was housed in the mental health unit and the hearing record sheet recited that there was a need for a formal mental health assessment to determine if the inmate was meaningfully able to participate in the hearing process through understanding the charge, the purpose of the hearing and the role of the participants. There was nothing in the hearing record, however, to establish that the hearing officer had asked the petitioner about his ability to participate in the hearing. The court found this to be especially significant given petitioner's lengthy mental health history, and the fact that the OMH clinician who testified had not examined or treated the petitioner. Finally, the court held that even if the hearing officer had properly concluded that petitioner's mental state was such that he was able to participate in the hearing, the hearing officer did not advise the petitioner that his claim of inability to attend the hearing had been rejected and that the hearing would proceed in his absence. Under these circumstances, the court held, it cannot be said that the petitioner knowingly and intelligently waived his right to attend the hearing.

Because the petitioner had completely served the penalty, the court ordered the hearing annulled and all references to the charges expunged from petitioner's institutional records.

Prisoners' Legal Services of New York represented the petitioner in Matter of Rodriguez v. Fischer.

Where 6 Individuals Had Access to Weapon, Substantial Evidence Does Not Support the Finding that Petitioner Possessed Contraband

In Dushock v. Prack, 949 N.Y.S.2d 802 (3d Dep't 2012), the Third Department reviewed a hearing where the hearing officer found the petitioner guilty of possession of a weapon. The basis for the determination was the presence of a weapon in the cube that the petitioner shared with 5 other residents at a shelter. The weapon, a metal rod, sharpened to a point, with a taped handle, was found in a pillow case between two lockers that were stacked on top of each other. Petitioner's locker was the top locker. The bottom locker was assigned to another resident. All six residents had access to the space where the weapon was found. No evidence was introduced indicating that the other five inmates could not have been responsible for placing the weapon between the lockers. The court concluded that no reasonable inference could

be drawn that petitioner possessed the contraband just because he had access to the area where it was found and that it was, to some extent, under his control. Because the determination was not supported by substantial evidence, the court annulled the finding of guilt and directed that all references to this matter be expunged from the petitioner's records.

Substantial Evidence Does Not Support Charge of Possession of Gang Materials

According to a misbehavior report, during a cell search, an officer saw MK pass documents from a booklet entitled "Urban Books" to another inmate. Finding references to Black Nationalism in the documents, the officer charged MK with, among other charges, possessing unauthorized organization material. The hearing officer found MK guilty of the charges and the determination was affirmed on appeal. The Third Department, however, in Matter of Kimbrough v. Fischer, 946 N.Y.S.2d 714 (3d Dep't 2012), annulled the determination. The rule which the petitioner was alleged to have violated provides that: "an inmate shall not . . . possess printed or handwritten material relating to an unauthorized organization where such material advocates either expressly or by clear implication, violence based upon race, religion, sex, sexual orientation, creed, law enforcement status or violence or acts of disobedience against department employees or that could facilitate organizational activity within the institution by an unauthorized organization." 7 N.Y.C.R.R. 270.2(B)(6)(v). Significantly, the court wrote, the documents possessed by MK did not refer to any particular organization nor did they advocate violence or acts of disobedience. The court annulled the determination and ordered all references expunged from petitioner's institutional records and all good time restored.

Court Finds Hearing Officer Violated Petitioner's Right to Be Present

The petitioner in Matter of West v. Prack, 947 N.Y.S.2d 217 (3d Dep't 2012), was found guilty of soliciting a sexual act, engaging in lewd conduct and violating visiting room procedures when an officer observed him masturbating and engaging in other prohibited conduct with his wife during a visit. The charges were affirmed on appeal and his Article 78 petitioner was dismissed by the supreme court. On appeal, finding that the petitioner's right to be present at the hearing had been violated, the Third Department reversed.

At his hearing, when asked by the hearing officer if he was satisfied by his employee assistant, PW stated that his employee assistant had said that he could review the videotape of the incident before the hearing. The hearing officer denied the request. When petitioner attempted to object and **reiterate** (restate) his need to review the tape before his hearing in order to prepare his defense, the hearing officer had him removed from the hearing, citing PW's frequent interruptions.

