

**MESSAGE FROM THE STAFF OF  
PRISONERS' LEGAL SERVICES OF NY  
REGARDING THE COVID-19 PUBLIC HEALTH EMERGENCY (7/14/20)<sup>1</sup>**

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 reducing the prison population by selectively releasing people who are close to their release dates, medically compromised or in custody due to technical parole violations. Some of our proposals with respect to these concerns have been adopted.

Eligibility for Early Release

DOCCS is currently considering for early release non-violent felony offenders 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. DOCCS says that consideration for early release if you are convicted of a nonviolent felony and within 90 days of your release is ongoing; that is, as non-violent offenders approach the 90 day mark, DOCCS will review the other factors to determine whether they will be released. If you believe you qualify for release consideration, we urge you to contact your ORC to ensure that your address is approved.

DOCCS Re-Opening Plan: Programs, Transfers, and Visitation

In early June, DOCCS issued a re-opening plan that is posted on its website. This plan includes gradually reintroducing:

- Non-essential staff in regions that have been approved for reopening;
- Mental health programming, with both staff and prisoners required to wear masks;
- Step-Down programs, where both staff and prisoners required to wear masks;
- Staff-led programs such as ASAT, SOCT, and Transitional Services, where both staff and prisoners required to wear masks;

DOCCS is continuing the suspension of academic and vocational programming through the summer. The re-opening plan calls for lifting the suspension on academic and vocational programming at a later time.

DOCCS's re-opening plan includes slowly resuming internal transfers and movement, while instituting social distancing on transportation vehicles, with both staff and prisoners required to wear masks.

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<sup>1</sup> The coronavirus public health emergency and the actions being undertaken in response to it are continuously and rapidly changing. PLS can only represent that as of July 14, 2020, the information in this message is current and accurate.

DOCCS has transferred all adolescent offenders from Adirondack AO Facility to Hudson AO Facility.

DOCCS is transferring to Adirondack C.F. individuals age 65 and older and who meet the facility's medical and OMH level restrictions. As of the date of this writing, Adirondack is an OMH Level 2 facility. It does not have a regional medical unit.

DOCCS will be slowly accepting intake from the county jails. DOCCS's re-opening plan states that it is not going to accept admissions from county jails where there is even one current COVID-19 case. In addition, any individual being transferred into DOCCS custody must be tested and isolated following the test and must receive a negative test result. Individuals being transferred from a county jail must be beyond the quarantine period and not be part of a current contact trace when they are transferred. When an individual who is transferred from a county jail arrives at a DOCCS facility, the individual must be temperature checked and medically assessed before entering the draft area of the facility. Once the individual is cleared for entry, they will be given a mask.

DOCCS reports that in-person visitation remains suspended. DOCCS is currently working on a plan for resuming in-prison visiting.

### **Inability to Program During Pandemic**

DOCCS officials initially stated that a prisoner's failure to program due to the virus-related program suspensions and "through no fault of the individual" would not have adverse consequences, for example, the loss of eligibility for early release. More recently, however, DOCCS has revised their position. This revision is based on DOCCS' plan to re-open programs. DOCCS now states that it is not going to completely and fully credit all time that otherwise might have been spent programming had the programs not been suspended. We continue to urge DOCCS to reconsider this issue.

DOCCS' current position is that they are only crediting the period of time between 3/16/20 and 4/10/20 to individuals who would otherwise have been actively programming in substance abuse treatment programs (ASAT, CASAT, IDDT. DOCCS informs us that they are also crediting all time that would have been spent in *court-ordered* Shock. However, DOCCS is not crediting time that would have been spent in other programs, such as ART. DOCCS is also not crediting time that would have been spent in vocational or educational programs, many of which contain mandatory certification of attendance periods under state or federal law.

Although DOCCS does have the authority and discretion to withhold credit during the program suspensions, we have been investigating whether there is a legal entitlement or right to program credit for substance abuse programming such as ASAT for individuals with substance use disorders during the period when the programs were suspended due to the public health crisis. Generally, there is no legal entitlement to these programs. There is an argument that individuals who are court-ordered to Shock or Willard, have a legal entitlement to the benefit of those sentences. If you were *court-ordered* to these programs, you should immediately speak to your counselor and request a response in writing.

Some individuals have noted that during the program interruptions, DOCCS required individuals in program housing to abide by the rules associated with that residence and program even though no programming was taking place. During this period, DOCCS kept program pay rates the same. With the exception of court-ordered Shock and Willard, neither of these facts alter the discretion DOCCS has with respect to whether to afford any program credit during the suspension periods.

With the anticipated resumption of programs, hopefully few people will be directly adversely affected by the program interruptions. However, if based upon a specific failure to program caused by the public health crisis that was not the result of any fault of your own, the TAC takes away good time, or Parole denies release, you should object, appeal the denial, file a grievance, and also write to Donald Venettozzi, Director of Special Housing / Inmate Discipline at DOCCS Central Office, 1220 Washington Avenue, Albany, NY 12227.