The court found that petitioner had only interrupted the hearing officer once during this brief exchange, and that its review did not show that the petitioner's behavior rose to the level of disruption required to warrant exclusion from the hearing. Based on these findings, the court granted the petition, annulled the determination and directed the Commissioner to expunge all references thereto from petitioner's institutional records.

Parole

At Parole Hearing, Interpreter Must Speak Inmate's Language

In Matter of Zheng v. Evans, 947 N.Y.S.2d 669 (3d Dep't 2012), following his first parole board hearing, the petitioner appealed the denial of parole. At that hearing, he had been provided with an

interpreter who spoke English and Mandarin. Petitioner is a native of Fuzhou.

In his Article 78 proceeding, the petitioner alleged that language barriers prevented him from fully participating in the hearing. In assessing his petition, the court said that a parole release applicant is entitled to a fair hearing where he or she "fully understands the question posed to him or her by the Board and makes himself or herself understood in responding to any question." Here, the respondent acknowledged that the petitioner speaks Fujianese and has only limited understanding of English or Mandarin and did not assert that an interpreter familiar with his language could not be located. The transcript of the hearing, the court found, showed that the interpreter was not effective and petitioner had problems understanding and responding to the questions posed to him.

On the record before it, the court found that it was appropriate to remit the matter for a new hearing. Thus, the court annulled the determination and remitted the matter for further proceedings not inconsistent with the court's decision.

Miscellaneous

Court Finds Confusion No Reason to Deny Inmate's Name Change

JP, an inmate who was born a male but identifies as a female, petitioned to change his name to SP. The lower court denied the petition, based on the potential for confusion and the lack of evidence that the petitioner had undergone sex-reassignment surgery.

The Third Department of the Appellate Division found that neither the risk of confusion and deception nor the lack of evidence of a sex change operation were sufficient grounds for denying the petition. See, In re Powell, 945 N.Y.S.2d 789 (3d Dept 2012). Turning first to the statute, Civil Rights Law § 63, the court noted that a court's authority to review an application for a name change is limited: if the petition is true and there is no reasonable objection to the change of name proposed, the statute requires the court to issue an order authorizing the petitioner to assume the name proposed. Thus, the court wrote, petitioner's application satisfied the requirements of the Civil Rights Law and should have been granted, absent "a demonstrable reason" necessitating its denial.

As to the possibility of confusion, the court wrote that confusion is attendant to any name change and does not warrant denial of the petition. Nor is the lack of medical evidence relevant; the petitioner sought only to assume a different name and did not seek a declaration of a gender change from male to female. Notably, the court wrote, the law does not distinguish between male and female names which are a matter of social tradition. Finally the court noted that although the District Attorney and the Department of Corrections and Community Supervision were given notice of the petition, neither objected. Under these circumstances, and absent any indication of fraud, misrepresentation, or intent to interfere with another's rights, the court found that the petition should have been granted. It therefore reversed the order of the lower court and granted the petition.

Contrary to Petitioner's Claim, Court Finds Information in PSR to be Correct

In Matter of Johnson v. NYC Department of Probation, Index No. 400561/12 (Sup. Ct. New York County Aug. 6, 2012), the petitioner sought to correct certain information in his pre-sentence report (PSR) because it was being used against him at his parole hearings. The information that he wanted removed were references to a criminal charge that he had been acquitted of. Specifically, petitioner noted that on his Parole Status Report, under the heading "Present Offense," the following entry appears ". . . [T]he inmate shot his girlfriend in the head. She died 10 days later. He also shot a male victim causing serious injury." The petitioner argued that the Board of Parole had continuously used the second shooting to deny him parole and that therefore the information should be taken out of the PSR. In its decision to deny him parole, the Parole Board member wrote that there was a

reasonable probability that [Mr. Johnson] would not live and remain at liberty "due to the serious factor of the instant offense, Murder, 2nd, involved you shooting the victim in the head, ultimately causing her death. You also shot a second victim causing serious physical injury." When Mr. Johnson appealed the denial of parole, he noted that the decision was based on erroneous information, "specifically he was found not guilty to shooting a second victim." The Board replied that the information came from the PSR and it is entitled to rely on information from that source.

Before addressing the petitioner's arguments, the court noted that the PSR also states that Mr. Johnson was acquitted of shooting the second victim and that he was convicted of the murder of the mother of his child and that Mr. Johnson admits to having shot the second victim. The court also noted that the statutory procedures for correcting an inaccurate PSR set the time for doing so as before sentence is imposed. A wrongful failure to correct can then be raised on appeal. Other than that, the court wrote, there is no mechanism for correcting erroneous information in a PSR.