### **Lawsuits for Release 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 seeking the release of prisoners serving sentences imposed by state court judges. To date, the lawsuits have not led to the release of any state-sentenced prisoner. The reasoning used by these courts to deny relief varies, but is rooted generally in various procedural and substantive legal hurdles. Lawsuits seeking more tailored relief, for example the release of pre-trial detainees and people charged with technical parole violations, have been more successful.

Our administrative advocacy efforts, however, do not preclude bringing a lawsuit at a later date should there be significant legal and/or factual developments. We are continually monitoring the situation in the NYS prisons and 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 protecting, to the greatest extent possible, the health and safety of the incarcerated population.

Throughout the pandemic, we have demanded that DOCCS take immediate measures to reduce the spread of the virus in the prisons by reducing the number of people in custody, providing regular access to soap, clean towels, cleaning supplies, and hot water and, most recently, increasing the amount of testing. Beginning in the last week of June, there has been a significant increase in the amount of testing for individuals in DOCCS custody.

We asked DOCCS to be more transparent in reporting COVID-19 cases within the prison and urged DOCCS to create a COVID-19 dedicated webpage to provide detailed and updated information related to COVID-19. On April 10, DOCCS went live with its COVID-19 webpage. See: <https://doccs.ny.gov/doccs-covid-19-report>. This website continues to be updated.

Posted on DOCCS' COVID-19 website is a listing, updated daily, of COVID-19 positive cases for incarcerated individuals, parolees and DOCCS staff. In response to pressure from PLS and other prisoners' rights advocates, DOCCS now provides information on the number of people at each prison who have tested positive for the virus. The information on incarcerated individuals includes the number of prisoners tested, the number of positive, negative and pending test results, the number of prisoners who have died and the number of prisoners who have recovered. As of July 10, 545 incarcerated New Yorkers have tested positive for COVID-

19, 495 have recovered and sadly, 16 died. The most recent death from COVID-19 in DOCCS custody was on May 11.

### **Reducing the Spread of the Virus**

One of the most effective measures for reducing the spread of Covid-19 is to have people wear masks. DOCCS provides all incarcerated individuals with surgical-type masks. Correction officers, parole officers and civilian staff are required to wear masks while on duty. We encourage you to wear a mask.

According to its website, DOCCS continues to implement enhanced cleaning/sanitizing measures and disinfecting procedures for office surfaces and devices consistent with the Centers for Disease Control and Prevention and New York State Department of Health guidelines.

In addition, DOCCS uses the protocol below for reducing the spread of the virus:

- Incarcerated individuals who have been exposed to an individual who has tested positive for COVID-19 are quarantined for 14 days;
- Incarcerated individuals who show symptoms of COVID-19 are tested.
- Individuals who test positive for COVID-19 are placed in isolation rooms in the facility medical unit or other available areas.
- Individuals who need medical care beyond that which can be provided in a facility are transferred to local hospitals.

### **Contact with Loved Ones and Family**

On March 14, DOCCS first suspended all personal visits. DOCCS is now working on a plan to resume visits. While visits are suspended, DOCCS will continue to provide:

- Five (5) free stamps per week for general correspondence;
- Incarcerated individuals with access to a general confinement tablets are provided with two (2) free secure messages per week via electronic tablet, with additional stamps as part of their bundles;
- Three (3) free 15-minute phones call per week. Free calls are available beginning at 7:00 a.m. on Saturday and are associated with the first three calls made during each week and do not carry forward week to week; and
- On Wednesdays, every secure message sent by a friend or family member on a Wednesday will be accompanied with a free pre-paid stamp that will allow the incarcerated individual to reply to the sender. This will continue until August 5, 2020.

PLS has urged DOCCS to provide unlimited postage, emails and phone calls without charge.

### **General Population Tablet Program.**

JPay will continue to make the previously announced four free games available at one time.

On May 1, JPay agreed to provide incarcerated individuals with general confinement tablets a free month's subscription to the vendor's Newsstand application. The Newsstand provides access to local and world news, sports and current events. You must update your tablet to

receive the Newsstand application and to subscribe to the service. Daily updates are available via kiosks. The offer has been extended at least through July.

### **Changes in State Court Operations**

On March 20, 2020, New York Governor Cuomo issued Executive Order 202.8. **The terms of this order were extended on April 7 and 16, May 6, June 8 and July 6.** This Executive Order **tolled** – stopped the clock running – on **all state court filing deadlines**, including *state* statutes of limitations, **currently through midnight on August 5, 2020.**

### **Changes in State Statutes of Limitations and Court Filing Deadlines**

This suspension includes any state statute of limitation for commencing actions that are set by Criminal Procedure Law, the Family Court Act, the Civil Practice Law and Rules, the Court of Claims Act, the Surrogate’s Court Procedure Act, and the Uniform Court Acts, or by any other statute, local law, ordinance, order, rule, or regulation.

Example: On March 20, you received a decision on a Tier III appeal. The four-month statute of limitation on your Article 78 would normally begin running on March 20. Due to the suspension of statutes of limitation, the clock stopped running on that deadline on March 20 and will start running again on August 5, 2020. Thus, in the example, you will have 4 months from August 5, within which to file an Article 78 petition. In effect, you do not count the days in the period during which all these deadlines are tolled when you are figuring out your filing deadline.

Effective June 10, 2020, Administrative Order 121/20 allows unrepresented parties (*pro se* litigants) to file, serve, and be served by non-electronic means (paper filings). If you are represented, you will be required to file through the New York State Courts Electronic Filing System (NYSCEF).

Many courts are conducting hearings via video or teleconference rather than conducting in-person hearings.

As of July 14, except for the courts in New York City, courts in New York State are hearing the following types of cases in person:

- Child support proceedings and child permanency hearings
- Plea and sentencing proceedings for defendants at liberty
- Preliminary hearings in criminal cases for defendants being held in jail on felony complaints
- Superior civil court appearances where at least one party is self-represented
- Arraignments of defendants issued desk appearance tickets
- A limited number of bench trials in civil matters
- Grand jury proceedings

## **Changes to the State Court Appeals Process**

### Appellate Divisions, All Departments

All departments of the Appellate Division have expanded their requirements for electronic filing. However, *pro se* incarcerated litigants are considered “exempt litigants” under 22 NYCRR 1245.5 (Joint Rules of the Appellate Division on Electronic Filing) and do not have to participate in electronic filing. Given the rapidly changing rules about submitting paper copies, we recommend you contact the Appellate Division you will be filing in and request any rules about submitting paper copies and other requirements for *pro se* incarcerated litigants.

All departments of the Appellate Division are accepting filings in essential and non-essential matters.

### First Department

Beginning on May 27, 2020, the First Department is operating as a Virtual Court. It has resumed operations, including calendaring appeals and motions and scheduling conferences. On May 8, 2020, the court rescinded its order temporarily suspending perfection and filing deadlines. The deadlines in September through December 2020 are reinstated. The court has continued to suspend requirements for submitting paper copies of records, appendices and briefs.

The court now requires all appeals originating from civil matters in Bronx and New York Counties to be submitted via NYSCEF, beginning on June 1, 2020.

### Second Department

On July 7, the Second Department lifted the suspension of filing deadlines for perfection of non-actively managed civil matters as follows:

- The deadline for perfecting appeals which were due to be perfected between 3/16/20 and 5/14/20 is now 9/9/20;
- The deadline for perfecting appeals which were due to be perfected between 5/15/20 and 7/9/20 is now 9/23/20;
- The deadline for perfecting appeals which were due to be perfected between 7/10/20 and 8/10/20 is now 10/13/20;
- The deadline for perfecting appeals which were due to be perfected after 8/10/20 shall be determined in accordance with § 1250.9 of the Rules of Practice of the Appellate Division (22 NYCRR 1250.9)

An earlier order lifted the suspension of deadlines for any pending civil matters, including the filing of response and reply briefs.

### **Criminal Appeals**

The deadlines for briefs which were due to be filed between 3/16/20 and 3/31/20 is 7/6/20;  
The deadlines for briefs which were due to be filed between 4/1/20 and 4/15/20 is 7/20/20; and  
The deadlines for briefs which were due to be filed between 4/16/20 and 5/6/20 is 8/3/20.

### Third Department

On May 22, 2020, the court vacated its earlier orders suspending the deadlines for perfection, filing and other deadlines. The deadlines for perfection are now:

If your deadline to perfect was due:	It is now due:
March 17 – March 27	July 8
March 30 – April 10	July 15
April 13 – April 24	July 22
April 27 – May 6	July 29
May 11 – May 22	August 5

For any answering or responding brief due on or after May 26 through June 22, the deadline is extended an additional 45 days. An extension of time to perfect an appeal after June 22 will require an application or motion under 22 NYCRR 1250.9(b) and 22 NYCRR 850.9(c). Any pending motions for extensions of time made before March 17, 2020 are granted for an addition 45 days.

The above schedule does not apply to any deadline ordered by the Court after March 17, 2020. If the court ordered a particular deadline in your case, the court-ordered deadline shall control.

### Fourth Department

On April 13, 2020, the court rescinded its earlier order suspending perfection, filing, and other deadlines. If your deadline to perfect was after May 22, 2020, that deadline remains in place. All hearings and appearances are being conducted via teleconference.

Effective July 1, 2020, the court is requiring electronic filing for appeals of family court and criminal court matters.

### **Changes to Federal Court Procedures**

**The federal courts have not announced tolling provisions comparable to those of the state courts.** You are still responsible for complying with statutes of limitations and deadlines relating to federal court claims and filings.