The court concluded that the information in the PSR was not inaccurate. The statement to which the petitioner objected was under the heading "Abstract of Indictment." In fact, the petitioner was indicted for assault in the second degree relating to shooting a second victim. The fact that the petitioner was acquitted of this charge, while relevant to the complete story and noted in the PSR, does not, the court wrote, "make the reference to the original charges false or even meaningless. The Parole Board does have a right to consider alleged bad acts of the petitioner as well as the crime that he was convicted of." For that reason, and because of issues relating to the timeliness of the request and statutory rules, the court dismissed the petition.

Court Upholds DOCCS' Limits on Property

In Matter of Abreu v. Fischer, 948 N.Y.S.2d 194 (3d Dep't 2012), the petitioner challenged the limits on the amount of property that a prisoner is permitted to possess while in prison. Directive 4913 provides that no inmate may possess more than 4 draft bags of property. The Directive further provides that an inmate with excess legal material may possess one additional bag of legal material. The petitioner had 3 to 4 bags of active legal material and 3 to 4 bags of personal property. DOCCS required that he send home or destroy 3 bags of personal property. The IGRC could not agree upon a mutually acceptable result. The Superintendent denied the grievance and three bags of property were mailed to an address provided by petitioner. The CORC affirmed the denial of petitioner's grievance and he filed this Article 78 proceeding.

The court's review of CORC's action is limited to determining whether it was irrational, arbitrary and capricious or affected by an error of law. The respondent's memo of law states that the Department set the limit on inmate property at 5 bags because of the significant and wide ranging problems resulting from the accumulation of excessive amounts of property by inmates. Among these problems are fire and safety hazards, sanitation and hygiene issues, theft and **pilferage** (repeated small thefts) concerns as well as **escalating** (increasing) storage expenses. Correction officials are entitled to wide latitude in taking measures to ensure the safety and security of correctional facilities. This extends to the property permitted in such facilities.

Applying these principles to the case before it, the court found that CORC's denial of the petitioner's grievance was not irrational, arbitrary and capricious or affected by error of law.

PRO SE PRACTICE

Removal Proceedings

Non-citizens, including permanent residents and refugees, are deportable (also called removable) from the United States when they are convicted of almost any crime, even a misdemeanor. An important point to understand is that under immigration law, there is not necessarily a difference between misdemeanors and felonies. Immigration law has a different vocabulary for crimes. The law states that, generally, a non-citizen is deportable when s/he is convicted of a crime of moral turpitude, a firearms offense, a domestic violence offense, a controlled substances offense, or an aggravated felony. These can include misdemeanors. While there are some criminal convictions that will not make a non-citizen deportable, most will. The best advice to follow is that if a non-citizen is considering a plea to a crime, his or her defense lawyer should consult an immigration lawyer to fully understand the consequences of that plea on the client's immigration status before taking the plea.

Some of the offenses for which a non-citizen can be deported are rather clear. For example, all controlled substances offenses make someone deportable except for a single conviction for simple possession of 30 grams or less of marijuana. Others, like crimes of moral turpitude or aggravated felonies, need more explanation. In general, a crime of moral turpitude involves an offense where the intent to defraud is an element of the crime (like forgery or writing "bad" checks), thefts and many assaults. Aggravated unlicensed operation of a motor vehicle while under the influence of alcohol may be a crime of moral turpitude, while a simple driving while intoxicated is not even a deportable offense. This is only a general list. There has been a lot of case law over the years to define the term "crime of moral turpitude," and the law can be confusing. In addition, one conviction for a crime of moral turpitude committed after a person has been a permanent resident for five years may not lead to deportation. However, two such convictions will.

The list of which offenses are aggravated felonies is in the immigration statute (the Immigration and Nationality Act) at Section 101(a)(43). There are many aggravated felonies, but some important ones include a drug offense in which sale is an element of the crime. This includes possession with intent to sell, actual sale, and conspiracy, intent or attempt to sell. Aggravated felonies also include crimes of theft, burglary, forgery, counterfeiting, obstruction of justice, perjury, and crimes of violence, like assaults, where the criminal court imposed a one year sentence, regardless of whether less than one year was served. It also involves sexual abuse of a minor, which will likely include a statutory rape conviction. There are several more. Any conviction for an aggravated felony will make a person deportable.

It is also clear under immigration law that there must be a conviction for the commission of a crime to lead to deportation. A juvenile or youthful offender disposition is not a conviction. Also, a conviction which is being challenged on direct appeal is not yet a final conviction. However, after a conviction has been affirmed by the Appellate Division, for the purpose of the Immigration law, it remains a conviction unless and until the Court of Appeals grants the defendant's leave application.

An important decision to keep in mind is the U.S. Supreme Court's decision in Padilla v. Kentucky,130 S.Ct. 1473 (2010). In this decision, the Court held that a non-citizen must be clearly advised by his/her defense counsel about the immigration consequences of taking a plea to a certain offense. If the defense attorney does not give a defendant this specific information, then s/he could have a claim for ineffective assistance of counsel. This would allow a defendant to file a motion to vacate the conviction (in New York State these are called "440 motions" because they are authorized and governed by Criminal Procedure Law Article 440). A 440 motion must be filed with the criminal court where the conviction occurred. The immigration court does not consider these motions.

The removal process can begin while a non-citizen is serving his/her criminal sentence, or it might begin when he or she is reporting for

probation or parole. It is also possible that immigration officials will not catch up with a non-citizen until months or years after s/he has served a sentence. There is no statute of limitation on when removal proceedings can begin. Furthermore, most non-citizens convicted of crimes are subject to mandatory custody while removal proceedings are pending. This means that if a person is out on the streets, s/he may be taken into the custody of the immigration officials and held in detention without the opportunity for a bond. If a person is still serving state or county time, then a hold or a detainer will be placed on him/her, and then s/he will be transferred to immigration custody once the sentence is served. While there are some exceptions to mandatory custody, they are few.

The removal process is started by the Department of Homeland Security (either Immigration and Customs Enforcement (ICE) or Customs and Border Protection (CBP or Border Patrol) when a non-citizen is served a Notice to Appear (NTA) which contains the charges alleged for deportation. The NTA may or may not include all of the convictions a person has had. Charges can easily be added to the NTA by the government.

In general, everyone who is placed in removal proceedings will appear before an immigration judge so that the judge can decide whether the person is eligible for relief.

There is no right to counsel at government expense in deportation hearings. This means that while the subject of a removal proceeding may be represented by a lawyer, he or she has no right to a public defender, legal aid attorney or assigned counsel -- lawyers who are paid by the government to represent someone who cannot afford a lawyer in the criminal process. Since immigration hearings are considered civil hearings, and not criminal ones, the 6th Amendment right to counsel does not apply. In immigration court, a person usually has to pay for a lawyer since there are very few organizations that provide legal representation for free. A person can also represent himself or herself (called "pro se"). In 25 immigration detention facilities in the U.S., including the one in Batavia, NY, there are legal agencies that organize free workshops to help detainees learn to represent themselves before the immigration court.

There are limited forms of relief from removal, especially when the subject of a removal proceeding has been convicted of a crime. The most generous defense against deportation for a permanent resident (a "green card" holder) is called cancellation of removal. Unfortunately, if a permanent resident is convicted of an aggravated felony, s/he is not legally eligible for cancellation of removal. This means that the immigration court does not have to consider the person's ties to the United States, the hardship he or she will face if deported, or the impact on the subject's family. A non-citizen convicted of an aggravated felony is practically automatically deportable under the current law. The only exception would be if the conviction(s) for an aggravated felony happened before April 24, 1996.

In order to be eligible for cancellation of removal a person must be a permanent resident for at least five years, and have lived legally in the United States for seven years before committing (not the conviction date) the offense that is making him/her deportable. Again, a permanent resident with an aggravated felony conviction is not eligible for this form of relief from removal. However, for those who are eligible, the immigration court will balance the good things about the person against the bad things. For example, any and all convictions for crimes will go onto the negative side of the scale, along with anything else that the judge might consider bad, like not filing income tax returns, or not paying child support. On the positive side of the scale, the immigration judge will consider how long someone has lived in the US, his/her employment history, and how much family s/he has here, especially where there is a spouse and kids. The judge will also consider the impact of deportation on the person and his/her family, which will include ties to the native country and conditions in the native country. Finally, the immigration judge will want to know how someone feels about having broken the law and whether the person is rehabilitated or not. If the good outweighs the bad, then the judge can "cancel" the removal and allow the resident to stay in the United States as a permanent resident. Always keep in mind when presenting a cancellation of removal case that an immigration hearing is not about whether you are guilty or innocent of a crime. You have been

convicted and now the immigration court will only consider whether you should also be deported for it.

Another form of relief is available to those who are afraid of returning to their home countries. It is called asylum. A permanent resident, a refugee, or someone who has never had status in the United States, can apply for asylum. To win an asylum case, an individual must prove s/he has been persecuted in the past or faces a "well-founded fear" of persecution in the future by the government of his/her native country -- or by a group that the government is unable or unwilling to control -- on account of race, religion, nationality, social group or political opinion. However, a non-citizen with an aggravated felony conviction is ineligible for asylum by law and generally, a person must apply for asylum within one year of arriving in the United States unless there are extraordinary or changed circumstances. For example, if a non-citizen has been a permanent resident for fifteen years and never feared deportation until now because s/he was always in legal status, then an immigration judge will find that this is an extraordinary circumstance for why this person did not apply for asylum within one year of arriving in the United States.

Putting together an asylum application can be tricky. There are many things to keep in mind. First, what is persecution? Persecution is generally a human rights violation or a threat to an individual's life or freedom. Persecution is not a fear of crime in your native country, the hardship of readjusting to life in your native country, or the lack of work or other opportunities in your home country. Second, the law requires that the persecution be committed by the government (police, military, security agencies, etc.) or a group the government cannot or will not control. Over the years, such a group has generally been considered a guerrilla group or an armed militia. Today, non-citizens are making asylum applications based on fear of gangs and drug traffickers, for example, but these have had mixed success since judges may believe that the country is trying to control them through law enforcement, even if not very successfully.

Third, the persecution that the individual has suffered in the past or fears suffering in the future must be connected to his or her race, religion, nationality, social group or political opinion. Social group is the broadest of these categories and has included tribes, clans, LGBT people, women subjected to female genital mutilation or victims of severe domestic violence in their countries.

If a non-citizen is not eligible for asylum because s/he did not apply within one year and does not meet an exception to this rule, or because s/he has an aggravated felony conviction, there are two related defenses against removal for those who fear harm. One is called withholding of removal and the other is called protection under the United Nations Convention Against Torture (CAT). The law which applies to these is a bit different than the law of asylum, but the same application is used for all three types of relief.

Withholding of removal requires a non-citizen to prove that it is more likely than not s/he would be persecuted by the government, or a group that the government is unable or unwilling to control, on account of race, religion, nationality, social group or political opinion. A person with an aggravated felony conviction is not eligible for withholding of removal if s/he has served a five year sentence or longer for the aggravated felony, or if the aggravated felony is considered by the immigration judge to be a "particularly serious crime." The law states that drug trafficking almost always is a "particularly serious crime."

If a non-citizen is ineligible for asylum or withholding of removal, then s/he may qualify for CAT. This requires proof that it is more likely than not the non-resident would be tortured by the government of the native country if returned. The torture must be at the hands of the government only, but it can be for any reason at all, and not just on account of one of the five protected grounds listed above.

Finally, studies on asylum applications show that people with lawyers are more likely to succeed in getting asylum than those who are not represented. Getting the required proof in asylum cases can be difficult. It is important to note that an immigration judge will consider testimony as to why the individual who is applying for asylum fears return, and what persecution he or she has suffered in the past. The judge will also want evidence of conditions in the country which support that what the asylum applicant says has happened, or will happen, actually does tend to happen in that country. The judge might also want medical records

or other evidence if an asylum applicant states s/he has been mistreated in the past. The applicant may also need evidence of his/her religion, political opinion or social group.

Unfortunately, other than the defenses discussed above, there are not many other forms of relief from deportation for non-citizens convicted of crimes. Some defenses under the immigration law require that a person prove that s/he is of "good moral character," and having a conviction may disqualify a non-citizen from such forms of relief. In addition, obtaining permanent residence (when an individual has never had it) becomes much more difficult, if not impossible, when a non-citizen has a criminal conviction. For example, immigration law disqualifies a non-citizen, even if s/he has a US citizen spouse, from getting permanent residence if s/he has a controlled substances conviction other than one simple possession of less than 30 grams of marijuana. Other convictions may pose problems as well. Some criminal convictions can be "waived" in order to obtain permanent residence, but others, like those related to drugs, cannot.

Last but not least, a critical issue to consider is whether you are a US citizen. US citizens can never be deported from this country. You are a US citizen if you were born in the US, you were naturalized after having been a permanent resident, or you acquired or derived citizenship from a US citizen parent. The law on acquired or derived citizenship is especially complicated, but should be investigated if one or both of your parents was a citizen of this country on the day you were born. If so, you may have acquired US citizenship at birth, even if you were never a permanent resident. If a parent naturalized before a non-citizen child turned 18 years old, and the child was a permanent resident before the age of 18, then s/he may have derived US citizenship.

Another factor in determining whether someone is a US citizen is the person's birth date. For example, in 2001, the law changed to allow a child under 18, who is a permanent resident, to gain US citizenship even if only one parent is naturalized. This law is not retroactive and applies only to someone born on or after February 27, 1983. Non-citizens born before that date are subject to different laws, and whether they are citizens will depend on whether both parents naturalized, or just one. If just one parent was naturalized then the assessment is more complicated and will depend on whether the non-citizen parent was deceased or whether there was a divorce and the citizen parent had legal custody over the permanent resident child. If your parents were not married, the law of the country where you were born may determine whether you are a U.S. citizen.

There is no doubt that immigration law is complex and can be overwhelming if one does not have a lawyer. However, there are self-help guides available that may answer many of the non-citizen's basic questions. At the ICE detention facility in Batavia, the Volunteer Lawyers Project gives weekly "know your rights presentations" about detention and deportation law. While clearly this is not the same as having one's own lawyer, only Congress can decide to create a system of free representation in immigration court proceedings for those who cannot afford counsel.

This article was written by Sophie Feal, Supervising Immigration Attorney of the Erie County Bar Association Volunteer Lawyers Project, Inc. Ms. Feal is also a member of the Special Immigration Committee of the New York State Bar Association.

Important Notice Regarding Your *Pro Se* Subscription

***Pro Se* is not considered legal mail. As such, DOCCS will not forward your *Pro Se* newsletters to you if you are transferred. It is important that you let the staff at *Pro Se* know your location each time you are transferred.**

Due to the cost of postage, we cannot re-mail issues of *Pro Se* to inmates. You may miss issues if you do not inform us of your current location.

You can contact *Pro Se* at: *Pro Se*, 114 Prospect Street, Ithaca, New York 14850.

Pro Se
114 Prospect Street
Ithaca, NY 14850

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: Bayview, Beacon, Bedford Hills, CNYPC, Coxsackie, Downstate, Eastern, Edgecombe, Fishkill, Great Meadow, Greene, Greenhaven, Hale Creek, Hudson, Lincoln, Marcy, Midstate, Mohawk, Mt. McGregor, Otisville, Queensboro, Shawangunk, Sing Sing, Sullivan, Taconic, Ulster, Wallkill, Walsh, Washington, Woodbourne.

BUFFALO, 237 Main Street, Suite 1535, Buffalo, NY 14203
Prisons served: Albion, Attica, Collins, Gowanda, Groveland, Lakeview, Livingston, Orleans, Rochester, Wende, Wyoming.

ITHACA, 114 Prospect Street, Ithaca, NY 14850
Prisons served: Auburn, Butler, Cape Vincent, Cayuga, Elmira, Five Points, Monterey Shock, Southport, Watertown, Willard.

PLATTSBURGH, 121 Bridge Street, Suite 202, Plattsburgh, NY 12901
Prisons served: Adirondack, Altona, Bare Hill, Chateaugay, Clinton, Franklin, Gouverneur, Moriah Shock, Ogdensburg, Riverview, Upstate

Pro Se Staff

EDITORS: BETSY HUTCHINGS, ESQ., KAREN L. MURTAGH, ESQ.
COPY EDITING AND PRODUCTION: ALETA ALBERT
CONTRIBUTING WRITERS: DORI LEWIS, ESQ., SOPHIE FEAL, ESQ.